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THE  
ENCYCLOPEDIA  
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UNITED STATES SUPREME  
COURT REPORTS

BEING A

Complete Encyclopedia of All the Case Law of the Federal  
Supreme Court up to and including Volume 206 U. S.  
Supreme Court Reports (Book 51 Lawyers' Edition)

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UNDER THE EDITORIAL SUPERVISION OF

THOMAS JOHNSON MICHIE

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Volume IX

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THE MICHIE COMPANY, LAW PUBLISHERS  
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# TABLES OF TITLES AND WORDS AND PHRASES.

## I. TITLES.

*Italics indicate cross-references.*

- PARDON, 1.  
 PARENT AND CHILD, 9.  
*Pari Delicto*, 10.  
*Parks and Squares*, 10.  
*Parliamentary Law*, 11.  
*Parol Agreements*, 11.  
 PAROL EVIDENCE, 12.  
*Partial Assignment*, 33.  
*Partial Loss*, 33.  
*Particeps Criminis*, 33.  
 PARTIES, 34.  
 PARTITION, 66.  
 PARTNERSHIP, 73.  
*Part Owners*, 133.  
*Part Payment*, 133.  
*Part Performance*, 133.  
*Party Aggrieved*, 133.  
 PARTY WALLS, 134.  
*Pass*, 134.  
*Pass Book*, 134.  
 PATENTS, 136.  
 PAUPERS, 318.  
*Pavements*, 318.  
*Pawn*, 318.  
*Paymaster*, 318.  
 PAYMENT, 319.  
 PAYMENT INTO COURT, 350.  
*Payrolls of Supervisors of Elections*, 353.  
*Pecuniary Legacies*, 353.  
*Peddler*, 353.  
 PEDIGREE, 353.  
*Penal Law or Statute*, 356.  
 PENALTIES AND FORFEITURES, 357.  
*Penitentiaries*, 370.  
*Pennsylvania*, 370.  
 PENSIONS, 371.  
*Percolating Waters*, 383.  
*Per Diem*, 383.  
*Peremptory Challenge*, 383.  
*Peremptory Instructions*, 383.  
*Peremptory Mandamus*, 383.  
*Peremptory Nonsuit*, 383.  
*Perform—Performers*, 383.  
 PERIOD, 384.  
 PERJURY, 385.  
*Permanent Alimony*, 391.  
*Permanent Injury*, 391.  
*Permit*, 392.  
*Perpetual Injunction*, 392.  
*Perpetual Lease*, 392.  
*Perpetuation of Testimony*, 392.  
 PERPETUITIES, 392.  
*Personal Action Dies with Person*, 396.  
*Personal Injuries*, 396.  
*Personal Judgment*, 396.  
*Per Stirpes*, 396.  
*Petit Jury*, 397.  
*Petition*, 397.  
*Petitory Actions*, 397.  
*Petit Officer*, 397.  
*Petroleum*, 397.  
*Pews*, 397.  
*Pharmacists*, 397.  
*Philippine Islands*, 397.  
*Phosphate*, 397.  
*Photographs*, 397.  
*Physical Examination*, 397.  
 PHYSICIANS AND SURGEONS, 398.  
*Piers*, 398.  
 PILOTS, 399.  
*Pines*, 410.  
*Pious Gift*, 410.  
*Pious Uses*, 410.  
*Pipe Lines*, 410.  
 PIRACY, 411.  
*Place of Trial*, 416.  
*Plate Glass Insurance*, 417.  
*Plats*, 417.  
 PLEADING, 418.  
*Pleas in Abatement*, 457.  
 PLEDGE AND COLLATERAL SECURITY, 458.  
*Plene Administravit*, 467.  
*Plenipotentiaries*, 467.  
*Pluries Writ*, 467.  
*Point*, 467.  
*Poisons and Poisoning*, 467.  
*Police*, 467.  
 POLICE POWER, 468.  
*Policy Slips*, 547.  
*Poll*, 547.  
*Political Facts*, 547.  
*Political Opinions*, 547.

- Political Questions*, 547.  
*Political Status*, 547.  
*Political Offenses*, 547.  
*Pollution*, 547.  
*Polls*, 547.  
*Polygamy*, 548.  
*Ponds*, 548.  
*Pooling Agreements*, 548.  
*Poor and Poor Laws*, 548.  
*Positive Evidence*, 548.  
 POSSESSION, WRIT OF, 549.  
*Possessory Action*, 549.  
*Postage Stamps*, 549.  
 POSTAL LAWS, 550.  
*Posthumous Child*, 587.  
*Postmaster*, 587.  
*Posting Rates*, 587.  
*Postnuptial Contracts or Settlements*, 587.  
*Postoffice*, 587.  
*Postponement*, 587.  
*Post Roads*, 587.  
*Pottawatomies*, 587.  
 POWERS, 588.  
*Powers of Attorney*, 609.  
*Præcipe*, 609.  
*Prayer for Process*, 609.  
*Prayers for Relief*, 609.  
*Preamble*, 609.  
*Precatory Trusts*, 609.  
*Precedent*, 609.  
*Pre-Emption*, 609.  
*Preferences*, 610.  
*Preferred Stock*, 610.  
*Prejudice*, 610.  
*Preliminary Examination*, 610.  
*Preliminary Proof*, 610.  
 PREMATURE SUITS, 610.  
*Premium*, 611.  
*Preponderance of Evidence*, 611.  
 PRESCRIPTION, 611.  
*Presence of Accused*, 613.  
*Presence of the Court*, 613.  
*Presentation of Claims*, 613.  
*Presentment*, 613.  
*Presidential Electors*, 613.  
*President of Corporations*, 613.  
 PRESIDENT OF THE UNITED STATES, 614.  
 PRESUMPTIONS AND BURDEN OF PROOF, 618.  
*Pretermitted Child*, 639.  
*Prevailing Party*, 639.  
*Prices*, 639.  
*Prima Facie*, 639.  
*Primary and Secondary Evidence*, 639.  
*Principal and Accessory*, 639.  
 PRINCIPAL AND AGENT, 640.  
 PRINCIPAL AND SURETY, 713.  
*Principle of a Machine*, 728.  
*Printing*, 728.  
*Priorities*, 728.  
 PRISONS AND PRISONERS, 729.  
*Private*, 732.  
*Private Act or Statutes*, 732.  
*Private Conveyances*, 732.  
*Private Corporation*, 732.  
*Privateer*, 732.  
*Private Examination*, 733.  
*Private International Law*, 733.  
*Private Land Claims*, 733.  
*Private Nuisance*, 733.  
*Private Sale*, 733.  
*Private Survey*, 733.  
 PRIVATE WAYS, 733.  
 PRIVILEGE, 734.  
 PRIVILEGED COMMUNICATIONS, 740.  
 PRIZE, 744.  
*Probate Court*, 785.  
*Prodedendo*, 785.  
*Process*, 786.  
*Prochein Ami*, 787.  
*Proclamation*, 787.  
 PRODUCTION OF DOCUMENTS, 788.  
 PROFERT AND OYER, 793.  
*Profit A Prendre*, 796.  
*Pro Forma Judgment or Decree*, 797.  
*Prohibit*, 797.  
 PROHIBITION, 798.  
*Promissory Notes*, 813.  
*Promissory Warranties*, 813.  
*Promoter*, 813.  
*Promotion*, 813.  
*Proof of Loss*, 813.  
*Proof of Other Crimes*, 813.  
*Propounding*, 815.  
*Prosecuting and District Attorneys*, 815.  
*Prospective Damages*, 815.  
*Protest*, 816.  
*Provided*, 816.  
*Province of Court and Jury*, 816.  
*Provisions*, 816.  
*Proxies*, 816.  
*Proximate Cause*, 816.  
*Prudence*, 816.  
*Public Aid*, 816.  
*Public Blockade*, 817.  
*Public Buildings*, 817.  
*Public Charity*, 817.  
*Public Contracts*, 817.  
*Public Conveyance*, 817.  
*Public Corporations*, 817.  
*Public Enemy*, 817.  
*Public Documents*, 817.  
*Public Funds*, 817.  
*Public Highways*, 817.  
*Public Improvements*, 817.



## II. WORDS AND PHRASES.

---

*Italics indicate cross-references.*

- Parish Church*, 10.  
*Parochial Church*, 11.  
PART, 33.  
*Particular Average*, 33.  
*Particular State*, 33.  
*Party Rate Tickets*, 133.  
*Passage Money*, 134.  
PASSENGER, 134.  
PASSPORT, 134.  
PATENT, 135.  
PATENT AND LATENT AMBIGUITY, 135.  
PATENT TO LAND, 317.  
*Pay*, 318.  
*Pebbles*, 353.  
*Peltry*, 356.  
PENAL, 356.  
PENDING, 370.  
PEONAGE, 382.  
PEOPLE, 383.  
PER CAPITA, 383.  
*Perfect*, 383.  
PERILS OF THE SEA, 383.  
PERIODICAL, 384.  
PERIODICAL OVERFLOW, 384.  
PERMANENT—PERMANENTLY, 391.  
PERSIST, 395.  
PERSON, 395.  
PERSONAL EFFECTS, 396.  
*Personal Liberty*, 396.  
*Personally Known*, 396.  
PERSONAL PROPERTY, 396.  
*Personal Representatives*, 396.  
PERSONAL SECURITY, 396.  
PERSONAL TAX, 396.  
*Personal Warranty*, 396.  
PERSUADE, 396.  
*Pertain*, 397.  
PERTENENCIA, 397.  
*Philosophical Apparatus*, 397.  
*Pin*, 410.  
*Pioneer*, 410.  
PLACE, 416.  
PLACERS, 416.  
*Plain Woolen Goods*, 416.  
PLANK ROADS, 416.  
*Plant Cane*, 416.  
PLANTING, 417.  
POLICY OF INSURANCE, 547.  
POLYGAMIST, 548.  
POOL, 548.  
*Porcelain Ware*, 548.  
PORT, 548.  
*Porto Rico*, 548.  
POSSESSED, 548.  
POSSESSION, 548.  
*Post*, 549.  
POWER, 587.  
PRACTICE, 609.  
PRECINCT, 609.  
PREDECESSOR, 609.  
*Prefect*, 609.  
PREROGATIVE COURTS, 610.  
PRESCRIBE, 610.  
PRESUMPTIVE NOTICE, 638.  
*Previously Patented*, 639.  
*Principal Challenge*, 728.  
PRINT, 728.  
PRIVATE PROPERTY, 733.  
PRIVATE WHARF, 733.  
PRIVATE WRONG, 733.  
PRIVY—PRIVITY, 733.  
*Privileges and Immunities*, 743.  
PRIZE AND CAPTURE, 785.  
*Prize Money*, 785.  
PROBABLE CAUSE, 785.  
PROBATE, 785.  
PROCEDURE, 785.  
PROCEEDING, 785.  
PROCEEDINGS IN REM AND IN PERSONAM, 786.  
PROCEEDS, 786.  
PROCESS OF LAW, 786.  
PRO CONFESSO, 787.  
PROCURADOR DEL COMUN, 787.  
PROCURATION, 787.  
PROCURE, 787.  
PRODUCER, 787.  
PROFESSION, 796.  
PROFITS, 796.  
PROPER, 813.  
PROPERTY, 813.  
PROPRIETARY—PROPRIETOR, 815.  
PROSECUTE—PROSECUTION, 815.  
PROSPECTIVE RIGHT, 815.  
PROTECT—PROTECTION, 815.  
PROVING A WILL, 816.  
PROVISIONAL, 816.

PROVISO, 816.

PROVOST COURT, 816,

PROXIMITY, 816.

PUBLICATION, 817.

PUBLIC DOMAIN, 817.

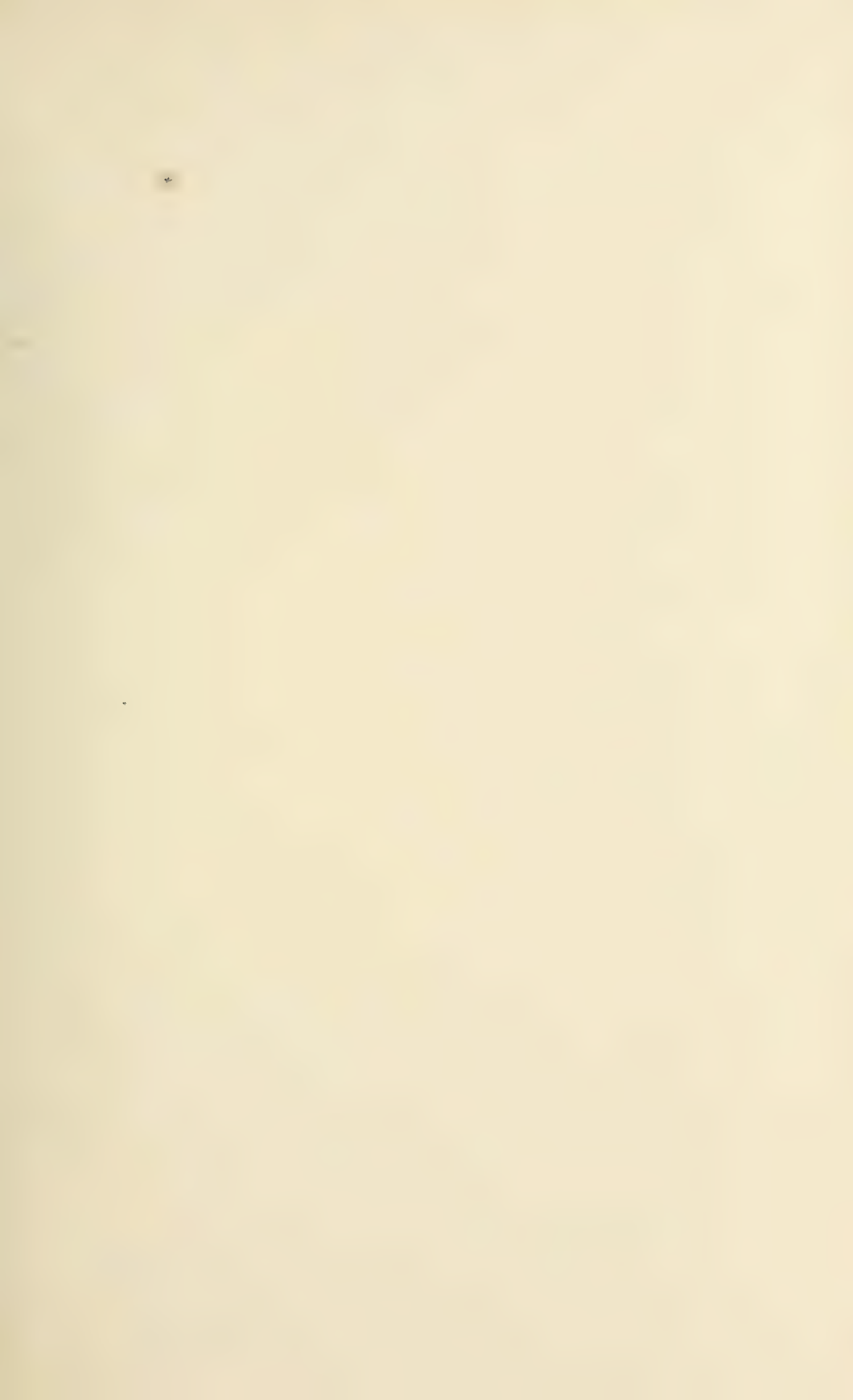
PUBLIC GRANT, 817.

PUBLIC GROUNDS, 817.

PUBLIC INTEREST, 817.

PUBLIC JOURNAL, 818.









# Encyclopedia of United States Supreme Court Reports.

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## PARDON.

BY BEIRNE STEDMAN.

- I. Definitions, Classification and Distinctions, 3.**
  - A. Definitions, 3.
    - 1. Pardon, 3.
    - 2. Amnesty, 3.
    - 3. Reprieve, 3.
  - B. Classification of Pardons, 3.
  - C. Distinctions, 4.
- II. Pardoning Power, 4.**
  - A. By Whom Exercised, 4.
    - 1. The President, 4.
    - 2. Congress, 4.
    - 3. Governors of the States, 4.
  - B. When Power May Be Exercised, 4.
  - C. Nature and Extent of Power, 4.
    - 1. In General, 4.
      - a. Nature, 4.
      - b. Extent, 5.
    - 2. Conditional Pardons, 5.
    - 3. Commutation of Sentence, 5.
    - 4. Reprieves, 5.
    - 5. Offenses Pardoned, 5.
    - 6. As to Fines, Penalties and Forfeitures, 5.
  - D. Construction of Power, 6.
- III. Form and Requisites, 6.**
- IV. Construction of Pardons, 6.**
- V. Operation and Effect, 6.**
  - A. Time of Taking Effect, 6.
  - B. Obliteration of Offense, 6.
  - C. Retrospective Operation, 6.
  - D. Release from Punishment, 7.
  - E. Penalties and Forfeitures, 7.
    - 1. Pardon Prior to Conviction, 7.
    - 2. Pardon Subsequent to Conviction, 7.
      - a. In General, 7.
      - b. Civil Rights, 7.
      - c. Restoration of Property, 7.
      - d. Restoration of Offices Forfeited, 8.
- VI. Conditional Pardons and Reprieves, 8.**
  - A. Conditional Pardons, 8.
    - 1. In General, 8.

2. Power to Grant, 8.
3. Acceptance, 8.
4. Operation and Effect of Compliance with Conditions, 8.
- B. Reprieves, 8.
  1. Power to Grant, 8.
  2. When Granted, 8.

## VII. Pleading, 9.

### CROSS REFERENCES.

See the titles **ABANDONED AND CAPTURED PROPERTY**, vol. 1, p. 1; **WAR**.

As to effect of pardon granted to persons who participated in the rebellion, see the title **ABANDONED AND CAPTURED PROPERTY**, vol. 1, p. 9. As to effect of pardon granted after two years from the suppression of the rebellion, see the title **ABANDONED AND CAPTURED PROPERTY**, vol. 1, p. 11. As to validity of an act providing that pardon shall not give right to a claim for captured and abandoned property, see the title **ABANDONED AND CAPTURED PROPERTY**, vol. 1, p. 9. As to pardon dispensing with proof of loyalty in an action to recover abandoned and captured property, see the title **ABANDONED AND CAPTURED PROPERTY**, vol. 1, pp. 8, 9. As to the effect of the president's proclamation of December, 1868, granting pardon and amnesty, see the titles **ABANDONED AND CAPTURED PROPERTY**, vol. 1, p. 9; **WAR**. As to right of accomplice turning state's evidence to immunity from prosecution, see the title **ACCOMPLICES AND ACCESSORIES**, vol. 1, p. 68. As to whether the president's proclamation and pardon of December 25, 1868, included aliens, see the titles **ABANDONED AND CAPTURED PROPERTY**, vol. 1, p. 9; **ALIENS**, vol. 1, p. 218. As to whether the power of a governor of a state to grant a reprieve to a condemned criminal is reviewable by the federal supreme court on writ of error, see the title **APPEAL AND ERROR**, vol. 1, p. 636. As to effect of president's proclamation of pardon and amnesty of December 8, 1863, on the liability of a vessel seized for breach of blockade, see the title **BLOCKADE**, vol. 3, p. 379. As to legislative encroachment upon the pardoning power of the executive, see the title **CONSTITUTIONAL LAW**, vol. 4, p. 278. As to authority of district attorney to promise immunity to an accomplice turning state's evidence, see the title **DISTRICT AND PROSECUTING ATTORNEYS**, vol. 5, p. 400. For due process of law as to reprieves, see the title **DUE PROCESS OF LAW**, vol. 5, p. 550. As to whether a statute authorizing nonjudicial persons to exercise the pardoning power infringes the right to due process of law, see the title **DUE PROCESS OF LAW**, vol. 5, p. 544. As to whether a public proclamation of the president's granting pardon and amnesty has the force of public law, see the title **JUDICIAL NOTICE**, vol. 7, p. 672. As to whether courts will take judicial notice of a pardon by private deed, see the title **JUDICIAL NOTICE**, vol. 7, p. 672. As to publication of proclamation of amnesty, see the title **PRESIDENT OF THE UNITED STATES**. As to whether the refusal of a state court to recognize the validity of an alleged pardon is ground for the removal of a case from the state court into the federal courts, see the title **REMOVAL OF CAUSES**. As to effect of the amnesty proclamation of the president of September 7, 1867, on proceedings against property seized under the confiscation laws, see the title **WAR**. As to effect of the amnesty and pardon proclamation of December 25, 1868, on property already confiscated but not condemned; on proceeds of property previously sold under the confiscation laws; on the rights of a person not engaged in the insurrection to the restoration of property forfeited under the nonintercourse laws; on the confiscation act of 1862, see the title **WAR**. As to the effect of pardon on the right to property sold under the confiscation laws and vested in third persons, see the title **WAR**. As to effect of a pardon and amnesty granted by the president on the act of congress, 1867, 14 Stat. at Large 571, barring the claim of the one pardoned to property confiscated, see the title **WAR**. As to the extent a claimant of property seized under the confiscation act is entitled to the benefit of the amnesty proclamation of December 8, 1863, see the title **WAR**.

As to effect of a conditional pardon that recipient shall claim no property sold under confiscation laws, see the title *WAR*. As to effect of pardon received while proceedings were pending for the confiscation of the property of the one pardoned, see the title *WAR*. As to effect of a full pardon by the president for all offenses committed by the owner of property seized under the confiscation laws, see the title *WAR*. As to whether a pardon before a sentence of condemnation relieves the recipient from the consequences of his assent to the unlawful use of his property, see the title *WAR*. As to the effect of a pardon in restoring the competency of a witness, see the title *WITNESSES*.

## I. Definitions, Classification and Distinctions.

**A. Definitions**—1. **PARDON**.—"Pardon" is a word familiar in common-law proceedings, but it is not a term peculiar to such proceedings, and applies to the ordinary intercourse of men.<sup>1</sup> The meaning of the word "pardon" in common parlance, is forgiveness, release and remission.<sup>2</sup> The term "pardon" in a legal sense means "an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individuals, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed."<sup>3</sup>

**Construction of Word "Pardon."**—The word pardon has the same meaning as prevailed here and in England at the time it found a place in the constitution.<sup>4</sup>

2. **AMNESTY**.—Amnesty is an act of the sovereign power granting a general pardon for a past offense. It is rarely, if ever, exercised in favor of single individuals, but is usually exerted in behalf of certain classes of persons, who are subject to trial, but have not yet been convicted.<sup>5</sup> For the history of the proclamations of pardon and amnesty of 1863, 1868, see cases cited below.<sup>6</sup>

3. **REPRIEVE**.—A reprieve is an order of the executive delaying the execution of a judicial sentence.<sup>8</sup>

**B. Classification of Pardons**.—Pardons are general, special, or particular, conditional or absolute, statutory, not necessary in some cases, and in some grantable of course.<sup>9</sup>

1. **"Pardon" defined**.—Ex parte William Wells, 18 How. 307, 321, 15 L. Ed. 421, dissenting opinion.

2. **Meaning in common parlance**.—"Forgiveness for an offense, whether it be one for which the person committing it is liable in law or otherwise. Release from pecuniary obligation, as where it is said, I pardon you your debt. Or it is the remission of a penalty, to which one may have subjected himself by the non-performance of an undertaking or contract, or when a statutory penalty in money has been incurred, and it is remitted by a public functionary having power to remit it." Ex parte William Wells, 18 How. 307, 309, 15 L. Ed. 421.

3. **Meaning in legal sense**.—United States v. Wilson, 7 Pet. 150, 160, 8 L. Ed. 640; Brown v. Walker, 161 U. S. 591, 638, 40 L. Ed. 819, dissenting opinion.

"A pardon is an act of grace by which an offender is released from the consequences of his offense, so far as such release is practicable and within control of the pardoning power, or of officers under its direction." Knote v. United States, 95 U. S. 149, 153, 24 L. Ed. 442; Illinois Cent. R. Co. v. Bosworth, 133 U. S. 92, 104, 33 L. Ed. 550.

**Coke's definition**.—"A pardon is said by Lord Coke to be a work of mercy,

whereby the king, either before attainder, sentence, or conviction, or after, forgiveth any crime, offense, punishment, execution, right, title, debt, or duty, temporal or ecclesiastical (3 Inst. 233)." Ex parte William Wells, 18 How. 307, 311, 15 L. Ed. 421.

4. **Construction of word "pardon"**.—Ex parte William Wells, 18 How. 307, 311, 15 L. Ed. 421. See, on the general rule of construction, Cathcart v. Robinson, 5 Pet. 264, 280, 8 L. Ed. 120. See, generally, the title *INTERPRETATION AND CONSTRUCTION*, vol. 7, p. 257.

5. **Amnesty defined**.—Brown v. Walker, 161 U. S. 591, 601, 40 L. Ed. 819.

6. **History of proclamations of pardon and amnesty**.—Haycraft v. United States, 22 Wall. 81, 97, 22 L. Ed. 738; Austin v. United States, 155 U. S. 417, 421, 39 L. Ed. 206.

8. **Reprieve defined**.—Ex parte William Wells, 18 How. 307, 314, 15 L. Ed. 421.

9. **Kinds of pardon**.—Ex parte William Wells, 18 How. 307, 310, 15 L. Ed. 421.

**Effect of recital in pardon**.—The recital in a pardon that the district attorney requested it in order to restore the competency as a witness of the person pardoned in a murder trial, did not alter the fact that the pardon was, by its terms,



**C. Distinctions.**—The distinction between amnesty and pardon is of no practical importance,<sup>10</sup> as pardon includes amnesty.<sup>11</sup>

## II. Pardoning Power.

**A. By Whom Exercised**—1. **THE PRESIDENT.**—The constitution gives to the president, in general terms, the power to grant reprieves and pardons for offenses against the United States.<sup>12</sup> To the executive alone is intrusted the power of pardon.<sup>13</sup>

2. **CONGRESS.**—Congress cannot grant a pardon,<sup>14</sup> but the pardoning power as vested in the president by the constitution has never been held to take from congress the power to pass acts of general amnesty.<sup>15</sup>

3. **GOVERNORS OF THE STATES.**—Where the constitution of a state so provides, the governor has the power to grant pardons and reprieves<sup>16</sup> and to commute sentences,<sup>17</sup> and such power is neither granted nor withheld by the federal constitution.<sup>18</sup>

**B. When Power May Be Exercised.**—The pardoning power may be exercised at any time after the commission of the offense pardoned, either before legal proceedings are taken, or during their pendency, or after conviction and judgment.<sup>19</sup>

**C. Nature and Extent of Power**—1. **IN GENERAL**—a. *Nature.*—The pardoning power is an act of executive clemency, which covers cases of conviction by the civil authorities but does not extend to private wrongs or relieve the wrongdoer from civil liability to the individual he has wronged.<sup>20</sup> It is a benign prerogative of mercy of the president,<sup>21</sup> and it is ordinarily exercised only in cases

"full and unconditional." *Boyd v. United States*, 142 U. S. 450, 453, 35 L. Ed. 1076.

10. **Pardon and amnesty distinguished.**—*Brown v. Walker*, 161 U. S. 591, 601, 40 L. Ed. 819.

11. **Pardon includes amnesty.**—*United States v. Klein*, 13 Wall. 128, 142, 20 L. Ed. 519.

In *Knote v. United States*, 95 U. S. 149, 152, 24 L. Ed. 442, the court say: "The constitution does not use the word 'amnesty,' and, except that the term is generally applied where pardon is extended to whole classes or communities, instead of individuals, the distinction between them is one rather of philological interest than of legal importance." Quoted in *Brown v. Walker*, 161 U. S. 591, 601, 40 L. Ed. 819.

"All the benefits which can result to the claimant from both pardon and amnesty would equally have accrued to him if the term 'pardon' alone had been used in the proclamation of the president." *Knote v. United States*, 95 U. S. 149, 152, 24 L. Ed. 442.

12. **Power of president.**—*United States Constitution*, Art. 2, § 2. *United States v. Wilson*, 7 Pet. 150, 160, 8 L. Ed. 640; *Brown v. Walker*, 161 U. S. 591, 601, 40 L. Ed. 819; *Young v. United States*, 97 U. S. 39, 66, 24 L. Ed. 992.

13. *United States v. Klein*, 13 Wall. 128, 147, 20 L. Ed. 519; *Brown v. Walker*, 161 U. S. 591, 638, 40 L. Ed. 819; *Young v. United States*, 97 U. S. 39, 66, 24 L. Ed. 992.

14. **Power of congress.**—*Brown v. Walker*, 161 U. S. 591, 638, 40 L. Ed. 819, dissenting opinion.

15. *Brown v. Walker*, 161 U. S. 591, 601, 40 L. Ed. 819.

16. **Power of governors.**—*Rogers v. Peck*, 199 U. S. 425, 436, 50 L. Ed. 256.

17. *Schwab v. Berggren*, 143 U. S. 442, 451, 36 L. Ed. 218.

Where the constitution of Illinois expressly conferred upon the governor the power "to grant reprieves, commutations and pardons, after conviction, for all offenses," Art. 5, § 13, it was held that the governor had authority to commute the punishment of death to imprisonment for life in the penitentiary. *Schwab v. Berggren*, 143 U. S. 442, 451, 36 L. Ed. 218.

It has often been decided in the states that the governor may grant conditional pardons by commuting the punishment where the governor acted generally, if not uniformly, under special provisions in the constitution or laws of the state, or on the principles of the common law adopted by the state. *Ex parte William Wells*, 18 How. 307, 318, 15 L. Ed. 421, dissenting opinion.

18. *Rogers v. Peck*, 199 U. S. 425, 436, 50 L. Ed. 256; *Storti v. Massachusetts*, 183 U. S. 138, 46 L. Ed. 120.

19. **When exercised.**—*Ex parte Garland*, 4 Wall. 333, 380, 18 L. Ed. 366.

20. **Nature of pardoning power.**—*Angle v. Chicago*, etc., R. Co., 151 U. S. 1, 19, 38 L. Ed. 55.

Neither the executive nor the legislature can pardon a private wrong. *Angle v. Chicago*, etc., R. Co., 151 U. S. 1, 19, 38 L. Ed. 55.

21. *Austin v. United States*, 155 U. S. 417, 425, 39 L. Ed. 206.

of individuals after conviction.<sup>22</sup> It is a private, though official, act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the court.<sup>23</sup>

b. *Extent*.—The power of pardon conferred by the constitution upon the president is unlimited except in cases of impeachment,<sup>24</sup> and is not subject to legislative control.<sup>25</sup>

2. **CONDITIONAL PARDONS**.—The power to reprieve and pardon includes the power to grant a conditional pardon.<sup>26</sup> And the president has power, if not otherwise, yet with the sanction of congress, to grant a general conditional pardon.<sup>27</sup>

3. **COMMUTATION OF SENTENCE**.—The president may commute sentences of punishment.<sup>28</sup>

4. **REPRIEVES**.—The president is given the power to grant reprieves by the constitution.<sup>29</sup>

5. **OFFENSES PARDONED**.—The president can pardon every offense known to the law except impeachment.<sup>30</sup>

6. **AS TO FINES, PENALTIES AND FORFEITURES**.—Except in cases of impeachment and where fines are imposed by a co-ordinate department of the government for contempt of its authority, the president, under the general, unqualified grant of power to pardon offenses against the United States, may remit fines, penalties, and forfeitures of every description arising under the laws of congress;<sup>31</sup> and his constitutional power in these respects cannot be interrupted, abridged, or limited by any legislative enactment.<sup>32</sup> But that power is not exclusive, in the sense that no other officer can remit forfeitures or penalties in-

22. *Brown v. Walker*, 161 U. S. 591, 601, 40 L. Ed. 819.

23. *United States v. Wilson*, 7 Pet. 150, 160, 8 L. Ed. 640.

24. *Extent of power to pardon*.—Ex parte Garland, 4 Wall. 333, 380, 18 L. Ed. 366.

It is not within the constitutional power of congress to inflict punishment beyond the reach of executive clemency. Ex parte Garland, 4 Wall. 333, 381, 18 L. Ed. 366.

Under the power of pardon granted by the constitution of the United States, the president has granted reprieves and pardons since the commencement of the present government. Sundry provisions have been enacted, regulating its exercise for the army and navy, in virtue of the constitutional power of congress to make rules and regulations for the government of the army and navy. No statute has ever been passed regulating it in cases of conviction by the civil authorities. In such cases, the president has acted exclusively under the power as it is expressed in the constitution. Ex parte William Wells, 18 How. 307, 309, 15 L. Ed. 421. See post, "Operation and Effect," V, E, 2, c.

25. Ex parte Garland, 4 Wall. 333, 380, 18 L. Ed. 366; *United States v. Klein*, 13 Wall. 128, 141, 20 L. Ed. 519.

26. *Conditional pardons*.—Ex parte William Wells, 18 How. 307, 314, 15 L. Ed. 421.

The president may grant a conditional pardon. *United States v. Padelford*, 9 Wall. 531, 542, 19 L. Ed. 788; *United States v. Klein*, 13 Wall. 128, 20 L. Ed. 519.

It was competent for the president to annex to his offer of pardon of Dec. 8,

1863, any conditions or qualifications he should see fit. *United States v. Klein*, 13 Wall. 128, 142, 20 L. Ed. 519.

The president in granting a conditional pardon does not assume a power not conferred by the constitution; he does not legislate a new punishment into existence, and sentence the convict to suffer it, and in no way violates the legislative and judicial powers of the government. Ex parte William Wells, 18 How. 307, 309, 15 L. Ed. 421.

27. *General conditional pardon*.—*United States v. Padelford*, 9 Wall. 531, 542, 19 L. Ed. 788.

28. *Commutation of sentence*.—In re Ross, 140 U. S. 453, 35 L. Ed. 581; Ex parte William Wells, 18 How. 307, 15 L. Ed. 421.

The commutation by the president of a sentence of death to life imprisonment is not the exercise of a new power, but is part of the power to pardon. Ex parte William Wells, 18 How. 307, 315, 15 L. Ed. 421.

29. *Reprieves*.—U. S. Constitution, Art. 2, § 2; *United States v. Wilson*, 7 Pet. 150, 160, 8 L. Ed. 640.

30. *Offenses pardoned*.—Ex parte Garland, 4 Wall. 333, 380, 18 L. Ed. 366.

31. *As to fines, penalties and forfeitures*.—The Laura, 114 U. S. 411, 413, 29 L. Ed. 147.

"The constitutional grant to the president of the power to pardon offenses must be held to carry with it, as an incident, the power to release penalties and forfeitures which accrue from the offenses." *Osborn v. United States*, 91 U. S. 474, 478, 23 L. Ed. 388.

32. The Laura, 114 U. S. 411, 29 L. Ed. 147. See ante, "Extent," II, C, 1, b.

curred for the violation of the laws of the United States.<sup>33</sup>

**D. Construction of Power.**—The language used in the constitution as to the power of pardoning, must be construed by the exercise of that power in England prior to the Revolution, and in the states prior to the adoption of the constitution.<sup>34</sup>

### III. Form and Requisites.<sup>35</sup>

**Statement as to Residence.**—In the case of a pardon, if the residence of the person intended to be benefited is improperly designated, the effect of the pardon would be extremely doubtful.<sup>36</sup>

**Delivery and Acceptance.**—A pardon is a deed to the validity of which delivery is essential; and delivery is not complete without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, there is no power in a court to force it on him.<sup>37</sup>

### IV. Construction of Pardons.

**Construction.**—As a pardon is an act of grace, limitations upon its operation should be strictly construed.<sup>38</sup>

### V. Operation and Effect.

**A. Time of Taking Effect.**—As to when a proclamation of pardon and amnesty by the president becomes operative, see the title *PRESIDENT OF THE UNITED STATES*.

**B. Obliteration of Offense.**—A pardon of an offense removes the offending act out of sight.<sup>39</sup> It obliterates the offense in legal contemplation,<sup>40</sup> and produces innocence in law.<sup>41</sup>

**C. Retrospective Operation.**—A pardon does not make amends for the past; it affords no relief for what has been suffered by the offender in his person by imprisonment, forced labor, or otherwise; it does not give compensation for

33. Where a libel was filed to recover penalties for violation of § 4465, Rev. Stat., it was held that § 5294, Rev. Stat., which provides that the secretary of the treasury may "remit or mitigate any fine or penalty relating to steam vessels," etc., was constitutional and that the exercise of such power by the secretary did not interfere with the pardoning power of the president nor infringe such power. *The Laura*, 114 U. S. 411, 29 L. Ed. 147.

34. **Construction of pardoning power.**—*Ex parte William Wells*, 18 How. 307, 15 L. Ed. 421.

"As the power [of pardon] has been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance, we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it." *United States v. Wilson*, 7 Pet. 150, 160, 8 L. Ed. 640; *Ex parte William Wells*, 18 How. 307, 310, 15 L. Ed. 421; *The Laura*, 114 U. S. 411, 416, 29 L. Ed. 147.

35. **Form of pardon.**—Form of pardon is set out in *Boyd v. United States*, 142 U. S. 450, 453, 35 L. Ed. 1076.

Part of form of pardon is set out in *Ex parte William Wells*, 18 How. 307, 308, 15 L. Ed. 421.

36. **Statement as to residence.**—*Republica v. Buffington*, 1 Dall. 60, 61, 1 L. Ed. 37.

37. **Delivery and acceptance necessary.**—*United States v. Wilson*, 7 Pet. 150, 161, 8 L. Ed. 640.

38. **Construction.**—*Osborn v. United States*, 91 U. S. 474, 478, 23 L. Ed. 388.

39. **Obliteration of offense.**—*Young v. United States*, 97 U. S. 39, 66, 24 L. Ed. 992; *United States v. Klein*, 13 Wall. 128, 147, 20 L. Ed. 519; *Ex parte Garland*, 4 Wall. 333, 18 L. Ed. 366.

"We have decided that pardon closes the eyes of the courts to the offending acts, or, perhaps more properly, furnishes conclusive evidence that they never existed as against the government." *Young v. United States*, 97 U. S. 39, 68, 24 L. Ed. 992.

"Having been pardoned, his offense, \* \* \* could not be imputed to him." *United States v. Padelford*, 9 Wall. 531, 19 L. Ed. 788.

40. *Osborn v. United States*, 91 U. S. 474, 478, 23 L. Ed. 388; *Carlisle v. United States*, 16 Wall. 147, 151, 21 L. Ed. 426; *Austin v. United States*, 155 U. S. 417, 425, 39 L. Ed. 206.

41. **Pardon produces innocence in law.**—*Austin v. United States*, 155 U. S. 417, 432, 39 L. Ed. 206; *Ex parte Garland*, 4 Wall. 333, 380, 18 L. Ed. 366; *United States v. Padelford*, 9 Wall. 531 542, 19 L. Ed. 788.



what has been done or suffered, nor does it impose upon the government any obligation to give it.<sup>42</sup>

**D. Release from Punishment.**—A pardon releases the offender from the punishment prescribed for the offense.<sup>43</sup>

**E. Penalties and Forfeitures.**—1. **PARDON PRIOR TO CONVICTION.**—A pardon granted before conviction, prevents any of the penalties and disabilities consequent upon conviction from attaching.<sup>44</sup>

2. **PARDON SUBSEQUENT TO CONVICTION.**—a. *In General.*—A pardon granted after conviction, removes all penalties and disabilities.<sup>45</sup>

b. *Civil Rights.*—A pardon restores all civil rights.<sup>46</sup>

c. *Restoration of Property.*—Subject to exceptions therein prescribed, a pardon by the president restores to its recipient all rights of property lost by the offense pardoned, unless the property has by judicial process become vested in other persons.<sup>47</sup> A pardon does not affect vested interests,<sup>48</sup> nor can a subsequent proclamation of amnesty have the effect of divesting vested rights.<sup>49</sup> It does not have the effect of restoring to the offender the right to proceeds, that have become absolutely vested in the United States.<sup>50</sup> Where, however, property condemned, or its proceeds, have not thus vested, but remain under control of the executive, or of officers subject to his orders, or are in the custody of the judicial tribunals, the

**42. Retrospective operation.**—*Knote v. United States*, 95 U. S. 149, 153, 24 L. Ed. 442.

**43. Release from punishment.**—*Carlisle v. United States*, 16 Wall. 147, 151, 21 L. Ed. 426; *Ex parte Garland*, 4 Wall. 333, 380, 18 L. Ed. 366; *United States v. Klein*, 13 Wall. 128, 147, 20 L. Ed. 519; *Osborn v. United States*, 91 U. S. 474, 477, 23 L. Ed. 388; *United States v. Padelford*, 9 Wall. 531, 542, 19 L. Ed. 788.

**44. Pardon prior to conviction.**—*Ex parte Garland*, 4 Wall. 333, 380, 18 L. Ed. 366.

**45. Pardon subsequent to conviction.**—*Ex parte Garland*, 4 Wall. 333, 380, 18 L. Ed. 366; *Osborn v. United States*, 91 U. S. 474, 477, 23 L. Ed. 388.

In *Armstrong's Foundry*, 6 Wall. 766, 769, 18 L. Ed. 882, it was held that a general pardon relieves the person pardoned from a penalty which he had incurred to the United States. Cited in *United States v. Padelford*, 9 Wall. 531, 542, 19 L. Ed. 788.

**46. Civil rights.**—*Ex parte Garland*, 4 Wall. 333, 380, 18 L. Ed. 366; *Illinois Cent. R. Co. v. Bosworth*, 133 U. S. 92, 103, 33 L. Ed. 550; *Knote v. United States*, 95 U. S. 149, 24 L. Ed. 442; *Austin v. United States*, 155 U. S. 417, 428, 39 L. Ed. 206; *Osborn v. United States*, 91 U. S. 474, 23 L. Ed. 388.

**47. Restoration of property.**—*Osborn v. United States*, 91 U. S. 474, 23 L. Ed. 388.

"Conceding that amnesty did restore what the United States held when the proclamation was issued, it could not restore what the United States had ceased to hold. It could not give back the property which had been sold, or any interest in it, either in possession or expectancy." *Wallach v. Van Riswick*, 92 U. S. 202, 214, 23 L. Ed. 473, citing *Semmes v. United States*, 91 U. S. 21, 23 L. Ed. 193.

**48. Effect of intervening vested rights.**

—*Semmes v. United States*, 91 U. S. 21, 23 L. Ed. 193; *Illinois Cent. R. Co. v. Bosworth*, 133 U. S. 92, 103, 33 L. Ed. 550; *Osborn v. United States*, 91 U. S. 474, 477, 23 L. Ed. 388; *Ex parte Garland*, 4 Wall. 333, 380, 18 L. Ed. 366.

A pardon does not affect any rights which have vested in others directly by the execution of the judgment for the offense or which have been acquired by others whilst that judgment was in force. *Knote v. United States*, 95 U. S. 149, 154, 24 L. Ed. 442; *The Confiscation Cases*, 20 Wall. 92, 22 L. Ed. 320; *Chaffraix v. Shift*, 92 U. S. 214, 23 L. Ed. 478; *Wallach v. Van Riswick*, 92 U. S. 202, 23 L. Ed. 473.

That a pardon does not affect vested interest, was exemplified in the case of *Semmes v. United States*, 91 U. S. 21, 23 L. Ed. 193, where a pardon was held not to interfere with the right of a purchaser of the forfeited estate. The same doctrine had been laid down in *The Confiscation Cases*, 20 Wall. 92, 112, 113, 22 L. Ed. 320. It was distinctly repeated and explained in *Knote v. United States*, 95 U. S. 149, 24 L. Ed. 442; *Illinois Cent. R. Co. v. Bosworth*, 133 U. S. 92, 103, 33 L. Ed. 550.

**49. Subsequent proclamation of amnesty.**—*The Confiscation Cases*, 20 Wall. 92, 113, 22 L. Ed. 320.

**50. Rights vested in United States.**—*Illinois Cent. R. Co. v. Bosworth*, 133 U. S. 92, 33 L. Ed. 550; *Knote v. United States*, 95 U. S. 149, 153, 24 L. Ed. 442.

If the proceeds of the property of the offender sold under the judgment have been paid into the treasury, the right to them has so far become vested in the United States that they can only be recovered by him through an act of congress. Moneys once in the treasury can only be withdrawn by an appropriation by

property will be restored or its proceeds delivered to the original owner, upon his full pardon. The property and proceeds are not considered as so absolutely vesting in third parties or in the United States as to be unaffected by the pardon until they have passed out of the jurisdiction of the officer or tribunal.<sup>51</sup>

d. *Restoration of Offices Forfeited*.—A pardon does not restore offices forfeited.<sup>52</sup>

## VI. Conditional Pardons and Reprieves.

**A. Conditional Pardons**—1. *IN GENERAL*.—A pardon may be conditional,<sup>53</sup> and if accepted, the one pardoned has no right to contend that the pardon is absolute and the condition of it void.<sup>54</sup>

2. *POWER TO GRANT*.—See ante, "Conditional Pardons," II, C, 2.

3. *ACCEPTANCE*.—The acceptance of a pardon containing a condition, makes the condition binding upon the person pardoned,<sup>55</sup> and there can be no question as to the binding effect of the acceptance.<sup>56</sup>

4. *OPERATION AND EFFECT OF COMPLIANCE WITH CONDITIONS*.—When proof is made of compliance with the conditions upon which a pardon is granted, the pardon takes full effect and blots out the offense.<sup>57</sup> And if the one pardoned does not perform the condition of the pardon, it will be altogether void; and he may be brought to the bar and remanded, to suffer the punishment to which he was originally sentenced.<sup>58</sup>

**B. Reprieves**—1. *POWER TO GRANT*.—See ante, "Reprieves," II, C, 4.

2. *WHEN GRANTED*.—The president may not only grant reprieves to be used to delay a judicial sentence when he thinks the merits of the case, or some cause connected with the offender, may require it, but he may also exercise this power

law. *Knote v. United States*, 95 U. S. 149, 24 L. Ed. 442.

51. *Knote v. United States*, 95 U. S. 149, 154, 24 L. Ed. 442.

52. *Restoration of offices forfeited*.—*Illinois Cent. R. Co. v. Bosworth*, 133 U. S. 92, 103, 33 L. Ed. 550; *Ex parte Garland*, 4 Wall. 333, 380, 18 L. Ed. 366.

53. *Pardon may be conditional*.—*United States v. Klein*, 13 Wall. 128, 147, 20 L. Ed. 519; *United States v. Wilson*, 7 Pet. 150, 161, 8 L. Ed. 640; *Ex parte William Wells*, 18 How. 307, 15 L. Ed. 421.

"Authorities to show that a pardon may be special in its character, or subject to conditions and exceptions, are quite unnecessary, as they are very numerous, and are all one way." *Semmes v. United States*, 91 U. S. 21, 27, 23 L. Ed. 193.

The king's charter of pardon is frequently conditional, as he may extend his mercy upon what terms he pleases, and annex to his bounty a condition precedent or subsequent, on the performance of which the validity of the pardon will depend (*Co. Litt.* 274, 276, 2 Hawkins Ch. 37, § 45; 4 Black Com. 401). *Ex parte William Wells*, 18 How. 307, 311, 15 L. Ed. 421.

54. *Ex parte William Wells*, 18 How. 307, 15 L. Ed. 421.

*Contra*.—"If the condition on which a pardon shall be granted be void, the pardon becomes absolute. This, I think, is a clear principle, although there may be found some opinions against it. The president has the power to pardon, and if he makes the grant on an impossible

condition—for a void condition may be considered of that character—the grant is valid." *Ex parte William Wells*, 18 How. 307, 328, 15 L. Ed. 421, dissenting opinion.

55. *Acceptance of conditional pardon*.—*Semmes v. United States*, 91 U. S. 21, 27, 23 L. Ed. 193; *In re Ross*, 145 U. S. 453, 480, 35 L. Ed. 581.

56. *Binding effect of acceptance*.—*In re Ross*, 140 U. S. 453, 480, 35 L. Ed. 581. Where a person convicted of the crime of murder and sentenced to be hung was granted a conditional pardon by the president changing the punishment to imprisonment for life, it was held that the acceptance of such pardon was binding. *In re Ross*, 140 U. S. 453, 35 L. Ed. 581; *Ex parte William Wells*, 18 How. 307, 30, 15 L. Ed. 421.

*Duress per minas*.—Where it was contended that a conditional pardon could not be considered as being voluntarily accepted by a convict so as to be binding upon him, because it was made whilst under duress per minas and duress of imprisonment, it was held, that neither applied to the case, as the prisoner was legally in prison. *Ex parte William Wells*, 18 How. 307, 315, 15 L. Ed. 421.

57. *Compliance with conditions*.—*United States v. Klein*, 13 Wall. 128, 142, 20 L. Ed. 519, cited in *Armstrong v. United States*, 13 Wall. 154, 155, 20 L. Ed. 614.

58. *Ex parte William Wells*, 18 How. 307, 311, 15 L. Ed. 421, citing *Bac. Abr. Pardon E.*; *Cole's Case*, *Moore* 466.

in cases *ex necessitate legis*, as where a female after conviction is found to be enceinte, or where a convict becomes insane, or is alleged to be so.<sup>59</sup>

## VII. Pleading.

**Necessity for Pleading.**—A pardon must be brought “judicially before the court, by plea, motion or otherwise,” and unless pleaded will not be noticed by the court, or in any manner affect the judgment of the law.<sup>60</sup> A pardon by act of parliament need not be pleaded but the court need *ex officio* take notice of it. The king’s charter of pardon must be specially pleaded.<sup>61</sup>

**As to time for pleading pardon** and waiver of benefit of pardon by failure to plead at the proper time, see case below.<sup>62</sup>

**Sufficiency of Plea of Amnesty.**—In order for a plea of amnesty proclaimed by the president to be sufficient, it must contain an averment that the claimant does not come within any of the exceptions made by the proclamation.<sup>63</sup>

## PARENT AND CHILD.

### CROSS REFERENCES.

See the titles *ADVANCEMENTS*, vol. 1, p. 198; *ALIENS*, vol. 1, p. 210; *APPEAL AND ERROR*, vol. 2, p. 1; *BASTARDY*, vol. 3, p. 204; *CITIZENSHIP*, vol. 3, p. 788; *DESCENT AND DISTRIBUTION*, vol. 5, p. 335; *FRAUDULENT AND VOLUNTARY CONVEYANCES*, vol. 6, p. 472; *FRAUD AND DECEIT*, vol. 6, p. 394; *GIFTS*, vol. 6, p. 564; *GUARDIAN AND WARD*, vol. 6, p. 599; *HABEAS CORPUS*, vol. 6, p. 610; *HUSBAND AND WIFE*, vol. 6, p. 716; *INFANTS*, vol. 6, p. 1012; *MARRIAGE*, ante, p. 247; *NATURALIZATION*, ante, p. 797; *UNDUE INFLUENCE*.

As to presumption of satisfaction of debt where parent is debtor of child, see the title *ADVANCEMENTS*, vol. 1, p. 198. As to right to custody of child being of a pecuniary estimation as governing the right of appeal, see the title *APPEAL AND ERROR*, vol. 1, pp. 854, 855. As to legitimation of bastards, see the title *BASTARDY*, vol. 3, p. 204. As to validity of conveyance from parent to child, see the title *FRAUDULENT AND VOLUNTARY CONVEYANCES*, vol. 6, p. 488. As to preference of child, see the title *FRAUDULENT AND VOLUNTARY CONVEYANCES*, vol. 6, p. 495. As to voluntary conveyances to child, see the title *FRAUDULENT AND VOLUNTARY CONVEYANCES*, vol. 6, p. 509. As to gifts between parent and child, see the title *GIFTS*, vol. 6, p. 564. See, also, the title *UNDUE INFLUENCE*. As to right of United States district court to issue writ of habeas corpus to restore an infant to the custody of its father, see the title *HABEAS CORPUS*, vol. 6, p. 625. As to petition of private individual to bring up the body of his infant daughter, see the title *HABEAS CORPUS*, vol. 6, p. 626. As to setting aside deed for undue influence, see the title *UNDUE INFLUENCE*.

**Who Are Children.**—The legal construction of the word “children” accords with its popular signification, namely, as designating the immediate offspring.<sup>1</sup>

**Duty to Support Child.**—At common law, a father is bound to support his legitimate children, and the obligation continues during their minority—one may assume this obligation to exist in all the states.<sup>2</sup>

**Control of Property of Child.**—During the minority of the child, the only right of the father is, to take the usufruct. He has no power to sell the prop-

59. **When granted.**—*Ex parte* William Wells, 18 How. 307, 314, 15 L. Ed. 421.

60. **Necessity for pleading a pardon.**—*United States v. Wilson*, 7 Pet. 150, 161, 163, 8 L. Ed. 640. See the title *JUDICIAL NOTICE*, vol. 7, pp. 689, 690.

61. *United States v. Wilson*, 7 Pet. 150, 162, 8 L. Ed. 640. See *Blackstone*, vol. 4, p. 401.

62. **Time to plead.**—*United States v. Wilson*, 7 Pet. 150, 162, 8 L. Ed. 640.

63. **Pleading amnesty.**—*St. Louis Street Foundry*, 6 Wall. 770, 18 L. Ed. 884.

1. **Who are children.**—*Adams v. Law*, 17 How. 417, 421, 15 L. Ed. 149. See *CHILD—CHILDREN*, vol. 3, p. 767.

2. **Duty to support child.**—*Dunbar v.*



erty of the minor except for certain purposes and under the sanction of the judge.<sup>3</sup>

**Acts of Parent Cannot Affect Vested Rights of Child.**—No acts done by the parents can affect the legal validity of the rights of the children, once acquired and vested in them.<sup>4</sup>

**Rule in Regard to Conveyances between Father and Child.**—"The natural and just influence which a parent has over a child renders it peculiarly important for courts of justice to watch over and protect the interests of the latter; and therefore all contracts and conveyances, whereby benefits are secured by children to their parents, are objects of jealousy, and if they are not entered into with scrupulous good faith, and are not reasonable under the circumstances, they will be set aside, unless third persons have acquired an interest under them."<sup>5</sup>

**Extent of Control Over Child.**—No parent, under any circumstances, can make his child a servant, in the strict sense of the word. Though he is entitled to the service of his child, he cannot enforce it, as a master can that of his servants; he cannot commit him to jail, if he runs away; he cannot demand the penalty of five days' service for every day of absence; and, therefore, it is impossible that he can transfer such right to another.<sup>6</sup>

**Laws of States Govern Relation.**—The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States.<sup>7</sup>

**PARI DELICTO.**—See the titles *FRAUD AND DECEIT*, vol. 6, p. 421; *ILLEGAL CONTRACTS*, vol. 6, p. 754.

**PARISH CHURCH.**—See *CHURCH*, vol. 3, p. 785.

**PARKS AND SQUARES.**—As to dedication of property for use as parks and public squares, manner and effect of such dedication, etc., see the title *DEDICATION*, vol. 5, p. 235. As to the appropriation of property for public parks and squares, as constituting a taking for public use, the manner of appropriating, the necessity and manner of making compensation for such property, etc., see the title *EMINENT DOMAIN*, vol. 5, pp. 767, 781, 782, 786, 792. As to the granting by congress of lands to a state for the benefit of the public as a place of resort and recreation, see the title *PUBLIC LANDS*. As to the grant to a railroad of the right of way through a public park, see the title *EASEMENTS*, vol. 5, pp. 691, 692, 693. As to the duty of a railroad to fence its track within the limits of or adjacent to a public park, see the titles *FENCES*, vol. 6, p. 273; *RAILROADS*. As to appointment of park commissioners, see the title *PUBLIC OFFICERS*.

Dunbar, 190 U. S. 340, 351, 47 L. Ed. 1084.

3. **Control of property of child.**—Hoyt v. Hammekin, 14 How. 346, 350, 14 L. Ed. 449.

**Conveyance by father void.**—Where a title to land in the state of Coahuila and Texas was obtained in 1833, by a mother for and in the name of her daughter, and in 1836, the father of the daughter conveyed it away by a deed executed in Louisiana, this deed was properly set aside by the district court of Texas, as it was not executed either according to the laws of Louisiana or those of Coahuila and Texas. Hoyt v. Hammekin, 14 How. 346, 14 L. Ed. 449.

4. **Acts of parent cannot affect vested rights of child.**—Carver v. Astor, 4 Pet. 1, 92, 7 L. Ed. 761.

5. **Statement by Justice Story.**—Taylor v. Taylor, 8 How. 183, 200, 12 L. Ed. 1040:

Towson v. Moore, 173 U. S. 17, 19, 21, 43 L. Ed. 597. See the title *UNDUE INFLUENCE*.

6. **Extent of control over child.**—Respublica v. Keppeler, 2 Dall. 197, 198, 1 L. Ed. 347. See, generally, the title *MASTER AND SERVANT*, ante, p. 275.

7. **Governed by state laws.**—The right to the control and possession of this child, as it is contested by its father and its grandfather, is one in regard to which neither the congress of the United States nor any authority of the United States has any special jurisdiction. Whether the one or the other is entitled to the possession does not depend upon any act of congress, or any treaty of the United States or its constitution. In re Burrus, 136 U. S. 586, 593, 34 L. Ed. 500. See the title *CONFLICT OF LAWS*, vol. 3, p. 1020.

**PARLIAMENTARY LAW.**—See the titles **BENEFICIAL AND BENEVOLENT ASSOCIATIONS**, vol. 3, p. 211; **COUNTIES**, vol. 4, p. 825; **MUNICIPAL CORPORATIONS**, vol. 8, p. 546; **OFFICERS AND AGENTS OF PRIVATE CORPORATIONS**, vol. 8, p. 957; **PUBLIC OFFICERS**; **UNITED STATES**. As to organization of congress and procedure therein, see the titles **CONSTITUTIONAL LAW**, vol. 4, p. 294, et seq.; **STATUTES**. As to power of congress to pass rules of procedure, see the title **CONSTITUTIONAL LAW**, vol. 4, p. 295. As to decision by congress of the qualification of its members, see the title **CONSTITUTIONAL LAW**, vol. 4, p. 294. As to necessity that a majority of each house of congress be present in order to constitute a quorum, and as to the validity of acts of majority of quorum, see the titles **CONSTITUTIONAL LAW**, vol. 4, p. 294; **STATUTES**. As to constitutionality of rules of congress for determining the presence of a quorum, see the title **CONSTITUTIONAL LAW**, vol. 4, p. 294. As to power of congress to prescribe methods to render certain the presence of a quorum, see the title **CONSTITUTIONAL LAW**, vol. 4, p. 295. As to power of congress to punish its members for disorderly behavior and to impeach its members for cause, see the title **CONSTITUTIONAL LAW**, vol. 4, p. 295. As to legislative interference with exclusive right of congress to punish or expel its members, see the title **CONSTITUTIONAL LAW**, vol. 4, p. 296. As to journal of proceedings kept by congress, see the title **CONSTITUTIONAL LAW**, vol. 4, p. 295. As to admissibility in evidence of legislative journals, see the title **DOCUMENTARY EVIDENCE**, vol. 5, p. 436. As to invalidating a statute by appeal to the journal, see the title **CONSTITUTIONAL LAW**, vol. 4, p. 295. As to the rule that courts cannot by writs of mandamus operating upon the officers of legislative bodies supervise the making up of their records or cause alterations to be made in the same, see the title **MANDAMUS**, vol. 8, p. 64. As to enforcing attendance of witnesses in congressional investigations, and the scope of inquiry, see the title **CONSTITUTIONAL LAW**, vol. 4, p. 316. As to what constitutes a quorum when corporate power resides in a select body, as a city council, or is delegated to a committee or agents, and as to the power of the majority of such quorum to act, and as to lack of power on part of a minority, see the title **MUNICIPAL CORPORATIONS**, vol. 8, p. 608. As to the meaning of a requirement of a majority of legal voters for an election, see the title **ELECTIONS**, vol. 5, p. 727. As to procedure in the enactment of statutes and legislative bills, and as to their form, and requisites, see the title **STATUTES**.

**PAROCHIAL CHURCH.**—See **CHURCH**, vol. 3, p. 785.

**PAROL AGREEMENTS.**—See the title **FRAUDS, STATUTE OF**, vol. 6, p. 451.

## PAROL EVIDENCE.

BY WALTER CARRINGTON.

- I. Scope of Title, 13.**
- II. General Rule as to Admission, 14.**
  - A. Rule Stated, 14.
  - B. Foundation of Rule, 14.
- III. Application of Rule to Specific Writings, 15.**
  - A. Public Documents, 15.
    - 1. Proclamations of Presidents of the United States, 15.
    - 2. Legislative Records, Statutes and Foreign Laws, 15.
    - 3. Judicial Records, 15.
    - 4. Instructions of Postmaster General, 15.
    - 5. Official Certificates and Plats, 15.
    - 6. Records of Deeds, 15.
    - 7. Public Grants and Land Office Records, 15.
  - B. Private Documents, 15.
    - 1. Contracts, 15.
    - 2. Assignments, 18.
    - 3. Bills of Lading, 18.
    - 4. Bills, Notes and Checks, 18.
    - 5. Certificates of Stock, 19.
    - 6. Charter Parties, 19.
    - 7. Deeds of Conveyance, 19.
    - 8. Mortgages and Deeds of Trust, 19.
    - 9. Releases, 19.
    - 10. Wills, 19.
- IV. Limitations of and Exceptions to Rule, 19.**
  - A. In General, 19.
  - B. Identity of Persons, 22.
  - C. Relations between the Parties, 22.
  - D. Real Party in Interest, 23.
    - 1. In General, 23.
    - 2. Written Contract Made by Agent in His Own Name, 23.
  - E. Execution and Delivery, 24.
    - 1. In General, 24.
    - 2. Evidence to Show Forgery, 24.
    - 3. Date or Time of Execution, 24.
    - 4. Reading Instrument to an Unlettered Person, 24.
    - 5. Seal of a Corporation, 24.
    - 6. Time of Delivery, 25.
  - F. Consideration, 25.
  - G. Subject Matter, 26.
  - H. Construction of Particular Terms, 27.
  - I. Medium of Payment, 28.
  - J. Conditions or Contingencies, 28.
  - K. Incomplete Contracts and Writings, 29.
  - L. Connecting Together and Identifying Writings, 29.
  - M. Alterations or Additions, 29.
  - N. Usages and Customs, 29.
  - O. Object of Parties in Executing and Receiving Instrument, 29.

**P. Invalidity of Instrument, 30.****1. Fraud or Mistake, 30.****a. In General, 30.****b. Fraud or Mistake in the Execution of a Sealed Instrument, 31.****c. Fraud in the Consideration of a Sealed Instrument, 31.****d. Writing Not Intended as a Contract, 31.****e. Terms Employed in Preparation of Contract Varied or Changed, 31.****f. Stipulations Inserted for Purpose of Defrauding a Third Person, 31.****2. Fraudulent or Voluntary Conveyance, 32.****3. Forgery, 32.****4. Partial Illegality of Contract, 32.****5. Testimony of Party to Negotiable Instrument Not Admissible to Invalidate It, 32.****6. Estoppel to Introduce Extrinsic Evidence to Impeach Validity of Instruments, 32.****Q. Contract between Persons Not Parties to the Suit, 32.****R. Receipts, 32.****S. Bills of Parcels, 32.****T. Entries in Books, 33.****U. Foreign Statutes, 33.****V. Rescission, Cancellation and Reformation of Instruments, 33.****V. Question of Admissibility One of Law, 33.****CROSS REFERENCES.**

See the titles ACKNOWLEDGMENTS, vol. 1, p. 76; ALTERATION OF INSTRUMENTS, vol. 1, p. 261; APPEAL AND ERROR, vol. 1, p. 333; ASSIGNMENTS, vol. 2, p. 549; BAILMENTS, vol. 2, p. 782; BEST AND SECONDARY EVIDENCE, vol. 3, p. 214; BILL OF LADING, vol. 3, p. 232; BILLS, NOTES AND CHECKS, vol. 3, p. 257; BOUNDARIES, vol. 3, p. 461; CARRIERS, vol. 3, p. 556; CHATTEL MORTGAGES, vol. 3, p. 699; CONTRACTS, vol. 4, p. 552; COPYRIGHT, vol. 4, p. 602; DECLARATIONS AND ADMISSIONS, vol. 5, p. 214; DEEDS, vol. 5, p. 245; DEPOSITIONS, vol. 5, p. 321; DOCUMENTARY EVIDENCE, vol. 5, p. 431; ESCROW, vol. 5, p. 900; ESTOPPEL, vol. 5, p. 913; EVIDENCE, vol. 5, p. 1004; EXECUTIONS, vol. 6, p. 84; FOREIGN JUDGMENTS, RECORDS AND JUDICIAL PROCEEDINGS, vol. 6, p. 335; FOREIGN LAWS, vol. 6, p. 374; FORGERY AND COUNTERFEITING, vol. 6, p. 380; FRAUD AND DECEIT, vol. 6, p. 394; FRAUDS, STATUTE OF, vol. 6, p. 451; FRAUDULENT AND VOLUNTARY CONVEYANCES, vol. 6, p. 472; GAMBLING CONTRACTS, vol. 6, p. 537; GUARANTY, vol. 6, p. 580; HEARSAY EVIDENCE, vol. 6, p. 686; ILLEGAL CONTRACTS, vol. 6, p. 737; INSURANCE, vol. 7, p. 66; JUDGMENTS AND DECREES, vol. 7, p. 544; JURISDICTION, vol. 7, p. 738; LETTERS OF CREDIT, vol. 7, p. 854; LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, p. 900; LOST INSTRUMENTS AND RECORDS, vol. 7, p. 1064; MISTAKE AND ACCIDENT, vol. 8, p. 417; MORTGAGES AND DEEDS OF TRUST, vol. 8, p. 452; PARTNERSHIP; PATENTS; PAYMENT; POSTAL LAWS; PRINCIPAL AND AGENT; PRINCIPAL AND SURETY; PUBLIC LANDS; QUESTIONS OF LAW AND FACT; RECEIPTS; RECORDING ACTS; RECORDS; RELEASE; RES ADJUDICATA; RES GESTE; RESCISSION, CANCELLATION AND REFORMATION; REVENUE LAWS; SALES; SEALS AND SEALED INSTRUMENTS; SEPARATE ESTATE OF MARRIED WOMEN; SHIPS AND SHIPPING; SLAVERY AND INVOLUNTARY SERVITUDE; STATUTES; STOCK AND STOCKHOLDERS; TAXATION; TRUSTS AND TRUSTEES; USAGES AND CUSTOMS; WARRANTY; WILLS; WITNESSES.

**I. Scope of Title.**

It is proposed under this title to state the general rule as to the admission of parol or extrinsic evidence to affect written instruments; to state the principles



which control the application of that rule to written contracts; to give some concrete illustrations of its application to other instruments; and, finally, to state the limitations of and exceptions to the rule. But it is not intended to treat of the application of the rule to every species of document or written contract, as an exhaustive treatment of the cases making such specific applications of the rule will be found under other titles in this work, to which references will be found in the table of cross references.

## II. General Rule as to Admission.

**A. Rule Stated.**—It is a general rule, in courts both of law and equity, that wherever written instruments are appointed, either by the requirement of law, or by the compact of the parties, to be the repositories and memorials of truth, any other evidence is excluded from being used, either as a substitute for such instruments or to contradict, qualify or alter them.<sup>1</sup> The language employed by the parties in making an instrument, and no other, must be used in ascertaining its meaning.<sup>2</sup> Written instruments as used in the rule include not only records, deeds, wills, and other instruments required by statute or by the common law to be in writing, but every document which contains the terms of a contract between different parties.<sup>3</sup> But the rule will not strictly apply to certain less formal documents.<sup>4</sup> In some jurisdictions the rule has been given statutory sanction.<sup>5</sup>

**B. Foundation of Rule.**—The parol evidence rule is founded upon both principle and policy; upon principle, because written instruments are in their nature and origin entitled to a much higher degree of credit than parol evidence; upon policy, because it would be attended with great mischief if those instruments upon which men's rights depended were liable to be impeached by loose collateral evidence.<sup>6</sup>

**1. General rule as to admission of parol evidence.**—*Northern Assur. Co. v. Grand View Bldg. Ass'n*, 183 U. S. 308, 318, 46 L. Ed. 213; *Fire Ins. Ass'n v. Wickham*, 141 U. S. 564, 576, 35 L. Ed. 860; *West v. Smith*, 101 U. S. 263, 271, 25 L. Ed. 809; *Peugh v. Davis*, 96 U. S. 332, 336, 24 L. Ed. 775; *Brick v. Brick*, 98 U. S. 514, 516, 25 L. Ed. 256; *Brown v. Spofford*, 95 U. S. 474, 480, 24 L. Ed. 508; *Moran v. Prather*, 23 Wall. 492, 499, 23 L. Ed. 121; *United States v. Fossat*, 20 How. 413, 427, 15 L. Ed. 944; *Clark v. Manufacturers' Ins. Co.*, 8 How. 235, 246, 12 L. Ed. 1061; *Philadelphia, etc., R. Co. v. Stimpson*, 14 Pet. 448, 461, 10 L. Ed. 535; *Shankland v. Washington*, 5 Pet. 390, 394, 8 L. Ed. 166; *Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. Ed. 589; *Weatherhead v. Baskerville*, 11 How. 329, 357, 13 L. Ed. 717; *Ross v. McLung*, 6 Pet. 283, 289, 8 L. Ed. 400; *Keene v. Meade*, 3 Pet. 1, 8, 7 L. Ed. 581.

**2.** *West v. Smith*, 101 U. S. 263, 271, 25 L. Ed. 809.

When a written instrument is duly executed and delivered the courts of law hold that it contains the true agreement of the parties, and that the writing furnishes better evidence of the sense of the parties than any that can be supplied by parol. *Walden v. Skinner*, 101 U. S. 577, 585, 25 L. Ed. 963.

Where the words of any written instrument are free from ambiguity in themselves, and where the external circumstances do not create any doubt or difficulty as to the proper application of the

words to the claimants under the instrument, or the subject matter to which the instrument relates, evidence dehors the instrument for the purpose of explaining it, according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible. *Moran v. Prather*, 23 Wall. 492, 501, 23 L. Ed. 121. See, also, *United States v. Fossat*, 20 How. 413, 427, 15 L. Ed. 944. See post, "In General," IV, A.

**3. What written instruments, as used in rule, include.**—*West v. Smith*, 101 U. S. 263, 271, 25 L. Ed. 809. See post, "Application of Rule to Specific Writings," III.

**4. Rule not strictly applicable to certain documents.**—*West v. Smith*, 101 U. S. 263, 271, 25 L. Ed. 809.

**5. Under a Montana statute, code of civil procedure, § 628, when the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and, therefore, there can be between the parties and their representatives or successors in interest no evidence of the terms of the agreement other than the contents of the writing, except in certain specified cases. The term, agreement, in this provision, includes deeds and wills, as well as contracts between the parties.** *Bogk v. Gasvert*, 149 U. S. 17, 24, 37 L. Ed. 631.

**6. Rule founded upon both principle and policy.**—*Northern Assur. Co. v. Grand View Bldg. Ass'n*, 183 U. S. 308, 318, 46 L. Ed. 213. See, also, *Sprigg v. Bank*, 14 Pet. 201, 10 L. Ed. 419.

### III. Application of Rule to Specific Writings.

**A. Public Documents**—1. PROCLAMATIONS OF PRESIDENTS OF THE UNITED STATES.—Extrinsic evidence is not admissible to prove the date at which a proclamation of a president of the United States took effect, it being conclusively presumed that such a proclamation had a valid existence on the day of its date.<sup>7</sup>

2. LEGISLATIVE RECORDS, STATUTES AND FOREIGN LAWS.—See the titles FOREIGN LAWS, vol. 6, p. 374; STATUTES.

3. JUDICIAL RECORDS.—See the titles FOREIGN JUDGMENTS, RECORDS AND JUDICIAL PROCEEDINGS, vol. 6, p. 335; JUDGMENTS AND DECREES, vol. 7, p. 544; RECORDS; RES ADJUDICATA.

4. INSTRUCTIONS OF POSTMASTER GENERAL.—Parol evidence is not admissible to show that one set of written instructions from the postmaster general, superseded another set of written instructions.<sup>8</sup>

5. OFFICIAL CERTIFICATES AND PLATS.—The rule that parol evidence is not admissible to contradict, vary, or explain a written instrument, is applicable to public official certificates and plats.<sup>9</sup>

6. RECORDS OF DEEDS.—See the title RECORDING ACTS.

7. PUBLIC GRANTS AND LAND OFFICE RECORDS.—See the title PUBLIC LANDS.

**B. Private Documents**—1. CONTRACTS.—When parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed, in the absence of fraud or mistake,<sup>10</sup> that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing,<sup>11</sup> and as a general rule, parol or extrinsic evidence is not admissible to contradict, qualify, add to, or substantially vary the written contract.<sup>12</sup> All oral testimony of previous or contemporary contracts, transactions

7. Date when proclamation took effect not provable by parol.—*Lapeyre v. United States*, 17 Wall. 191, 21 L. Ed. 606.

8. Instructions of postmaster general.—*Dunlop v. Munroe*, 7 Cranch 242, 3 L. Ed. 329. The court in this case said: "The instructions of the postmaster general spoke for themselves. If the one superseded or rescinded the other, the evidence was to be sought by comparing them together."

9. Where certificates and plats were made and recorded under the Maryland act of December 28th, 1793, *Burch's Dig.* 224, which provided that they "shall be sufficient and effectual to vest the legal estate in the purchasers, their heirs and assigns, according to the import of such certificates, without any deed or formal conveyance," it was held that parol evidence to contradict, vary, or explain them, was no more to be admitted than if they were formal conveyances. *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 672, 681, 27 L. Ed. 1070.

10. See post, "Fraud or Mistake," IV, P. 1.

11. Conclusive presumption that whole engagement was reduced to writing.—*DeWitt v. Berry*, 134 U. S. 306, 315, 33 L. Ed. 896; *Northern Assur. Co. v. Grand View Bldg. Ass'n*, 183 U. S. 308, 318, 46 L. Ed. 213; *Seitz v. Brewers' Refrigerat-*

*ing Mach. Co.*, 141 U. S. 510, 517, 35 L. Ed. 837; *Harrison v. Fortlage*, 161 U. S. 57, 63, 40 L. Ed. 616; *Van Ness v. Washington*, 4 Pet. 232, 286, 7 L. Ed. 842; *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 672, 681, 27 L. Ed. 1070; *Simpson v. United States*, 172 U. S. 372, 43 L. Ed. 482; *Brawley v. United States*, 96 U. S. 168, 173, 24 L. Ed. 622; *Walden v. Skinner*, 101 U. S. 577, 584, 25 L. Ed. 963; *Bast v. Bank*, 101 U. S. 93, 96, 25 L. Ed. 794; *Piatt v. United States*, 22 Wall. 496, 506, 22 L. Ed. 858; *Hawkins v. United States*, 96 U. S. 689, 24 L. Ed. 607; *Insurance Co. v. Lyman*, 15 Wall. 664, 670, 21 L. Ed. 246; *The Delaware*, 14 Wall. 579, 603, 20 L. Ed. 779; *Nash v. Towne*, 5 Wall. 689, 703, 18 L. Ed. 527; *Emerson v. Slater*, 22 How. 28, 41, 16 L. Ed. 360; *Phillips v. Preston*, 5 How. 278, 291, 12 L. Ed. 152.

Except when the language of a written contract is ambiguous, the intention of the parties is to be gathered from the writing alone. *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527, 541, 23 L. Ed. 868; *Falk v. Moebis*, 127 U. S. 597, 607, 32 L. Ed. 266.

12. Parol evidence not admissible to contradict or vary the writing.—*Delaware Indians v. Cherokee Nation*, 193 U. S. 127, 140, 48 L. Ed. 646; *Simpson v. United States*, 172 U. S. 372, 379, 43 L. Ed. 482; *Northern Assur. Co. v. Grand View Bldg. Ass'n*, 183 U. S. 308, 361, 46 L. Ed. 213;



and facts, or of conversations or declarations of the parties, so far as it tends to contradict, alter or modify the plain language of the writing, or affect its construction, must, as a general rule, be rejected.<sup>13</sup> The written agreement cannot be varied by proof of the circumstances out of which it grew, and which sur-

Hartford Fire Ins. Co. v. Wilson, 187 U. S. 467, 478, 47 L. Ed. 261; Culver v. Wilkinson, 145 U. S. 205, 212, 36 L. Ed. 676; DeWitt v. Berry, 134 U. S. 306, 312, 33 L. Ed. 896; Walden v. Skinner, 101 U. S. 577, 584, 25 L. Ed. 963; Brown v. Spofford, 95 U. S. 474, 24 L. Ed. 508; Moran v. Prather, 23 Wall. 492, 502, 23 L. Ed. 121; Bailey v. Railroad Co., 17 Wall. 96, 105, 21 L. Ed. 611; The Delaware, 14 Wall. 579, 601, 20 L. Ed. 779; Insurance Co. v. Wilkinson, 13 Wall. 222, 231, 20 L. Ed. 617; Northern Assur. Co. v. Grand View Bldg. Ass'n, 183 U. S. 308, 341, 46 L. Ed. 213; Nash v. Towne, 5 Wall. 689, 703, 18 L. Ed. 527; Oelricks v. Ford, 23 How. 49, 63, 16 L. Ed. 534; Barreda v. Silsbee, 21 How. 146, 166, 16 L. Ed. 86; Brown v. Wiley, 20 How. 442, 448, 15 L. Ed. 965; Garrison v. Memphis Ins. Co., 19 How. 312, 316, 15 L. Ed. 656; Philadelphia, etc., R. Co. v. Stimpson, 14 Pet. 448, 461, 10 L. Ed. 535; Sprigg v. Bank, 14 Pet. 201, 10 L. Ed. 419; Renner v. Bank, 9 Wheat. 581, 587, 6 L. Ed. 166; United States Bank v. Dunn, 6 Pet. 51, 57, 8 L. Ed. 316; Hinde v. Longworth, 11 Wheat. 199, 214, 6 L. Ed. 454; Graves v. Boston Marine Ins. Co., 2 Cranch 419, 439, 2 L. Ed. 324; O'Hara v. Hall, 4 Dall. 340, 1 L. Ed. 858; Selden v. Myers, 20 How. 506, 509, 15 L. Ed. 976; Sawyer v. Weaver, 131 U. S., appx., cli, clii, 24 L. Ed. 705; Falk v. Moebis, 127 U. S. 597, 607, 32 L. Ed. 266; Hendrickson v. Hinckley, 17 How. 443, 445, 15 L. Ed. 124; Thompson v. Insurance Co., 104 U. S. 252, 259, 26 L. Ed. 765; Specht v. Howard, 16 Wall. 564, 566, 21 L. Ed. 348; Forsythe v. Kimball, 91 U. S. 291, 294, 23 L. Ed. 352; Grant v. Naylor, 4 Cranch 224, 2 L. Ed. 603.

"It is a general rule that when a contract has been reduced to the form of a document or series of documents, no evidence can be given of the terms of such contract, except the document itself." Baltzer v. Raleigh, etc., R. Co., 115 U. S. 634, 648, 29 L. Ed. 505.

"Contracts in writing, if in unambiguous terms, must be permitted to speak for themselves, and cannot by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence." Northern Assur. Co. v. Grand View Bldg. Ass'n, 183 U. S. 308, 361, 46 L. Ed. 213; Hartford Fire Ins. Co. v. Wilson, 187 U. S. 467, 478, 47 L. Ed. 261.

13. DeWitt v. Berry, 134 U. S. 306, 33 L. Ed. 896; Northern Assur. Co. v. Grand View Bldg. Ass'n, 183 U. S. 308, 318, 46 L. Ed. 213; Johnson v. St. Louis, etc., R. Co., 141 U. S. 602, 611, 35 L. Ed. 875; Van Ness v. Washington, 4 Pet. 232, 286, 7 L. Ed. 842; Potomac Steamboat Co. v. Upper Potomac Steamboat Co., 109 U. S.

672, 681, 27 L. Ed. 1070; Brawley v. United States, 96 U. S. 168, 174, 24 L. Ed. 622; Simpson v. United States, 172 U. S. 372, 379, 43 L. Ed. 482; Simpson v. United States, 199 U. S. 397, 398, 50 L. Ed. 345; Burke v. Dulaney, 153 U. S. 228, 232, 38 L. Ed. 698; The Barnstable, 181 U. S. 464, 472, 45 L. Ed. 954; McAleer v. United States, 150 U. S. 424, 432, 37 L. Ed. 1130; Piatt v. United States, 22 Wall. 496, 506, 22 L. Ed. 858; Hawkins v. United States, 96 U. S. 689, 24 L. Ed. 607; Bailey v. Railroad Co., 17 Wall. 96, 105, 21 L. Ed. 611; Insurance Co. v. Lyman, 15 Wall. 664, 670, 21 L. Ed. 246; Brown v. Hiatts, 15 Wall. 177, 183, 21 L. Ed. 128; The Delaware, 14 Wall. 579, 603, 20 L. Ed. 779; Willard v. Tayloe, 8 Wall. 557, 558, 19 L. Ed. 501; Nash v. Towne, 5 Wall. 689, 703, 18 L. Ed. 527; Hogg v. Ruffner, 1 Black 115, 120, 17 L. Ed. 38; Oelricks v. Ford, 23 How. 49, 64, 16 L. Ed. 534; Emerson v. Slater, 22 How. 28, 41, 16 L. Ed. 360; Baker v. Nachtrieb, 19 How. 126, 130, 15 L. Ed. 528; Troy Iron, etc., Factory v. Corning, 14 How. 193, 217, 14 L. Ed. 383; Phillips v. Preston, 5 How. 278, 291, 12 L. Ed. 152; Sprigg v. Bank, 14 Pet. 201, 206, 10 L. Ed. 419.

All previous and contemporary negotiations and verbal statements are merged and excluded when the parties assent to a written instrument as expressing the agreement. Insurance Co. v. Wyman, 15 Wall. 664, 670, 21 L. Ed. 246; Hunt v. Rousmanier, 8 Wheat. 174, 211, 5 L. Ed. 589; Emerson v. Slater, 22 How. 28, 41, 16 L. Ed. 360; Oelricks v. Ford, 23 How. 49, 64, 16 L. Ed. 534; Nash v. Towne, 5 Wall. 689, 703, 18 L. Ed. 527; The Delaware, 14 Wall. 579, 603, 20 L. Ed. 779.

The parties cannot impair the obligations which the contract engenders by reference to the negotiations which preceded the making of it. Simpson v. United States, 172 U. S. 372, 379, 43 L. Ed. 482.

It is not competent by parol evidence to alter the terms of a contract, by showing that there was an antecedent parol agreement or understanding between the parties different in a material particular from that which the contract contains. Gavinkel v. Crump, 22 Wall. 308, 319, 22 L. Ed. 783.

"It is not permitted to a party to control a written agreement by parol testimony of declarations or conversation, at the time it was completed or before, which would contradict, add to, or alter the written agreement, either in the case of a latent or patent ambiguity." Troy Iron, etc., Factory v. Corning, 14 How. 193, 217, 14 L. Ed. 383.

Parol evidence is not admissible to

rounded its adoption.<sup>14</sup> This rule excluding parol or extrinsic evidence relating to written instruments, is applicable to parties and privies, and their representatives, and those claiming under them;<sup>15</sup> and in the absence of fraud or mistake, it applies in a court of equity as well as in a court of law.<sup>16</sup> The rule has been applied by the supreme court to contracts of bailment,<sup>17</sup> contracts of guaranty or suretyship,<sup>18</sup> contracts of indemnity,<sup>19</sup> building contracts,<sup>20</sup> insurance contracts,<sup>21</sup> gambling contracts,<sup>22</sup> partnership contracts,<sup>23</sup> contracts of carriage,<sup>24</sup>

show how all the parties to a transaction, evidenced by several writings, understood it from its commencement to its final consummation. *Bailey v. Railroad Co.*, 17 Wall. 96, 105, 21 L. Ed. 611.

Testimony of third persons as to what they understood, from conversations with the parties to a written contract, the terms of the contract to be, is not admissible to contradict the written contract. *Hogg v. Ruffner*, 1 Black 115, 120, 17 L. Ed. 38.

**Parol evidence not admissible to show mode of payment.**—Where in a written contract the mode in which a payment is to be made is clearly specified, parol evidence is not admissible to show that it was to be made in some other way. *Richardson v. Hardwick*, 106 U. S. 252, 244, 27 L. Ed. 145.

**Contract in relation to promissory note.**—Where, at the time of making and indorsing a promissory note, a written contract in relation thereto is entered into by the parties, parol testimony varying or contradicting its terms is not admissible. *Brown v. Spofford*, 95 U. S. 474, 24 L. Ed. 508.

**Agreement as to amount of indebtedness.**—Where a written agreement was made between A and B, in which both parties stated that A was indebted to B in a certain sum "over and above all discounts and set-offs of every name and nature," it was held that A could not go behind such agreement, as there was no sufficient or satisfactory evidence to impeach it on the ground that his signature to it was obtained by fraud or duress or without his full knowledge of its provisions and consent to its terms. *Goodwin v. Fox*, 129 U. S. 601, 606, 32 L. Ed. 805.

**14. Evidence of surrounding circumstances not admissible to vary contract.**—*Reed v. Insurance Co.*, 95 U. S. 23, 30, 24 L. Ed. 348.

Evidence of surrounding circumstances is not admissible for the purpose of adding a new and distinct undertaking to the written agreement. *Maryland v. Railroad Co.*, 22 Wall. 105, 113, 22 L. Ed. 713.

**15. To whom the rule is applicable.**—*Barreda v. Silsbee*, 21 How. 146, 166, 16 L. Ed. 86.

**16. Rule applies in a court of equity.**—*Willard v. Taylor*, 8 Wall. 557, 558, 19 L. Ed. 501; *Walden v. Skinner*, 101 U. S. 577, 584, 25 L. Ed. 963; *Hunt v. Rousmanier*, 8 Wheat. 174, 211, 5 L. Ed. 589; *Sprigg v. Bank*, 14 Pet. 201, 206, 10 L. Ed. 419; *Hendrickson v. Hinckley*, 17

How. 443, 445, 15 L. Ed. 124. See post, "Fraud or Mistake," IV, P. 1.

**17. Where a contract of bailment was clearly expressed in writing,** it was held that a printed billhead of an invoice could not control, modify, or alter it. *Sturm v. Boker*, 150 U. S. 312, 327, 37 L. Ed. 1093.

**18. See the titles GUARANTY,** vol. 6, p. 597; **PRINCIPAL AND SURETY,** and the cross references thereto appended. See the title **BAILMENTS**, vol. 2, p. 790.

**19. Indemnity contract.**—Where a firm, with several persons styling themselves, as a firm in this case did, "creditors of the steamboat B.," agreed to release P. (owner of 17/32 parts of the boat, the rest being owned by two other persons) "from all indebtedness due us by the said steamboat so far as the said P. is concerned," and where, on P.'s being about to sell to C. for a price greatly below its value had it been clear of debts, his interest in the steamer, on condition that C. would assume and pay all debts, the firm executed an agreement by which they bound themselves to defend and save the said P., free and harmless of any and all claims and demands that may arise or be brought against said steamboat excepting those above signed, it was held that it was not allowable to show by oral testimony that the expression "steamboat debts" was a well-known term among steamboat men and merchants in the port where the vessel was, and meant "debts that made a lien on the boat for supplies and material," though only for six months; and that when a debt could not be enforced by any of the conservatory processes allowed by the laws of the state, it ceased to be "a debt of the boat," though it might remain a debt of the owner. *Moran v. Prather*, 23 Wall. 492, 23 L. Ed. 121.

**20. Where a contract for building a house provided that, if the house was not finished by a certain day, a deduction of ten per cent from the price should be made, and the defendant offered evidence to prove that this forfeiture was intended by the parties as liquidated damages, it was held that the evidence was properly rejected.** *Van Buren v. Digges*, 11 How. 461, 13 L. Ed. 771.

**21. See the title INSURANCE,** vol. 7, p. 66.

**22. See the title GAMBLING CONTRACTS,** vol. 6, p. 542.

**23. See the title PARTNERSHIP.**

**24. See the title CARRIERS,** vol. 3, p. 556.



contracts of sale,<sup>25</sup> letters of credit,<sup>26</sup> contracts to repay money borrowed,<sup>27</sup> contracts fixing the amount due under a prior contract<sup>28</sup> and contracts between Indian nations.<sup>29</sup>

**In Pennsylvania** where there is no court of chancery, the courts admit parol proof to affect written contracts, to a greater extent than is sanctioned in the states where a chancery jurisdiction is exercised.<sup>30</sup> But even there, in the absence of fraud or mistake, parol evidence is not admissible to alter the plain and unequivocal terms of the writing.<sup>31</sup>

**Estoppel to Object to Admissibility of Evidence.**—Where a defendant has testified to a conversation between himself and the plaintiffs, concerning a written agreement before it was made, he is estopped to object to the plaintiffs submitting to the jury their understanding of such conversation.<sup>32</sup>

2. **ASSIGNMENTS.**—The rule that parol evidence is not admissible to vary the terms of a written instrument, applies to assignments in writing.<sup>33</sup>

3. **BILLS OF LADING.**—See the title **BILL OF LADING**, vol. 3, p. 232.

4. **BILLS, NOTES AND CHECKS.**—The general rule that parol evidence is inadmissible to vary, qualify, contradict, add to, or subtract from, the absolute

25. See the titles **SALES; WARRANTY.**

26. See the title **LETTERS OF CREDIT**, vol. 7, p. 854.

27. **Contract to repay money borrowed.**—In November, 1863, during the rebellion, Confederate notes being then so much depressed in market value that in Richmond, Virginia, \$3,260 of them were worth but \$204 in gold coin, G., a Swiss, at the time resident in Richmond, but desirous to go to Europe—to escape to which through the rebel lines was then extremely difficult—agreed to lend C., an American, resident in Richmond, the sum of \$3,260 in the Confederate notes, and C. borrowed the said sum in such notes. C. executed his bond to G., by which it was agreed that the money was not to become due and payable until the Civil War should be ended (during which no interest should be chargeable), nor become payable then unless demand was made for it; and, moreover, that if C. was not at that time prepared to pay the said sum, he should have a right to retain it for two years longer, when it should become absolutely payable. The bond continued: "And upon this further condition, that at any time after the 1st day of April, 1864, and during the continuance of said war, if the said G., or any attorney in fact duly authorized by him to receive payment of said sum, shall be present in person in the city of Richmond, I shall have the right (if I elect to do so) to tender said sum, without interest thereon, to said G., in person, or to his said attorney in fact in person, in said city, in current bankable funds; and upon such tender being made the said G. or his said attorney in fact shall be bound to receive the same in full payment and satisfaction of this obligation, and thereupon the said obligation shall be surrendered and canceled. But said tender is not to be made except to said G. or his said attorney in fact in person, in the city aforesaid." It was held that there was no ambiguity in the contract, and, therefore,

no occasion to introduce parol evidence to show that it was part of the contract that after the 1st of April, 1864, the war then continuing, G. should be in Richmond or have an attorney in fact there to receive payment for him of the money due on the bond. *Gavinzel v. Crump*, 22 Wall. 308, 22 L. Ed. 783.

28. **An absolute agreement fixing the amount due under a prior contract** cannot be reduced by parol evidence to a mere offer that in a certain contingency the creditor would accept the sum specified in full for the sum provided in the original contract. *Johnson v. St. Louis, etc., R. Co.*, 141 U. S. 602, 612, 35 L. Ed. 875.

29. **Contract between Cherokee and Delaware nations.**—On April 8th, 1867, an agreement was made between the Cherokee Nation and the Delaware Nation to the effect that the registered Delawares should be allotted so many acres per individual in the Cherokee land for a certain price and that all such Delawares should hold such land upon the same terms as the native Cherokees and that all their children should be incorporated into the Cherokee Nation. It was held that parol evidence of the understanding of the parties was incompetent to contradict the agreement. *Delaware Indians v. Cherokee Nation*, 193 U. S. 127, 140, 48 L. Ed. 646.

30. **Rule in Pennsylvania.**—*United States Bank v. Dunn*, 6 Pet. 51, 8 L. Ed. 316.

31. *Bast v. Bank*, 101 U. S. 93, 96, 25 L. Ed. 794.

32. **Estoppel to object to admissibility of evidence.**—*Bogk v. Gassert*, 149 U. S. 17, 25, 37 L. Ed. 631.

33. **Where there was an assignment by an employee in the treasury department,** to such department and its bureaus, of a right to make and use machines containing the improvements of the patentee to the end of the term, for which the letters were granted, it was held that such agreement could not be varied by parol evidence that it was to terminate

terms of a written contract, applies to negotiable instruments, and to indorsements thereon.<sup>34</sup>

5. **CERTIFICATES OF STOCK.**—See the title STOCK AND STOCKHOLDERS.

6. **CHARTER PARTIES.**—See the title SHIPS AND SHIPPING.

7. **DEEDS OF CONVEYANCE.**—A deed of conveyance cannot be contradicted or explained by parol testimony;<sup>35</sup> nor is parol evidence admissible to enlarge or change the legal estate of the grantee against the plain words of the instrument.<sup>36</sup>

8. **MORTGAGES AND DEEDS OF TRUST.**—See the titles CHATTEL MORTGAGES, vol. 3, p. 699; MORTGAGES AND DEEDS OF TRUST, vol. 8, p. 452.

9. **RELEASES.**—See the title RELEASE.

10. **WILLS.**—See the title WILLS.

#### IV. Limitations of and Exceptions to Rule.

**A. In General.**—The rule that parol testimony is not admissible to vary, contradict, add to or qualify the terms of a written instrument, is subject to numerous qualifications, as well established as the general principle itself.<sup>37</sup>

**Thus extrinsic evidence is admissible to interpret and make certain the terms of a written agreement.**<sup>38</sup> But as a general rule, there must be ambiguity or uncertainty upon the face of a written instrument, arising out of the terms used by the parties, in order to justify the admission of extraneous evidence.<sup>39</sup> And, when admissible, it must be limited in its effect to the clearing up of the obscurity.<sup>40</sup>

upon the discharge of the patentee from the employment of the government. *McAleer v. United States*, 150 U. S. 424, 37 L. Ed. 1130. See the title ASSIGNMENTS, vol. 2, p. 597.

34. **Negotiable instruments.**—In an action on a bill of exchange by a bona fide holder thereof, against an indorser, evidence that another person had an interest in the consideration for which the bill was indorsed, is inadmissible, as it would be an attempt to prove a different bargain and agreement from the tenor of the bill and indorsement, when the bill was given or transferred. *Evans v. Gee*, 11 Pet. 80, 83, 9 L. Ed. 639. See the titles BILLS, NOTES AND CHECKS, vol. 3, p. 257; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 8, p. 957.

35. **Deeds of conveyance.**—*Faw v. Marsteller*, 2 Cranch 10, 29, 2 L. Ed. 191.

36. *Smith v. McCann*, 24 How. 398, 406, 16 L. Ed. 714.

The description in a deed of the land thereby conveyed, if it is a complete identification of the land, cannot be controlled by the declarations of the parties, or by proof of the negotiations or agreements on which the deed was executed. *Parker v. Kane*, 22 How. 1, 18, 16 L. Ed. 286.

Where a deed of conveyance expressly reserves certain property, parol evidence that the grantor at the time of the execution of the deed did not assert verbally his right to the property so reserved, is not admissible. *Hornbuckle v. Stafford*, 111 U. S. 389, 394, 28 L. Ed. 468.

In an action of ejectment, where reference is made in the deeds under which the land is claimed to a recorded plat, evidence to show that such plat differs

from the original plat is not admissible. *Jones v. Johnston*, 18 How. 150, 153, 15 L. Ed. 320. See the titles DEEDS, vol. 5, p. 245; DOCUMENTARY EVIDENCE, vol. 5, p. 450; VENDOR AND PURCHASER.

37. **Rule excluding parol evidence subject to numerous qualifications.**—*Fire Ins. Ass'n v. Wickham*, 141 U. S. 564, 576, 35 L. Ed. 860.

38. **Extrinsic evidence admissible to interpret and explain terms of agreement.**—*Loneragan v. Buford*, 148 U. S. 581, 588, 37 L. Ed. 569; *Bradley v. Washington, etc., Steam-Packet Co.*, 13 Pet. 89, 99, 10 L. Ed. 72; *Lowrey v. Hawaii*, 206 U. S. 206, 221, 51 L. Ed. 1026.

Parol evidence is admissible to explain any doubt as to the meaning of the language of a written contract. *Case Mfg. Co. v. Soxman*, 138 U. S. 431, 438, 34 L. Ed. 1019; *Effinger v. Kenney*, 115 U. S. 566, 571, 29 L. Ed. 495; *Belcher v. Linn*, 24 How. 508, 525, 16 L. Ed. 754.

**The purpose of the admission of parol evidence** in such a case, is to ascertain by this medium of proof the intention of the parties, where, without the aid of such evidence, that could not be done so as to give a just interpretation to the contract. *Bradley v. Washington, etc., Steam-Packet Co.*, 13 Pet. 89, 99, 10 L. Ed. 72; *Lowrey v. Hawaii*, 206 U. S. 206, 221, 51 L. Ed. 1026.

39. **Conditions of and limitation upon admission.**—*Oelricks v. Ford*, 23 How. 49, 63, 16 L. Ed. 534.

40. *Oelricks v. Ford*, 23 How. 49, 63, 16 L. Ed. 534.

"You may explain, but you cannot alter, a written contract, by parol testimony. A case of explanation implies uncertainty,



**Patent and Latent Ambiguities.**—A distinction is made between a patent ambiguity, that is, one apparent on the face of the instrument,<sup>41</sup> and a latent ambiguity, that is, one not apparent on the face of the instrument, but arising from extrinsic evidence,<sup>42</sup> and it is held that extrinsic evidence is not, as a general rule, admissible to explain the former,<sup>43</sup> but is admissible to explain the latter.<sup>44</sup> It has been suggested that it would, perhaps, be a more convenient, and certainly a more intelligible distribution of the doctrine on this subject, if the cases were divided into positive, relative and mixed ambiguities; the positive corresponding to the patent; and the relative to the latent ambiguities of the authors who treat of the subject. The mixed would consist of those cases in which, although the ambiguity is suggested on the face of the instrument, the face of the instrument also suggests the medium by which the ambiguity may be removed.<sup>45</sup>

**Section 628 of the Montana code of civil procedure**, which excludes extrinsic evidence of a written agreement, does not exclude parol evidence to explain an extrinsic ambiguity in such an agreement.<sup>46</sup>

**Surrounding Circumstances.**—In construing a written instrument the attendant and surrounding circumstances, at the time it was made, are competent evidence for the purpose of placing the court in the same situation, and giving it the same advantages for construing the instrument, which were possessed by the actors themselves.<sup>47</sup> Whatever be the nature of the document under review,

ambiguity and doubt, upon the face of the writing." *O'Hara v. Hall*, 4 Dall. 340, 1 L. Ed. 858.

**Alleged admission in a letter.**—Parol evidence is admissible to explain the language of a letter which is in evidence, alleged to constitute an admission of a certain fact, where such admission might be, but is not necessarily to be, inferred from such language. *West v. Smith*, 101 U. S. 263, 25 L. Ed. 809.

**41. Patent and latent ambiguities defined and distinguished.**—*Bradley v. Washington, etc., Steam-Packet Co.*, 13 Pet. 89, 10 L. Ed. 72; *Barry v. Coombe*, 1 Pet. 640, 652, 7 L. Ed. 295.

**42. *Bradley v. Washington, etc., Steam-Packet Co.***, 13 Pet. 89, 10 L. Ed. 72; *Barry v. Coombe*, 1 Pet. 640, 652, 7 L. Ed. 295.

"'Ambiguitas patens,' says Lord Bacon, 'is that which appears to be ambiguous upon the deed or instrument; latens is that which seemeth certain and without ambiguity, for anything that appeareth upon the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity.'" *Deery v. Cray*, 10 Wall. 263, 270, 19 L. Ed. 887.

**43. Extrinsic evidence not admissible to explain a patent ambiguity.**—*Bradley v. Washington, etc., Steam-Packet Co.*, 13 Pet. 89, 10 L. Ed. 72. But see *Troy Iron, etc., Factory v. Corning*, 14 How. 193, 217, 14 L. Ed. 383.

**44. Extrinsic evidence admissible to explain a latent ambiguity.**—*Bradley v. Washington, etc., Steam-Packet Co.*, 13 Pet. 89, 10 L. Ed. 72; *United States Bank v. Dunn*, 6 Pet. 51, 8 L. Ed. 316; *Boardman v. Reed*, 6 Pet. 328, 329, 8 L. Ed. 415; *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527, 541, 23 L.

Ed. 868; *Williams v. Morris*, 95 U. S. 444, 456, 24 L. Ed. 360; *Clay v. Field*, 138 U. S. 464, 480, 34 L. Ed. 1044; *Troy Iron, etc., Factory v. Corning*, 14 How. 193, 217, 14 L. Ed. 383. See, also, *Delaware Indians v. Cherokee Nation*, 193 U. S. 127, 141, 48 L. Ed. 646.

"As a latent ambiguity is only disclosed by extrinsic evidence, it may be removed by extrinsic evidence." *Patch v. White*, 117 U. S. 210, 217, 29 L. Ed. 860; *Gilmer v. Stone*, 120 U. S. 586, 590, 30 L. Ed. 734. See, also, *Bradley v. Washington, etc., Steam-Packet Co.*, 13 Pet. 89, 10 L. Ed. 72; *Barry v. Coombe*, 1 Pet. 640, 652, 7 L. Ed. 295.

**45. Suggested classification of ambiguities.**—*Barry v. Coombe*, 1 Pet. 640, 652, 7 L. Ed. 295.

**46. Parol evidence to explain extrinsic ambiguity not excluded by Montana statute.**—*Bogk v. Gassert*, 149 U. S. 17, 24, 37 L. Ed. 631.

**47. Evidence of surrounding circumstances admissible.**—*Cavazos v. Trevino*, 6 Wall. 773, 784, 18 L. Ed. 813; *Good v. Martin*, 95 U. S. 90, 95, 24 L. Ed. 341; *Fire Ins. Ass'n v. Wickham*, 141 U. S. 564, 577, 35 L. Ed. 860.

In an action upon a written contract, evidence of the surrounding circumstances is admissible to determine its meaning. *Mobile, etc., R. Co. v. Jurey*, 111 U. S. 584, 592, 28 L. Ed. 527; *Bradley v. Washington, etc., Steam-Packet Co.*, 13 Pet. 89, 101, 10 L. Ed. 72; *Good v. Martin*, 95 U. S. 90, 95, 24 L. Ed. 341.

In the case either of a latent or a patent ambiguity, evidence of collateral facts, and the circumstances in which the parties were placed when the agreement was made, may be given in evidence. In the first case, to ascertain something extrinsic

the object is to discover the intention of the writer as evidenced by the words he has used; and, in order to do this, the judge must put himself in the writer's place, and then see how the terms of the instrument affect the property or subject matter.<sup>48</sup> With this view, extrinsic evidence must be admissible of all the circumstances surrounding the author of the instrument.<sup>49</sup> The object and effect of such evidence are not to contradict or vary the terms of the instrument, but to enable the court to arrive at the proper conclusion as to its meaning and the understanding and intention of the parties.<sup>50</sup>

**Section 628 of the Montana code of civil procedure**, which excludes extrinsic evidence of the terms of a written agreement, does not exclude parol evidence of the circumstances under which the agreement was made, or to which it relates, as defined in § 632.<sup>51</sup>

**Agreement upon Which Deed Is Founded.**—If a deed be ambiguously expressed in such a manner that it is difficult to give it a construction, the agreement of the parties upon which it is founded may be referred to as an aid in expounding the ambiguity.<sup>52</sup> But if the deed is so expressed that a reasonable construction may be given to it, and when so given it does not plainly appear to be at variance with the agreement, then the latter is not to be regarded in its construction.<sup>53</sup>

**Practical Interpretation of Parties.**—Evidence of the practical interpretation which the parties, by their conduct, have given to a written instrument, is admissible.<sup>54</sup>

**Subsequent Agreements.**—Oral agreements by the parties to a written contract, made subsequent to the execution of the contract, on a new and valuable consideration, and before the breach of the contract, may, if not within the statute of frauds, have the effect to enlarge the time of performance of the contract, or may vary any other of its terms, or may waive and discharge it altogether.<sup>55</sup>

or matter out of the instrument where there is no ambiguity from the language of it, and in the other when, from defective terms, the intention of the parties may not be collected from them. *Troy Iron, etc., Factory v. Corning*, 14 How. 193, 217, 14 L. Ed. 383.

Evidence of the attending circumstances under which an indorsement on a promissory note was made, is admissible to show the character of the indorsement and the nature of the indorser's liability. *Rey v. Simpson*, 22 How. 341, 16 L. Ed. 260.

As to the admissibility of extrinsic evidence to show the agreement as to liability of parties to negotiable instruments, see the title **BILLS, NOTES AND CHECKS**, vol. 3, p. 344.

48. *Taylor, Evid.*, § 1082, quoted in *Reed v. Insurance Co.*, 95 U. S. 23, 31, 24 L. Ed. 348.

A written instrument may be read in view of the subject matter and the attendant circumstances, in order more perfectly to understand the meaning and intent of the parties. *West v. Smith*, 101 U. S. 263, 271, 25 L. Ed. 809.

"It is a fundamental rule that in the construction of contracts the courts may look not only to the language employed, but to the subject matter and the surrounding circumstances, and may avail themselves of the same light which the parties possessed when the contract was made." *Merriam v. United States*, 107 U. S. 437, 441, 27 L. Ed. 531; *Moran v.*

*Prather*, 23 Wall. 492, 401, 23 L. Ed. 121; *Rey v. Simpson*, 22 How. 341, 350, 16 L. Ed. 260.

If there be ambiguity in a written contract, resort may be had to the situation of the parties and the circumstances under which it was entered into for the purpose, not of changing the writing, but of furnishing light by which to ascertain its actual significance. *Walker v. Brown*, 165 U. S. 654, 668, 41 L. Ed. 865. See the title **CONTRACTS**, vol. 4, p. 571.

49. *Taylor, Evid.*, § 1082, quoted in *Reed v. Insurance Co.*, 95 U. S. 23, 31, 24 L. Ed. 348.

50. *Cavazos v. Trevino*, 6 Wall. 773, 784, 18 L. Ed. 813.

51. **Parol evidence of surrounding circumstances not excluded by Montana statute.**—*Reed v. Gassert*, 149 U. S. 17, 24, 37 L. Ed. 631.

52. **Agreement upon which deed is founded.**—*Walden v. Skinner*, 101 U. S. 577, 584, 25 L. Ed. 963.

53. *Walden v. Skinner*, 101 U. S. 577, 584, 25 L. Ed. 963.

54. **Evidence of conduct of parties, showing practical interpretation, admissible.**—*Cavazos v. Trevino*, 6 Wall. 773, 785, 18 L. Ed. 813.

55. **Subsequent oral agreement may vary terms of written contract, or discharge it altogether.**—*Hawkins v. United States*, 96 U. S. 689, 24 L. Ed. 607; *Teal v. Bilby*, 123 U. S. 572, 578, 31 L. Ed. 263; *Fresh v. Gilson*, 16 Pet. 327, 335, 10 L.



Therefore, the rule that parol evidence is not admissible to contradict or vary the terms of a written instrument is not infringed by the admission of oral evidence to prove a new and distinct agreement upon a new consideration, whether it be as a substitute for the old or in addition to and beyond it.<sup>56</sup> Indeed the most solemn contracts under seal, where the statute of frauds is not involved, may be changed or abrogated by a new parol agreement, express or implied.<sup>57</sup>

**Legal presumptions** drawn by the courts independently of or against the words of an instrument may be, in some instances, repelled by extrinsic evidence.<sup>58</sup>

**Production of the Writing an Essential Prerequisite to Admission of Parol Evidence.**—Parol evidence, bearing upon written contracts and papers, ought not to be admitted in evidence, without the production of such written contracts or papers; so as to enable both the court and the jury to see whether or not the admission of the parol evidence, in any manner, will trench upon the rule that parol evidence is not admissible to vary or contradict written instruments.<sup>59</sup>

**B. Identity of Persons.**—The identity of a person signing a written contract by his initials only, may be established by extraneous evidence.<sup>60</sup> In an action brought by persons claiming title to land under the heirs of one Charles Willing, where entries in a register of burials and in a family Bible introduced in evidence showed that one Charles Willing died in 1788, it was held that parol evidence was admissible to show that the Charles Willing under whom the complainants claimed died in 1798.<sup>61</sup>

**C. Relations Between the Parties.**—Parol evidence is admissible to prove facts and circumstances respecting the relations of the parties.<sup>62</sup>

**Relations between Parties When Power of Attorney Was Executed.**—A question may be asked a witness in order to show the relations existing between the parties at the time an authority given by a power of attorney was acted on, although the answer tends to prove liability on a written contract executed under that authority.<sup>63</sup>

Ed. 982; *Emerson v. Slater*, 22 How. 28, 16 L. Ed. 360; *Piatt v. United States*, 22 Wall. 496, 506, 22 L. Ed. 858; *The Delaware*, 14 Wall. 579, 603, 20 L. Ed. 779.

**56. Oral evidence admissible to prove a subsequent agreement.**—*Piatt v. United States*, 22 Wall. 496, 506, 22 L. Ed. 858.

"If subsequent and involving the same subject matter, it is immaterial whether the new agreement be entirely oral or whether it refers to and partially or totally adopts the provisions of the written contract, provided the old agreement be rescinded and abandoned." *Piatt v. United States*, 22 Wall. 496, 506, 22 L. Ed. 858.

**57. Contract under seal may be changed or abrogated by subsequent parol agreement.**—*Railroad Co. v. Trimble*, 10 Wall. 367, 383, 19 L. Ed. 948.

"Notwithstanding what was said in some of the old cases, it is now recognized doctrine that the terms of a contract under seal may be varied by a subsequent parol agreement. Certainly, whatever may have been the rule at law, such is the rule in equity. *Dearborn v. Cross*, 7 Cow. (N. Y.) 48; *Le Fevre v. Le Fevre*, 4 Serg. & R. (Pa.) 241; *Fleming v. Gilbert*, 3 Johns. (N. Y.) 527. These are cases at law. Numerous others might be cited. The rule in equity is undoubted." *Canal Co. v. Rav*, 101 U. S. 522, 526, 25 L. Ed. 792.

**58. Admissibility of extrinsic evidence to repel legal presumptions.**—*Coulam v. Doull*, 133 U. S. 216, 230, 33 L. Ed. 596.

**59. Production of writing essential prerequisite to admission of parol evidence.**—*Philadelphia, etc., R. Co. v. Stimpson*, 14 Pet. 448, 10 L. Ed. 535.

**60. Identity of person signing contract by his initials only.**—*Salmon Falls Mfg. Co. v. Goddard*, 14 How. 446, 14 L. Ed. 493.

**61. Evidence to identify person under whom title to land is claimed.**—*Lewis v. Marshall*, 5 Pet. 470, 476, 8 L. Ed. 195. Such evidence was held not to be contradictory to the entries in the register and Bible, but to show that there must have been two persons named Charles Willing who died at the periods stated, and that the latter was the person in whose name the title set up by the complainants originated.

**62. Facts and circumstances respecting relations of parties.**—*West v. Smith*, 101 U. S. 263, 272, 25 L. Ed. 809.

**Evidence of the circumstances out of which a written contract grew and which surrounded its adoption, is admissible for the purpose of ascertaining the standpoint of the parties in relation to the subject matter.** *Reed v. Insurance Co.*, 95 U. S. 23, 30, 24 L. Ed. 348.

**63. Relations between parties when power of attorney was executed.**—*Runkle*

Where the relations of the parties to a corporation were evidenced by stock certificates it was held that the testimony of others was admissible to show that they were joint owners.<sup>64</sup>

**Evidence to show that a blank indorsement of a promissory note by a third party** was made before the instrument was indorsed by the payee or delivered to take effect is admissible.<sup>65</sup>

**D. Real Party in Interest**—1. **IN GENERAL**.—If a written contract fails to designate the real party to the contract, extrinsic evidence is admissible to show who the real party is.<sup>66</sup>

2. **WRITTEN CONTRACT MADE BY AGENT IN HIS OWN NAME**.—Where a contract in writing is made by an agent in his own name parol evidence is admissible to show that the agent was acting for an undisclosed principal.<sup>67</sup> This rule applies to a negotiable instrument as well as to an ordinary simple contract.<sup>68</sup> Such evidence does not deny that the contract binds him whom on its face it purports to bind; but shows that it also binds another, by reason that the act of the agent is the act of the principal.<sup>69</sup> The agent himself, in such case, will not be allowed to contradict the writing by proving that he was contracting only as agent.<sup>70</sup>

*v. Burnham*, 153 U. S. 216, 217, 224, 38 L. Ed. 694.

**64. Relations of parties to a corporation**.—*Beardsley v. Beardsley*, 138 U. S. 262, 268, 34 L. Ed. 928.

**65. Evidence to show character of indorsement of note**.—*Good v. Martin*, 95 U. S. 90, 96, 24 L. Ed. 341.

As to the admissibility of extrinsic evidence to show the real relation of the parties to a promissory note, see the title **BILLS, NOTES AND CHECKS**, vol. 3, p. 345.

**66. Real party to contract**.—*Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527, 542, 23 L. Ed. 868; *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, 409, 33 L. Ed. 730.

For the application of this rule to insurance contracts, see the title **INSURANCE**, vol. 7, p. 66.

"Parol evidence is always necessary to show that the party sued is the party making the contract, and bound by it; whether he does so in his own name, or in that of another, or in a feigned name, and whether the contract be signed by his own hand (or that of an agent) are inquiries not different in their nature from the question, Who is the person who has just ordered goods in a shop? If he is sued for the price, and his identity made out, the contract is not varied by appearing to have been made by him in a name not his own." Lord Denman in *Trueman v. Loder*, 11 Ad. & Ell. 589, quoted with approval in *Salmon Falls Mfg. Co. v. Goddard*, 14 How. 446, 455, 14 L. Ed. 493. See post, "Written Contract Made by Agent in His Own Name," IV, D, 2.

Where title to real estate is taken in the name of one person and the consideration paid by another parol evidence is admissible to show whose money was actually paid for the property. *Ducie v. Ford*, 138 U. S. 587, 592, 34 L. Ed. 1091. See the titles **TRUSTS AND TRUSTEES; VENDOR AND PURCHASER**.

**67. Evidence admissible to show that agent was acting for undisclosed principal**.—*Salmon Falls Mfg. Co. v. Goddard*, 14 How. 446, 454, 14 L. Ed. 493; *Mechanics' Bank v. Bank*, 5 Wheat. 326, 5 L. Ed. 100; *Ford v. Williams*, 21 How. 287, 289, 16 L. Ed. 36; *Baldwin v. Bank*, 1 Wall. 234, 241, 17 L. Ed. 534. See, also, *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 381, 12 L. Ed. 465.

**68. Rule applies to a negotiable instrument**.—*Baldwin v. Bank*, 1 Wall. 234, 17 L. Ed. 534; *Mechanics' Bank v. Bank*, 5 Wheat. 326, 5 L. Ed. 100; *Bradley v. Washington, etc., Steam-Packet Co.*, 13 Pet. 89, 98, 10 L. Ed. 72.

Where a check was drawn by a person who was a cashier of an incorporated bank, and it appeared doubtful upon the face of the instrument whether it was an official or a private act, parol evidence was held to be admissible to show that it was an official act. *Mechanics' Bank v. Bank*, 5 Wheat. 326, 5 L. Ed. 100. The signature of the promisor in this case had nothing appended to it to show that he had acted in an official character, and yet it was unhesitatingly held that parol evidence was admissible to show the real character of the transaction.

Where negotiable paper is drawn to a person by name, with addition of "Cashier" to his name, but with no designation of the particular bank of which he is cashier, parol evidence is admissible to show that he was the cashier of a bank which is plaintiff in the suit, and that in taking the paper he was acting as cashier and agent of that corporation. *Baldwin v. Bank*, 1 Wall. 234, 17 L. Ed. 534.

**69. Effect of evidence**.—*Ford v. Williams*, 21 How. 287, 289, 16 L. Ed. 36; *Baldwin v. Bank*, 1 Wall. 234, 242, 17 L. Ed. 534.

**70. Agent cannot show that he was contracting only as agent**.—*Ford v. Williams*, 21 How. 287, 289, 16 L. Ed. 36.



**E. Execution and Delivery**—1. **IN GENERAL**.—All that pertains to the execution of a written instrument is necessarily left to extrinsic evidence.<sup>71</sup>

2. **EVIDENCE TO SHOW FORGERY**.—It is always open to show that an instrument produced in evidence, whether in an action at law or in a suit in equity, in support of a claim or defense, was never executed by the person whose signature it bears, but that it is a simulated and forged document.<sup>72</sup>

3. **DATE OR TIME OF EXECUTION**.—The general rule of law that parol evidence cannot be received to contradict a written contract, does not apply to the date, which, though forming a part of the written instrument, may be contradicted whenever it is material to the issue to do so.<sup>73</sup> So, also, written contracts, or other instruments having no date on their face, may have the time of their execution proved by parol or other competent testimony.<sup>74</sup> It is believed that this principle would be applicable to any instrument in writing offered to a jury on an issue of fact, always requiring, however, the best evidence of the date that exists.<sup>75</sup>

4. **READING INSTRUMENT TO AN UNLETTERED PERSON**.—A person dealing with an unlettered man who can neither read nor write, and taking from him a written contract or deed, is bound to show, when he seeks to enforce it, that it or its material parts were read and fully explained to the party before it was executed, and that he fully understood its meaning and effect, and parol evidence is admissible for this purpose.<sup>76</sup> If this fact is established by positive and unimpeached testimony, parol evidence cannot be received to show that the contract was different from that expressed in the writing, or that nothing was at that time due from the party who executed the instrument.<sup>77</sup>

5. **SEAL OF A CORPORATION**.—**Evidence to Overcome Presumption That Corporate Seal Was Rightfully Affixed**.—The prima facie presumption is that a corporate seal affixed to a deed was rightfully affixed; but that presumption may be repelled by parol evidence.<sup>78</sup>

**Admission in Former Suit That Instrument Was Sealed with Corporate Seal**.—Evidence of an admission by a corporation in a suit to which it

71. **Matters pertaining to execution of instruments may be shown by extrinsic evidence**.—*Walden v. Skinner*, 101 U. S. 577, 585, 25 L. Ed. 963.

72. **Extrinsic evidence admissible to show forgery**.—*Marsh v. Nichols, etc., Co.*, 128 U. S. 605, 610, 32 L. Ed. 538.

As to the admissibility of evidence to show that an instrument was antedated by an agent after his power had been revoked, see post, "Date or Time of Execution," IV, E, 3. Generally, as to forgery, see the title **FORGERY AND COUNTERFEITING**, vol. 6, p. 380.

73. **Evidence to contradict date admissible**.—*Gardner v. The Collector*, 6 Wall. 499, 508, 18 L. Ed. 890; *Marsh v. Nichols, etc., Co.*, 128 U. S. 605, 610, 32 L. Ed. 538.

**Evidence admissible that contract was executed and delivered subsequent to its date**.—Where a contract provides that certain work shall be completed within a specified number of days "after the date of the execution of the contract," parol evidence is admissible to prove that the contract was executed and delivered on a day subsequent to its date. *District of Columbia v. Camden Iron Works*, 181 U. S. 453, 461, 15 L. Ed. 948.

**Antedating by an agent after his power has been revoked, so as to bind his prin-**

icipal, partakes of the character of forgery, and is always open to inquiry, no matter who relies upon it. *Marsh v. Nichols, etc., Co.*, 128 U. S. 605, 611, 32 L. Ed. 538; *Anthony v. County of Jasper*, 101 U. S. 693, 25 L. Ed. 1005.

74. **Time of execution of undated instrument**.—*Gardner v. The Collector*, 6 Wall. 499, 508, 18 L. Ed. 890. See, also, *Marsh v. Nichols, etc., Co.*, 128 U. S. 605, 610, 32 L. Ed. 538.

75. **Instruments to which principle is applicable**.—*Gardner v. The Collector*, 6 Wall. 499, 508, 18 L. Ed. 890. See the title **BEST AND SECONDARY EVIDENCE**, vol. 3, p. 214.

76. **Evidence that instrument executed by unlettered person was read to him**.—*Selden v. Myers*, 20 How. 506, 15 L. Ed. 976.

So held where a promissory note for the payment of money and a deed for property, in trust, to secure the payment, were so taken. *Selden v. Myers*, 20 How. 506, 15 L. Ed. 976.

77. *Selden v. Myers*, 20 How. 506, 15 L. Ed. 976.

78. **Evidence to overcome presumption that corporate seal was rightfully affixed**.—*Koehler v. Black River Falls Iron Co.*, 2 Black 715, 717, 17 L. Ed. 339.



was a party, that an instrument was sealed with its seal, is admissible to prove that fact in a subsequent suit brought upon such instrument.<sup>79</sup>

6. TIME OF DELIVERY.—Parol evidence is admissible to show when a written contract or deed was delivered.<sup>80</sup>

**F. Consideration.**—Where in a written instrument the consideration is stated, but the statement is ambiguous, or is wanting in particularity, parol or extrinsic evidence is admissible to make clear what the parties intended the consideration should be.<sup>81</sup> So evidence may be given of a consideration not mentioned in a deed, provided it be not inconsistent with the consideration expressed in it.<sup>82</sup> The fact that the sum of one dollar is mentioned in a deed as the consideration, does not preclude the admission of parol evidence to show what the real consideration was.<sup>83</sup> Parol evidence is admissible to show that a simple contract in writing was not supported by a consideration.<sup>84</sup> But in an action upon a sealed instrument in a court of law, evidence of failure of consideration is not, as a general rule, admissible for the purpose of avoiding the obligation, as

**79. Admission in former suit that instrument was sealed with corporate seal.**—*Philadelphia, etc., R. Co. v. Howard*, 13 How. 307, 333, 14 L. Ed. 157.

Where the question was, whether or not the paper declared upon bore the corporate seal of the defendants (an incorporated company), it was held that evidence was admissible to show that, in a former suit, the defendants had treated and relied upon the instrument, as one bearing the corporate seal; and this although the former suit was not between the same parties, and was against one of three corporations, which had afterwards become merged into one, which one was the present defendant. *Philadelphia, etc., R. Co. v. Howard*, 13 How. 307, 14 L. Ed. 157.

**80. Parol evidence admissible to show time of delivery.**—*Good v. Martin*, 95 U. S. 90, 95, 24 L. Ed. 341; *Mayburry v. Brien*, 15 Pet. 21, 10 L. Ed. 646.

Thus the time of the delivery of a promissory note may be proven by parol. *Good v. Martin*, 95 U. S. 90, 96, 24 L. Ed. 341.

**81. Evidence to show in what medium payment was to be made.**—Where a contract provides that the consideration shall be paid in pounds evidence is admissible that at the time the contract was executed, it was agreed that payment should be made in whatever money was current when it became due. *McMinn v. Owen*, 2 Dall. 173, 174, 1 L. Ed. 336.

But where a contract provided that payment should be made in "current lawful money," and by the positive words of a statute that term meant such money as was current at the time of entering into the contract, it was held that evidence to show what kind of money was meant was not admissible; not so much upon the ground that it would contradict the contract itself, as that it would substantiate an agreement in direct opposition to the law. *Lee v. Biddis*, 1 Dall. 175, 1 L. Ed. 88. See, also, *Bond v. Haas*, 2 Dall. 133, 134, 1 L. Ed. 320.

**82. Evidence of a consideration not**

**mentioned in a deed.**—*Richardson v. Traver*, 112 U. S. 423, 431, 28 L. Ed. 794.

Where a conveyance of property has been made by deed expressing on the face of it a consideration, it may be shown by parol evidence that an additional consideration or that another and distinct consideration in fact existed. *Mills v. Dow*, 133 U. S. 423, 431, 33 L. Ed. 717.

Evidence of a promise by the defendants, as a part of the consideration of an instrument, to pay the debts which the plaintiff owed to certain persons named in it, is admissible. *Mills v. Dow*, 133 U. S. 423, 431, 33 L. Ed. 717.

**The Virginia act of 1775** provided that if the consideration of a bill of exchange was a pre-existing currency-debt, or current money paid at the time of the draft, the bill should express the amount of the debt, or currency paid, which was the real consideration, and that on failure so to do, the bill, though it might be expressed for sterling, should be taken to be for current money. It was held that the act had regard to the consideration in fact, though variant from the face of the bill, and that extrinsic evidence was admissible to show what that consideration was. *Brown v. Barry*, 3 Dall. 365, 368, 1 L. Ed. 638.

**83. Real consideration may be shown though stated to be one dollar.**—*Jenkins v. Pye*, 12 Pet. 241, 253, 9 L. Ed. 1070.

So held as to a deed of trust. *Hitz v. National, etc., Bank*, 111 U. S. 722, 727, 28 L. Ed. 577. See the title MORTGAGES AND DEEDS OF TRUST, vol. 8, p. 452.

Where in an assignment of a claim against a foreign government the consideration was stated to be one dollar and "divers other good considerations" without specifying them particularly, it was held that parol evidence was admissible to show that the real consideration was a large indebtedness due from the assignor to the assignee. *Lewis v. Bell*, 17 How. 616, 618, 15 L. Ed. 203.

**84. Want of consideration in a simple contract may be shown by parol.**—*United States Bank v. Dunn*, 6 Pet. 51, 58, 8 L.

between parties and privies to the deed; and more especially, where there has been a part execution of the contract.<sup>85</sup>

**As to the admissibility of evidence of fraud in the consideration of a sealed instrument,** see post, "Fraud in the Consideration of a Sealed Instrument," IV, P, 1, c.

**A deed thirty years old** is not so open to explanation in relation to the consideration recited therein, as a more recent one.<sup>86</sup>

**Evidence to Rebut Recital of Payment of Consideration.**—As to admissibility of extrinsic evidence to control or rebut a recital in a deed acknowledging payment of the consideration, see the title DEEDS, vol. 5, p. 276.

**G. Subject Matter.**—Parol or extrinsic evidence, not inconsistent with a written instrument, is admissible to apply such instrument to its subject matter;<sup>87</sup> as by ascertaining the identity thereof,<sup>88</sup> or showing what property is included under the description given in the instrument.<sup>89</sup> Previous and contemporary transactions and facts may be very properly taken into consideration to ascertain the subject matter of a contract,<sup>90</sup> or to enable the court to arrive at the real intention of the parties, and to make a correct application of the words of the

Ed. 316; *Fire Ins. Ass'n v. Wickham*, 141 U. S. 564, 577, 35 L. Ed. 860.

**85. Evidence of failure of consideration not admissible, where instrument under seal.**—*Hartshorn v. Day*, 19 How. 211, 222, 15 L. Ed. 605.

**86. Old deed not so open to explanation as young one.**—*United States Bank v. Lee*, 13 Pet. 107, 116, 10 L. Ed. 81.

Where a deed of conveyance nearly thirty years old recites, that as part consideration for the grant, the grantee had relinquished her right of dower to certain land, the creditors of the grantor cannot show that such relinquishment was not made until some months after the grant. *United States Bank v. Lee*, 13 Pet. 107, 116, 10 L. Ed. 81.

**87. Extrinsic evidence admissible to apply instrument to its subject matter.**—*Noonan v. Lee*, 2 Black 499, 17 L. Ed. 278; *Jones v. Guaranty, etc., Co.*, 101 U. S. 622, 633, 25 L. Ed. 1030.

So held as to written contracts. *Jones v. Guaranty, etc., Co.*, 101 U. S. 622, 633, 25 L. Ed. 1030; *Williams v. Morris*, 95 U. S. 444, 456, 24 L. Ed. 360.

**88. Extrinsic evidence admissible to identify subject matter.**—*Bradley v. Washington, etc., Steam-Packet Co.*, 13 Pet. 89, 99, 10 L. Ed. 72; *Lowrey v. Hawaii*, 206 U. S. 206, 221, 51 L. Ed. 1026; *Loneragan v. Buford*, 148 U. S. 581, 588, 37 L. Ed. 569.

Parol evidence is admissible to identify the subject matter of a written contract. *Loneragan v. Buford*, 148 U. S. 581, 588, 37 L. Ed. 569.

So where in a deed, the description of the property conveyed does not precisely identify it, extrinsic evidence is admissible for that purpose. *Cox v. Hart*, 145 U. S. 376, 389, 36 L. Ed. 741. See the titles SHERIFFS', CONSTABLES' AND MARSHALS' SALES.

"The difficulty in the application of the descriptive portion of a deed to external objects, usually arises from what is called

a latent ambiguity, which has its origin in parol testimony, and must necessarily be solved in the same way." *Reed v. Proprietors of Locks and Canals*, 8 How. 274, 290, 12 L. Ed. 1077.

In all cases where a difficulty arises in applying the words of a deed to the subject matter of the grant, the difficulty or ambiguity which is introduced by the admission of extrinsic evidence may be rebutted or removed by the production of further evidence upon the same subject calculated to explain what was the estate or subject matter really intended to be granted. *Atkinson v. Cummins*, 9 How. 479, 13 L. Ed. 223.

**89. Evidence admissible to show what included under description in instrument.**

—Wherever there is a doubt as to the extent of the subject devised by will, or demised, or sold, extrinsic evidence is admissible to show what is included under the description, as parcel of it. *Bradley v. Washington, etc., Steam-Packet Co.*, 13 Pet. 89, 97, 10 L. Ed. 72. See the titles LANDLORD AND TENANT, vol. 7, p. 827; SALES; VENDOR AND PURCHASER; WILLS.

Natural objects, called for in a grant, may be proved by testimony, not found in the grant, but consistent with it. *Blake v. Doherty*, 5 Wheat. 359, 5 L. Ed. 105.

**As to the admissibility of parol evidence to identify a boundary line of land granted by deed,** see the title BOUNDARIES, vol. 3, p. 490.

**As to the admissibility of parol evidence to identify the subject matter of a public land grant,** see the title PUBLIC LANDS.

**90. Previous and contemporary transaction and facts.**—*Simpson v. United States*, 172 U. S. 372, 379, 43 L. Ed. 482; *Brawley v. United States*, 96 U. S. 168, 173, 24 L. Ed. 622; *Maryland v. Railroad Co.*, 22 Wall. 105, 113, 22 L. Ed. 713.

Evidence of the circumstances out of which a written contract grew, and which surrounded its adoption, may be resorted



contract to the subject matter and the objects professed to be described.<sup>91</sup> Parol evidence is also admissible to prove facts and circumstances respecting the nature, quality, and condition of the property which constitutes the subject matter of the contract.<sup>92</sup>

**H. Construction of Particular Terms.**—Parol or extrinsic evidence is sometimes admissible to explain such terms in a contract as are doubtful,<sup>93</sup> or to ascertain in what sense a term was used where it admits of several meanings,<sup>94</sup> or to ascertain the meaning of a term, where it has acquired by use a particular meaning.<sup>95</sup> For the purpose of thus explaining particular terms, or of ascertaining the sense in which the parties may have used them, evidence of the surrounding circumstances, and of previous and contemporary transactions and facts, is admissible.<sup>96</sup> In instances in which words or phrases are novel or obscure as in terms of art, where they are peculiar or exclusive in their signification, it may be proper to explain or elucidate them by reference to the art or science to which they are appropriate.<sup>97</sup> In mercantile contracts, evidence is admissible to prove that the words in which the particular contract is expressed, in the particular trade to which the contract refers, are used in a peculiar sense, and different from that which they ordinarily import.<sup>98</sup> But language which is familiar to all classes and grades and occupations—language, the meaning of which is impressed upon all by the daily habits and necessities of all, cannot be wrested from its established and popular import in reference to the common concerns of life, by showing that in certain mercantile or commercial circles it has a different signification.<sup>99</sup> In several cases the supreme court has made specific application of these general principles.<sup>1</sup>

to for the purpose of ascertaining its subject matter. *Reed v. Insurance Co.*, 95 U. S. 23, 24 L. Ed. 348.

"In giving effect to a written contract, by applying it to its proper subject matter, extrinsic evidence may be admitted, to prove the circumstances under which it was made, whenever, without the aid of such evidence, such application could not be made in the particular case." *Bradley v. Washington, etc., Steam-Packet Co.*, 13 Pet. 89, 99, 10 L. Ed. 72; *Lowrey v. Hawaii*, 206 U. S. 206, 222, 51 L. Ed. 1026; *United States v. Peck*, 102 U. S. 64, 65, 26 L. Ed. 46.

"Surrounding circumstances may sometimes sustain an imperfect description in a voluntary deed by a grantor." *Stout v. Mastin*, 139 U. S. 151, 152, 35 L. Ed. 121.

91. *Moran v. Prather*, 23 Wall. 492, 501, 23 L. Ed. 121.

92. Evidence as to nature quality and condition of property.—*West v. Smith*, 101 U. S. 263, 272, 25 L. Ed. 809.

93. Doubtful terms.—*DeWitt v. Berry*, 134 U. S. 306, 312, 33 L. Ed. 896.

94. Term which admits of several meanings.—*Bradley v. Washington, etc., Steam-Packet Co.*, 13 Pet. 89, 99, 10 L. Ed. 72; *Lowrey v. Hawaii*, 206 U. S. 206, 221, 51 L. Ed. 1026.

95. Term which has acquired by use a particular meaning.—*Bradley v. Washington, etc., Steam-Packet Co.*, 13 Pet. 89, 99, 10 L. Ed. 72; *Lowrey v. Hawaii*, 206 U. S. 206, 221, 51 L. Ed. 1026.

96. Surrounding circumstances, and previous and contemporary transactions and facts.—*Brawley v. United States*, 96 U. S. 168, 173, 24 L. Ed. 622; *Simpson v. United*

*States*, 172 U. S. 372, 379, 43 L. Ed. 482; *Simpson v. United States*, 199 U. S. 397, 50 L. Ed. 345; *Maryland v. Railroad Co.*, 22 Wall. 105, 113, 22 L. Ed. 713.

97. Terms of art.—*Millard v. Lawrence*, 16 How. 251, 261, 14 L. Ed. 925.

98. Trade words in mercantile contracts.—*Garrison v. Memphis Ins. Co.*, 19 How. 312, 316, 15 L. Ed. 656. See post, "Usages and Customs," IV, N.

99. *Maillard v. Lawrence*, 16 How. 251, 261, 14 L. Ed. 925.

1. Extrinsic evidence admissible to show meaning of letters in contract.—Where a written contract contained the words "your ½ E. B. wharf and premises," it was held that extrinsic evidence was admissible to show that the letters "E. B." meant eastern branch. *Barry v. Coombe*, 1 Pet. 640, 650, 652, 7 L. Ed. 295.

Evidence admissible to interpret meaning of "sound literature" and "solid science."—Where a foreign mission board maintaining a school in Hawaii, transferred the school to the government under a certain agreement, extrinsic evidence of the circumstances which preceded such agreement and the immediate and long-continued practice under it, was held to be admissible to interpret the meaning of any doubtful terms used, such as "sound literature" and "solid science." *Lowrey v. Hawaii*, 206 U. S. 206, 51 L. Ed. 1026.

Word in contract interpreted in light of phrases used in preliminary proposals.—Where advertisements for proposals to furnish supplies to troops in Cuba spoke of "posts remote from the seacoast" and "posts and camps in the interior of the



**Admissibility of expert testimony** to explain terms of art and technical words and phrases. See the title *EXPERT AND OPINION EVIDENCE*, vol. 6, p. 203.

**I. Medium of Payment.**—As to the admissibility of parol evidence to show the medium in which the parties intended that an obligation under a written contract should be paid, see ante, "Consideration," IV, F. And see the title *PAYMENT*.

**J. Conditions on Contingencies.**—The rule that excludes parol evidence in contradiction of a written agreement presupposes the existence in fact of such agreement at the time suit is brought. But the rule has no application if the writing was not delivered as a present contract.<sup>2</sup> Accordingly, parol evidence is admissible to show that a written paper which, in form, is a complete contract, of which there had been a manual tradition, was, nevertheless, not to become a binding contract until the performance of some condition precedent resting in parol.<sup>3</sup> This rule applies whether the instrument was delivered to a third person as an escrow or to the obligee in it, if it was made to depend, as to its going into operation, upon events to occur or to be ascertained thereafter.<sup>4</sup> Thus parol evidence is admissible to show that a paper, purporting to be a signed agreement, was in fact signed on the terms that it should not be an agreement till money was paid,<sup>5</sup> or until it should be executed by another person,<sup>6</sup> or until the person executing it should, upon consultation with attorneys,

island," it was held that these phrases might be considered in interpreting the word "interior," in the contract subsequently made for such supplies. *Simpson v. United States*, 199 U. S. 397, 399, 50 L. Ed. 345.

**Where a treasury note bearing interest at one "M" per centum** is introduced in evidence, it is proper to receive parol evidence for the purpose of explaining the meaning of the letter M, and proving the practice and usage of the treasury department and officers of the government and others, lawful receivers of similar treasury notes, in order to show thereby the meaning intended to be attached, and actually attached, to the letter M, by the treasury department and others; and that by such meaning the said treasury note bears one mill per centum interest, and not one per centum interest. *United States v. Hardyman*, 13 Pet. 176, 10 L. Ed. 113. See post, "Usages and Customs," IV, N.

The supreme court of Pennsylvania held that parol evidence was admissible to explain that the words "the deed of conveyance" in articles of agreement meant a deed conveying the land, free from all incumbrances. *Zantzing v. Ketch*, 4 Dall. 132, 1 L. Ed. 772.

**As to the admissibility of parol evidence to explain the word "dollars,"** see the title *PAYMENT*.

**2. Rule excluding parol evidence not applicable where writing was not delivered as a present contract.**—*Ware v. Allen*, 128 U. S. 590, 595, 32 L. Ed. 563; *Burke v. Dulaney*, 153 U. S. 228, 234, 38 L. Ed. 698.

The parties, "may not vary a written agreement, but they may show that they never came to an agreement at all, and that the signed paper was never intended to be the record of the terms of the agreement; for they never had agreeing minds.

Evidence to show that does not vary an agreement, and is admissible." *Crompton, J.*, in *Pym v. Campbell*, 6 El. & Bl. 370, 374, quoted with approval in *Burke v. Dulaney*, 153 U. S. 228, 236, 38 L. Ed. 698.

**3. Parol evidence admissible to prove a condition precedent.**—*Reynolds v. Robinson*, 110 N. Y. 654, quoted with approval in *Burke v. Dulaney*, 153 U. S. 228, 237, 38 L. Ed. 698.

"The manual delivery of an instrument may always be proved to have been on a condition which has not been fulfilled, in order to avoid its effect. This is not to show any modification or alteration of the written agreement, but that it never became operative, and that its obligation never commenced." *Wilson v. Powers*, 131 Mass. 539, 540, quoted with approval in *Burke v. Dulaney*, 153 U. S. 228, 237, 38 L. Ed. 698.

**4. Ware v. Allen**, 128 U. S. 590, 595, 32 L. Ed. 563.

**Bond delivered as an escrow.**—Parol evidence is admissible to prove that a bond, which upon its face purports to have been delivered absolutely, was in fact delivered as an escrow. *Pawling v. United States*, 4 Cranch 219, 222, 2 L. Ed. 601. See the title *ESCROW*, vol. 5, p. 902.

**Performance of condition essential to validity of bond.**—In an action on a bond, evidence was held admissible of a contemporaneous parol agreement of the parties, that if a certain condition was not performed within a prescribed time the bond should be void. *Field v. Biddle*, 2 Dall. 171, 172, 1 L. Ed. 335.

**5. Condition that paper shall not be an agreement till money is paid.**—*Burke v. Dulaney*, 153 U. S. 228, 236, 38 L. Ed. 698.

**6. Condition that bond shall be executed by other persons.**—Parol evidence

be assured that certain proceedings are lawful.<sup>7</sup> Where a covenant in a lease provides that if a certain event happens the lessee shall be required to pay less than will otherwise be required of him, parol evidence is admissible to show that the event has happened.<sup>8</sup>

**K. Incomplete Contracts and Writings.**—The existence of a separate oral agreement as to any matter on which a written contract is silent, and which is not inconsistent with its terms, may be proven by parol, if under the circumstances of the particular case it may properly be inferred that the parties did not intend the written paper to be a complete and final statement of the whole of the transaction between them.<sup>9</sup> But such an agreement must not only be collateral, but must relate to a subject distinct from that to which the written contract applies; that is, it must not be so closely connected with the principal transaction as to form part and parcel of it.<sup>10</sup>

**Where in an award a name is left blank,** parol evidence is admissible to show who was intended.<sup>11</sup>

**L. Connecting Together and Identifying Writings.**—It would seem that parol evidence is admissible for the purpose of connecting several written instruments together, and of showing that they are all parts of one transaction.<sup>12</sup> Where a written contract refers to another writing and adopts it as part of the contract, parol evidence is admissible to identify such writing.<sup>13</sup>

**M. Alterations or Additions.**—See the title ALTERATION OF INSTRUMENTS, vol. 1, p. 261.

**N. Usages and Customs.**—See the title USAGES AND CUSTOMS.

**O. Object of Parties in Executing and Receiving Instrument.**—The rule which excludes parol testimony to contradict or vary a written instrument has reference to the language used by the parties. The rule does not forbid

is admissible to prove that one of the co-obligors on a bond had executed the bond, on condition that others would execute it, which had not been done. *United States v. Leffler*, 11 Pet. 86, 9 L. Ed. 642.

**Deed of corporation.**—It would seem that evidence to prove that at the time a corporate seal was affixed to a contract it was agreed that the instrument should not be the deed of the company unless, or until, a third person should execute it, is admissible. *Philadelphia, etc., R. Co. v. Howard*, 13 How. 307, 334, 14 L. Ed. 157. See, also, *Pawling v. United States*, 4 Cranch 219, 2 L. Ed. 601.

But evidence to prove an agreement that a third person should sign the paper before it became obligatory upon the corporation, if made prior to the sealing, and no way connected with that act, is not admissible, as it does not bear upon the question whether the instrument was or was not the deed of the corporation. *Philadelphia, etc., R. Co. v. Howard*, 13 How. 307, 334, 14 L. Ed. 157.

**7. Condition of assurance as to legality of certain proceedings.**—*Ware v. Allen*, 128 U. S. 590, 596, 32 L. Ed. 563.

**8. Condition subsequent in a lease.**—Plaintiff leased to defendant all of its personal property including contracts with railroad companies for the use of its cars, and it was covenanted that if the profits, derived from such contracts, should fall below a specified sum, the defendant should only be liable for a certain share of such profits. On the trial of an action to recover the rent due under the

lease, the defendant offered evidence to show that the contracts with all the railroad companies had expired, and that those companies had refused to renew them, except on terms less favorable to the defendant, and that by reason thereof the income and revenue derived from and under the contracts remaining in force fell much below the sum specified in the agreement. This evidence was excluded. It was held that such exclusion was erroneous. *Pullman's Palace Car Co. v. Central Transp. Co.*, 139 U. S. 62, 66, 35 L. Ed. 69.

**9. Separate oral agreement as to matter on which written contract is silent.**—*Seitz v. Brewers' Refrigerating Mach. Co.*, 141 U. S. 510, 517, 35 L. Ed. 837.

**Completeness of written contract a question for court.**—Whether a written contract fully expresses the terms of the agreement is a question for the court. *Seitz v. Brewers' Refrigerating Mach. Co.*, 141 U. S. 510, 517, 35 L. Ed. 837. See the title QUESTIONS OF LAW AND FACT.

**10. Oral agreement must not form part of written contract.**—*Seitz v. Brewers' Refrigerating Mach. Co.*, 141 U. S. 510, 517, 35 L. Ed. 837.

**11. Parol evidence admissible to supply name left blank in award.**—*Lynn v. Risberg*, 2 Dall. 180, 1 L. Ed. 339.

**12. Connecting several written instruments together.**—*Bailey v. Railroad Co.*, 17 Wall. 96, 105, 21 L. Ed. 611.

**13. Identifying writing referred to in a written contract.**—*Clark v. Manufacturers'*



an inquiry into the object of the parties in executing and receiving the instrument.<sup>14</sup> Thus it may be shown by parol evidence that that object was a fraudulent or illegal one.<sup>15</sup> So parol evidence is admissible to show that a deed was made to secure a loan,<sup>16</sup> or that a certificate of stock issued to a party as owner was delivered to him as security for a loan.<sup>17</sup> The object of the parties in such cases will be considered by a court of equity: it constitutes a ground for the exercise of its jurisdiction, which will always be asserted to prevent fraud or oppression, and to promote justice.<sup>18</sup>

When papers or documents are introduced collaterally in the trial of a cause, the purpose and object for which they were made, and the reason why they were made in a particular form, may be explained by parol evidence.<sup>19</sup>

**P. Invalidity of Instrument**—1. **FRAUD OR MISTAKE**—a. *In General*.—As a general rule parol testimony is admissible in matters of contract, to show fraud or mistake of fact, notwithstanding its effect may be to contradict what is in writing.<sup>20</sup> This rule is of universal application in a court of equity.<sup>21</sup> But in an action at common law, the court is more circumscribed in its freedom to inquire into the origin of written agreements. Such an inquiry, however, is

Ins. Co., 8 How. 235, 246, 12 L. Ed. 1061. See the title **INSURANCE**, vol. 7, p. 66.

**14. Object of parties in executing and receiving instrument may be shown.**—Peugh v. Davis, 96 U. S. 332, 336, 24 L. Ed. 775; Jackson v. Lawrence, 117 U. S. 679, 681, 29 L. Ed. 1024; Brick v. Brick, 98 U. S. 514, 516, 25 L. Ed. 256.

**15.** See post, "Invalidity of Instrument," IV, P.

**16. Deed made to secure a loan.**—Peugh v. Davis, 96 U. S. 332, 336, 24 L. Ed. 775; Brick v. Brick, 98 U. S. 514, 516, 25 L. Ed. 256. See the title **MORTGAGES AND DEEDS OF TRUST**, vol. 8, p. 452.

**17. Certificate of stock delivered as security for loan.**—Brick v. Brick, 98 U. S. 514, 25 L. Ed. 256. See, also, Burgess v. Seligman, 107 U. S. 20, 27 L. Ed. 359. See the title **STOCK AND STOCKHOLDERS**.

**18. Object of parties considered by a court of equity.**—Peugh v. Davis, 96 U. S. 332, 336, 24 L. Ed. 775; Brick v. Brick, 98 U. S. 514, 516, 25 L. Ed. 256. See the title **EQUITY**, vol. 5, p. 803.

**19. Papers introduced collaterally in trial of a cause.**—Bank v. Kennedy, 17 Wall. 19, 21 L. Ed. 551. See the title **BANKS AND BANKING**, vol. 3, p. 95.

**20. Parol evidence admissible to show fraud or mistake.**—Barreda v. Silsbee, 21 How. 146, 170, 16 L. Ed. 86; Van Ness v. Washington, 4 Pet. 232, 286, 7 L. Ed. 842; Potomac Steamboat Co. v. Upper Potomac Steamboat Co., 109 U. S. 672, 681, 27 L. Ed. 1070.

**21. Rule of universal application in court of equity.**—Hunt v. Rousmanier, 8 Wheat. 174, 211, 5 L. Ed. 589; Insurance Co. v. Wilkinson, 13 Wall. 222, 20 L. Ed. 617; Ivinson v. Hutton, 98 U. S. 79, 83, 25 L. Ed. 66; Walden v. Skinner, 101 U. S. 577, 585, 25 L. Ed. 963.

Courts of equity will admit parol evidence to contradict or vary a writing where, by some mistake in fact, it speaks a different language from what the par-

ties intended, and where, consequently, it would be unconscionable or unjust to enforce it against either party, according to its terms. Ivinson v. Hutton, 98 U. S. 79, 83, 25 L. Ed. 66.

"Courts of equity grant relief in cases of fraud and mistake, which cannot be obtained in courts of law. In such cases, a court of equity may carry the intention of the parties into execution, where the written agreement fails to express that intention." Hunt v. Rousmanier, 8 Wheat. 174, 211, 5 L. Ed. 589.

"As a means of protecting those who are honest, accurate, and prudent in making their contracts, against fraud and false swearing, against carelessness and inaccuracy, by furnishing evidence of what was intended by the parties, which can always be produced without fear of change or liability to misconstruction, the rule (that a written contract cannot be contradicted by parol evidence) merits the eulogies it has received. But experience has shown that in reference to these very matters the rule is not perfect. The written instrument does not always represent the intention of both parties, and sometimes it fails to do so as to either; and where this has been the result of accident, or mistake, or fraud, the principle has been long recognized that under proper circumstances, and in an appropriate proceeding, the instrument may be set aside or reformed, as best suits the purposes of justice. A rule of evidence adopted by the courts as a protection against fraud and false swearing, would, as was said in regard to the analogous rule known as the statute of frauds, become the instrument of the very fraud it was intended to prevent, if there did not exist some authority to correct the universality of its application. It is upon this principle that courts of equity proceed in giving the relief just indicated." Mr. Chief Justice Miller in Insurance Co. v. Wilkinson, 13 Wall. 222, 231, 20 L. Ed. 617. See, also, Insurance Co. v. Mahone,



not always forbidden by the mere fact that the party's name has been signed to the writing offered in evidence against him.<sup>22</sup>

**Section 628 of the Montana code of civil procedure**, which excludes extrinsic evidence of the terms of a written agreement, does not exclude parol evidence to establish illegality or fraud.<sup>23</sup>

b. *Fraud or Mistake in the Execution of a Sealed Instrument.*—Fraud or mistake in the execution of a sealed instrument may be shown in an action at law,<sup>24</sup> as where it has been misread, or some other fraud or imposition has been practiced upon the party in procuring his signature and seal.<sup>25</sup> The fraud in this aspect goes to the question whether or not the instrument ever had any legal existence.<sup>26</sup>

c. *Fraud in the Consideration of a Sealed Instrument.*—The general rule is that in an action upon a sealed instrument in a court of law, evidence of fraud in the consideration, for the purpose of avoiding the obligation, is not admissible as between parties and privies to the deed;<sup>27</sup> and, more especially, where there has been a part execution of the contract.<sup>28</sup>

d. *Writing Not Intended as a Contract.*—For the purpose of preventing the accomplishment of a fraud, parol evidence is admissible in equity to show that a writing signed by the parties, and apparently a contract between them, was not intended as a contract, nor understood by either party to be binding as such.<sup>29</sup>

e. *Terms Employed in Preparation of Contract Varied or Changed.*—Proof of fraud or mistake may be admitted in equity to show that the terms of a written contract employed in the preparation of the same were varied or made different by addition or subtraction from what they were intended and believed to be when the same was executed.<sup>30</sup>

f. *Stipulations Inserted for Purpose of Defrauding a Third Person.*—Where an action is brought against one who is a party to a written contract with third parties, parol evidence is admissible to show that certain stipulations were in-

21 Wall. 152, 155, 22 L. Ed. 593. See the title RESCISSION, CANCELLATION AND REFORMATION.

22. *Inquiry into origin of written agreements in a court of law.*—Insurance Co. v. Wilkinson, 13 Wall. 222, 231, 20 L. Ed. 617. See post, "Testimony of Party to Negotiable Instruments Not Admissible to Invalidate It," IV, P. 5.

23. *Parol evidence of illegality or fraud admissible under Montana statute.*—Bogk v. Gassert, 149 U. S. 17, 24, 37 L. Ed. 631.

24. *Fraud or mistake in execution of sealed instrument.*—Railroad Co. v. Trimble, 10 Wall. 367, 383, 19 L. Ed. 948; George v. Tate, 102 U. S. 564, 570, 26 L. Ed. 232; Hartshorn v. Day, 19 How. 211, 223, 15 L. Ed. 605; Northern Assur. Co. v. Grand View Bldg. Ass'n, 183 U. S. 308, 341, 361, 46 L. Ed. 213.

25. Hartshorn v. Day, 19 How. 211, 223, 15 L. Ed. 605; George v. Tate, 102 U. S. 564, 570, 26 L. Ed. 232.

Witnesses may be called for the purpose of impeaching the execution of a deed or other writing under seal, and showing that its sealing or delivery was procured by fraudulently substituting one instrument for another, or by any other species of fraud by which the complaining party was misled and induced to put his name to that which was substantially different from the actual agreement. Walden

v. Skinner, 101 U. S. 577, 585, 25 L. Ed. 963.

26. Hartshorn v. Day, 19 How. 211, 223, 15 L. Ed. 605.

27. *Fraud in the consideration of a sealed instrument.*—Hartshorn v. Day, 19 How. 211, 222, 15 L. Ed. 605; George v. Tate, 102 U. S. 564, 570, 26 L. Ed. 232.

28. Hartshorn v. Day, 19 How. 211, 222, 15 L. Ed. 605.

"The difficulties are in adjusting the rights and equities of the parties in a court of law; and hence, in the states where the two systems of jurisprudence prevail, of equity and the common law, a court of law refuses to open the question of fraud in the consideration, or in the transaction out of which the consideration arises, in a suit upon the sealed instrument, but turns the party over to a court of equity, where the instrument can be set aside upon such terms as, under all the circumstances, may be equitable and just between the parties." Hartshorn v. Day, 19 How. 211, 222, 15 L. Ed. 605. See the title RESCISSION, CANCELLATION AND REFORMATION.

29. *Writing not intended as a contract.*—Michels v. Olmstead, 157 U. S. 198, 200, 39 L. Ed. 671.

30. *Terms employed in preparation of contract varied or changed.*—Walden v. Skinner, 101 U. S. 577, 584, 25 L. Ed. 693.

serted in such contract for the purpose of defrauding the plaintiff, and that they would in fact operate as a fraud upon him.<sup>31</sup>

2. **FRAUDULENT OR VOLUNTARY CONVEYANCE.**—It may be shown by parol evidence that a deed was made to defraud creditors, or to give a preference.<sup>32</sup>

**Evidence to Rebut Evidence of Fraud.**—Where evidence of collateral and independent facts, unconnected with a deed of conveyance, has been admitted to show that the deed was fraudulent, evidence of the same character is admissible in rebuttal thereof.<sup>33</sup>

3. **FORGERY.**—Parol evidence is admissible to prove that an instrument is a forged document.<sup>34</sup>

4. **PARTIAL ILLEGALITY OF CONTRACT.**—Where there is a seemingly legal written agreement between two parties, extrinsic evidence is admissible to show that the agreement is only part of an entire agreement between the parties, the rest of which is illegal.<sup>35</sup>

5. **TESTIMONY OF PARTY TO NEGOTIABLE INSTRUMENT NOT ADMISSIBLE TO INVALIDATE IT.**—One who is a party to a negotiable instrument will not be permitted by his own testimony to invalidate it.<sup>36</sup> This principle goes to the exclusion of such evidence only in regard to negotiable instruments, upon the ground of the currency given to them by the name of the witness called to impeach their validity,<sup>37</sup> and does not extend to other instruments to which the reasoning does not apply.<sup>38</sup>

6. **ESTOPPEL TO INTRODUCE EXTRINSIC EVIDENCE TO IMPEACH VALIDITY OF INSTRUMENTS.**—See the title **ESTOPPEL**, vol. 5, p. 913.

**Q. Contract between Persons Not Parties to the Suit.**—In some classes of cases a contract between persons not parties to the suit may, when introduced, be contradicted or varied by parol testimony.<sup>39</sup> But this principle does not apply to an attempt to make good by parol evidence a contract which the law requires to be made in writing to make it valid.<sup>40</sup>

**R. Receipts.**—See the title **RECEIPTS**.

**S. Bills of Parcels.**—A bill of parcels is not a contract, and a statement therein as to the ownership of the property sold is not conclusive, but may be explained by parol evidence.<sup>41</sup>

See the titles **RESCISSION, CANCELLATION AND REFORMATION**.

31. **Stipulations inserted for purpose of defrauding a third person.**—*Barreda v. Silsbee*, 21 How. 146, 170, 16 L. Ed. 86.

32. **Deed made to defraud creditors or give a preference.**—*Chandler v. Von Roeder*, 24 How. 224, 228, 16 L. Ed. 633; *Peugh v. Davis*, 96 U. S. 332, 336, 24 L. Ed. 775; *Brick v. Brick*, 98 U. S. 514, 516, 25 L. Ed. 256. See the title **FRAUDULENT AND VOLUNTARY CONVEYANCES**, vol. 6, p. 472.

33. **Evidence to rebut evidence of fraud.**—*Hinde v. Longworth*, 11 Wheat. 199, 214, 6 L. Ed. 454.

Thus where extrinsic evidence has been admitted to show a fraudulent intention in a grantor, in conveying certain land to his son, evidence that at the time of the grant the grantor was indebted to his son, is admissible to meet and repel the presumption of fraud thus attempted to be raised against the deed. *Hinde v. Longworth*, 11 Wheat. 199, 214, 6 L. Ed. 454.

34. See ante, "Evidence to Show Forgery," IV, E, 2.

35. **Partial illegality of contract.**—*McMullen v. Hoffman*, 174 U. S. 639, 653, 43 L. Ed. 1117.

36. **Testimony of party to negotiable instrument not admissible to invalidate it.**—*Henderson v. Anderson*, 3 How. 73, 11 L. Ed. 499; *Pleasants v. Pemberton*, 2 Dall. 196, 1 L. Ed. 346. See the title **BILLS, NOTES AND CHECKS**, vol. 3, p. 363.

37. **Ground of rule.**—*United States v. Leffler*, 11 Pet. 86, 95, 9 L. Ed. 642.

38. **Rule does not extend to instruments not negotiable.**—*United States v. Leffler*, 11 Pet. 86, 95, 9 L. Ed. 642; *Pleasants v. Pemberton*, 2 Dall. 196, 1 L. Ed. 346.

39. **Contract between persons not parties to the suit.**—*Stitt v. Huidekopers*, 17 Wall. 384, 397, 21 L. Ed. 644.

40. **Principle not applicable to contracts required to be in writing.**—*Stitt v. Huidekopers*, 17 Wall. 384, 21 L. Ed. 644. See the title **FRAUDS, STATUTE OF**, vol. 6, p. 451.

41. **Statement in bill of parcels may be explained by parol evidence.**—*Harris v. Johnston*, 3 Cranch 311, 318, 2 L. Ed. 450.

A bill of parcels, delivered by J., stating the goods as bought of D. and J., is not conclusive evidence against J., that the goods were the joint property of D. and J.; but the real circumstances may

**T. Entries in Books.**—Entries in books are always explainable, and the truth of the transaction to which they relate can be shown independent of them.<sup>42</sup>

**U. Foreign Statutes.**—The testimony of an expert as to the accepted and proper construction of a foreign statute is admissible upon any matter open to reasonable doubt.<sup>43</sup>

**V. Rescission, Cancellation and Reformation of Instruments.**—See the title RESCISSION, CANCELLATION AND REFORMATION.

### V. Question of Admissibility One of Law.

Whether parol evidence is admissible to alter or explain a written instrument is a question of law.<sup>44</sup>

**PART.**—See note 1.

**PARTIAL ASSIGNMENT.**—See the title ASSIGNMENTS, vol. 2, p. 554.

**PARTIAL LOSS.**—See the title MARINE INSURANCE, vol. 8, p. 193.

**PARTICEPS CRIMINIS.**—See the title ACCOMPLICES AND ACCESSORIES, vol. 1, p. 63.

**PARTICULAR AVERAGE.**—See the title MARINE INSURANCE, vol. 8, pp. 149, 202.

**PARTICULAR STATE.**—See note 2.

be explained by parol. *Harris v. Johnston*, 3 Cranch 311, 2 L. Ed. 450.

42. **Entries in books explainable.**—The *Patapsco*, 13 Wall. 329, 334, 20 L. Ed. 696.

43. **Testimony of expert as to construction of foreign statute.**—*Slater v. Mexican Nat. R. Co.*, 194 U. S. 120, 130, 48 L. Ed. 900.

As to the manner of proving foreign laws, see the title FOREIGN LAWS, vol. 6, p. 377.

44. **Question of admissibility one of law.**—*Fire Ins. Ass'n v. Wickham*, 128 U. S. 426, 435, 32 L. Ed. 503. See the title QUESTIONS OF LAW AND FACT.

1. **Parts of a dollar.**—By the act of 1792, § 9 (1 U. S. Stat. 248), establishing a mint and regulating the coin of the United States, the several denominations of silver coin are declared to be dollars, half dollars, quarter dollars, dimes and half dimes, and the value of each is established. And in the following year, 1793 (1 U. S. Stat. 300), an act passed, regulating foreign coin, by which, among other things, it is declared that foreign silver coin shall pass current as money within the United States, and be a legal tender for the payment of all debts and demands, at the rates

therein fixed. The Spanish milled dollar at the rate of 100 cents for each dollar, the actual weight whereof shall not be less than seventeen pennyweights and seven grains; and in proportion for the parts of a dollar. The dollar and parts of a dollar are here made current by law. The court said: "What is here meant by parts of a dollar? The parts of a dollar having been recently fixed and defined in our domestic coin, it is no more than reasonable to conclude, that the parts of a dollar here adopted in relation to foreign coin, are referrible to the same denomination in the subdivision, as established in the domestic coin." The court further said that in view of the acts relating to currency it was reasonable to conclude that when the terms, parts of a dollar, were used in these laws, it was in reference to the division of a dollar, as established at the mint. *United States v. Gardner*, 10 Pet. 618, 9 L. Ed. 556.

2. **Out of the jurisdiction of any "particular state."**—As to the meaning of this phrase as used in the act of 1790 providing for punishment of certain crimes against the United States, see the title CRIMINAL LAW, vol. 5, p. 79.



# PARTIES.

BY S. B. FISHER.

## I. Scope of Title, 36.

## II. Definition and General Consideration, 36.

- A. Definition, 36.
- B. Capacity to Sue or Be Sued, 36.
- C. Necessity for Interest in Litigation, 37.

## III. Parties in Equity, 37.

- A. Rules Applicable to Parties Generally, 37.
  - 1. Interest as Criterion, 37.
    - a. In General, 37.
    - b. Rule Subject to Qualifications and Exceptions, 39.
  - 2. Classification, 40.
    - a. In General, 40.
    - b. Indispensable Parties, 41.
    - c. Parties with Separable Interest in Controversy, 43.
    - d. Formal Parties, 44.
  - 3. Parties by Representation, 45.
    - a. In General, 45.
    - b. When Proper, 45.
      - (1) Persons Acting in Fiduciary Capacity, 45.
      - (2) Numerous Parties, 46.
      - (3) Persons Not in Being, Remaindermen, Reversioners, etc., 48.
  - 4. Power of Equity to Relieve Regardless of Position of Parties on Record, 49.
- B. Complainants, 49.
  - 1. Interest Entitling to Sue, 49.
  - 2. Rule as to Real Parties in Interest, 50.
  - 3. Joinder, 50.
- C. Defendants, 50.
  - 1. Necessity, 50.
  - 2. Interest as Determining Who Should Be Made Defendants, 50.
  - 3. Joinder, 51.
    - a. In General, 51.
    - b. Joinder as Defendants of Persons Refusing to Join as Plaintiffs, 51.
- D. Raising and Waiving Objections, 52.
  - 1. Manner of Raising, 52.
  - 2. Time of Raising, 52.
  - 3. Power of Court to Notice Defect of Parties Sua Sponte, 53.
- E. Bringing in New Parties, 53.
  - 1. Necessity and Manner, 53.
  - 2. Time, 54.

## IV. Parties at Common Law, 54.

- A. In General, 54.
- B. Plaintiffs, 54.
  - 1. General Rules Determining Proper Parties Plaintiff, 54.
    - a. Capacity to Sue, 54.
    - b. Legal Interest as Determining Right to Sue, 54.
      - (1) General Rule, 54.

- (2) Action by Nominal for Use Plaintiff, 54.
- 2. In Actions Ex Contractu, 54.
- 3. In Actions Ex Delicto, 55.
- 4. Joinder, 55.
- C. Defendants, 56.
  - 1. In General, 56.
  - 2. Joinder, 56.
    - a. In Actions Ex Contractu, 56.
      - (1) In General, 56.
      - (2) Where Contract Joint, 56.
      - (3) Where Contract Joint and Several, 56.
    - b. In Actions Ex Delicto, 56.
- D. Raising and Waiving Objections, 57.
  - 1. Nonjoinder, 57.
    - a. Nonjoinder of Joint Obligees, 57.
    - b. Nonjoinder of Joint Obligors, 57.
    - c. Joinder of Intermediate Number of Joint and Several Obligors, 57.
  - 2. Misjoinder, 58.

## V. Parties under Codes and Statutes, 58.

- A. Parties Plaintiff, 58.
  - 1. Requirement That Action Be Brought in Name of Real Party in Interest, 58.
  - 2. Joinder, 59.
    - a. Permissive, 59.
    - b. Necessity for Joining Those United in Interest, 59.
- B. Parties Defendant, 60.
  - 1. General Rule as to Proper Parties Defendant, 60.
  - 2. Joinder, 60.
    - a. Joinder of Persons Severally Liable on Same Obligation or Instrument, 60.
    - b. Necessity for Joining Those United in Interest, 60.
    - c. Effect of Statutory Changes in Common-Law Rules as to Joint Contracts, 61.
- C. Raising and Waiving Objections, 62.
- D. Bringing in New Parties, 62.
- E. Amendments as to Parties, 62.

## VI. Intervention, 62.

- A. Definition, 62.
- B. Who May Intervene, 63.
  - 1. In General, 63.
  - 2. Interest Entitling to Intervene, 63.
- C. Time for Exercising Right to Intervene, 64.
- D. Procedure, 64.
  - 1. Manner of Intervening, 64.
  - 2. Objections, 65.
- E. Review of Decision on Application to Intervene, 65.
- F. Effect of Allowance of Application, 65.

## CROSS REFERENCES.

See the titles ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, pp. 12, 31; ADMIRALTY, vol. 1, p. 159; AMENDMENTS, vol. 1, pp. 293, 298; APPEAL AND ERROR, vol. 2, pp. 52, 110; APPEARANCES, vol. 2, p. 429; ASSIGNMENTS, vol. 2, p. 589, et seq.; ASSUMPSIT, vol. 2, p. 653; ASSOCIATIONS, vol. 2, p. 635; BANKS AND BANKING, vol. 3, p. 173; BILL OF REVIEW, vol. 3, p. 253; BILLS, NOTES AND CHECKS, vol. 3, p. 356; BONDS, vol. 3, p. 426; CHATTEL MORTGAGES, vol. 3, p. 764; CONFLICT OF LAWS, vol. 3, p. 1087; CONTRACTS, vol. 4, p. 569; COR-

PORATIONS, vol. 4, p. 762; COURTS, vol. 4, pp. 936, 974, 996, 1045, 1138; COVENANT, ACTION OF, vol. 5, p. 2; COVENANTS, vol. 5, p. 18; CREDITORS' SUITS, vol. 5, p. 37; CROSS BILLS, vol. 5, p. 142; DEATH BY WRONGFUL ACT, vol. 5, p. 201; DEBT, THE ACTION OF, vol. 5, p. 209; DECLARATIONS AND ADMISSIONS, vol. 5, p. 214; DETINUE, vol. 5, p. 345; DISMISSAL, DISCONTINUANCE AND NON-SUIT, vol. 5, pp. 370, 383; DUE PROCESS OF LAW, vol. 5, p. 616, et seq.; EXECUTORS AND ADMINISTRATORS, vol. 6, p. 178; FRAUD AND DECEIT, vol. 6, p. 432; FRAUDULENT AND VOLUNTARY CONVEYANCES, vol. 6, p. 521; GUARANTY, vol. 6, p. 597; HUSBAND AND WIFE, vol. 6, p. 732; INJUNCTIONS, vol. 6, p. 1051; INSURANCE, vol. 7, p. 66; INTERPLEADER, vol. 7, p. 256; JUDGMENTS AND DECREES, vol. 7, p. 544; LANDLORD AND TENANT, vol. 7, p. 827; LIS PENDENS, vol. 7, p. 1051; MANDATE AND PROCEEDINGS THEREON, vol. 8, p. 97; MASTER AND SERVANT, vol. 8, p. 275; MECHANICS' LIENS, vol. 8, p. 328; MORTGAGES AND DEEDS OF TRUST, vol. 8, p. 452; MULTIFARIOUSNESS, vol. 8, p. 532; MULTIPLICITY OF SUITS, vol. 8, p. 539; MUNICIPAL CORPORATIONS, vol. 8, p. 546; MUNICIPAL, COUNTY, STATE AND FEDERAL AID, vol. 8, p. 618; MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES, vol. 8, p. 650; NAMES, vol. 8, p. 795; OPEN AND CLOSE, vol. 8, p. 1002; PARTITION; PARTNERSHIP; PLEADING; PRINCIPAL AND SURETY; QUIETING TITLE; QUO WARRANTO; REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS; REMOVAL OF CAUSES; RES ADJUDICATA; RESCISSION, CANCELLATION AND REFORMATION; SPECIFIC PERFORMANCE; STATE; SUBROGATION; SUBSTITUTION OF PARTIES; TORTS; TRESPASS; TROVER AND CONVERSION; TRUSTS AND TRUSTEES; UNITED STATES; VENDOR AND PURCHASER; VENDORS' LIENS; WARRANTY; WASTE; WILLS; WITNESSES; WORKING CONTRACTS; WRIT OF RIGHT.

### I. Scope of Title.

In the title PARTIES nothing more will be attempted than to set out the general rules relating to proper and necessary parties in equity, at common law, and under code practice; the necessity and manner of objecting to defects of parties, and the proper method of bringing in new parties. As to parties in particular proceedings, see the specific titles. As to the capacity of particular persons or classes of persons to sue, and their liability to suit, see the appropriate titles.

### II. Definition and General Consideration.

**A. Definition.**—The term parties, within the meaning of the rule that only parties and privies are concluded by a judgment or a decree, includes all those persons who are directly interested in the subject matter, and who have the right to make defense, control the proceedings, examine and cross-examine witnesses, and appeal from the judgment.<sup>1</sup> Persons not having these rights substantially, are regarded as strangers to the cause.<sup>2</sup>

**B. Capacity to Sue or Be Sued.**—At common law neither an infant, an insane person, married woman, nor alien enemy could maintain a suit in his or her own name.<sup>3</sup>

As to the capacity of particular persons or classes of persons to sue or be sued, see the specific titles, as for instance, the titles EXECUTORS AND ADMINISTRATORS, vol. 6, pp. 178, 187; HUSBAND AND WIFE, vol. 6, p. 732; INFANTS, vol. 6, p. 1018; TRUSTS AND TRUSTEES; etc.

1. Parties within the doctrine of *res adjudicata*.—*Robbins v. Chicago*, 4 Wall. 657, 18 L. Ed. 427; *Green v. Bogue*, 158 U. S. 478, 39 L. Ed. 1061; *Litchfield v. Goodnow*, 123 U. S. 549, 31 L. Ed. 199.

"Parties, in the larger legal sense, are all persons having a right to control the proceedings, to make defense, to adduce and cross-examine witnesses, and to appeal from the decision, if an appeal lies." *Green v. Bogue*, 158 U. S. 478, 39 L. Ed.

1061, quoting 1 Greenl. Ev., § 535.

2. Persons without such rights regarded as strangers.—*Robbins v. Chicago*, 4 Wall. 657, 18 L. Ed. 427.

For a full treatment of the question as to who are parties and privies, and as such concluded by a former adjudication, see the title *RES ADJUDICATA*.

3. Common-law rule as to persons incapacitated to sue.—*Illinois Cent. R. Co. v. Adams*, 180 U. S. 28, 45 L. Ed. 410.



**As to the capacity of private corporations to sue or be sued**, see the titles CORPORATIONS, vol. 4, p. 762; FOREIGN CORPORATIONS, vol. 6, p. 329.

**As to the capacity of municipal corporations to sue or be sued**, see the titles COUNTIES, vol. 4, p. 844; MUNICIPAL CORPORATIONS, vol. 8, p. 546, and cross references there found.

**As to actions by or against a state**, see the title STATES.

**As to actions by or against the United States**, see the title UNITED STATES.

**As to manner and time of raising objections as to capacity to sue**, see the titles ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, pp. 30, 40; APPEAL AND ERROR, vol. 2, p. 112.

**C. Necessity for Interest in Litigation.**—The prime object of all litigation is to establish a right asserted by the plaintiff or to sustain a defense set up by the party pursued,<sup>4</sup> and in order that a person may properly be a party to any litigation either at law or in equity he should have a direct and real interest or right in such litigation.<sup>5</sup> For a full treatment of the question of interest as the criterion of proper and necessary parties in proceedings in equity, at common law, and under codes, see the appropriate sections in this title.

### III. Parties in Equity.

**A. Rules Applicable to Parties Generally.**—1. INTEREST AS CRITERION

—a. *In General.*—**All Persons Materially Interested to Be Made Parties.**

—The general rule in chancery proceedings is, that however numerous the persons materially interested, legally or beneficially, in the subject matter of a suit, they should be made parties to it, either as plaintiffs or defendants,<sup>6</sup> to prevent

4. *Tyler v. Judges*, 179 U. S. 405, 45 L. Ed. 252.

5. **Necessity for direct and real interest in litigation.**—"By all correct legal intendment, this term party is applicable only to persons sustaining a direct or real interest or right in any pending litigation; an interest or right immediately affected or bound by the issues such litigation involves. This term cannot be extended to persons who may be arbitrarily and irregularly named in proceedings either at law or in equity, the very description of whose relation to the case shall evince a total absence of legal or equitable claims upon the subject of litigation, a total absence, too, of reciprocal duty or obligation with reference to those whose property and whose possession and enjoyment of that property are sought to be affected." Per Daniel J., dissenting, in *Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. 518, 594, 14 L. Ed. 249.

No one can be a party to an action if he has no interest in it. A plaintiff cannot properly sue for wrongs that do not affect him, and on the other hand a person is not properly made a defendant to a suit upon a cause of action in which he has no interest and as to which no relief is sought against him. *Tyler v. Judges*, 179 U. S. 405, 45 L. Ed. 252. See, also, *McMicken v. United States*, 97 U. S. 204, 24 L. Ed. 947.

"In familiar illustration of this rule, the plaintiff in an action of ejectment must recover upon the strength of his own title and not upon the weakness of the defendant's, who may even show title

in a third person to defeat the action. Actions instituted in this court by writ of error to a state court are no exceptions to this rule. In order that the validity of a state statute may be 'drawn in question' under the second clause of § 709, Rev. Stat., it must appear that the plaintiff in error has a right to draw it in question by reason of an interest in the litigation which has suffered, or may suffer, by the decision of the state court in favor of the validity of the statute. This principle has been announced in so many cases in this court that it may not be considered an open question." *Tyler v. Judges*, 179 U. S. 405, 45 L. Ed. 252.

6. **All persons materially interested properly made parties in equity.**—*Elmendorf v. Taylor*, 10 Wheat. 152, 6 L. Ed. 289; *Mallow v. Hinde*, 12 Wheat. 193, 6 L. Ed. 599; *Osborn v. United States Bank*, 9 Wheat. 738, 6 L. Ed. 204; *Mechanics' Bank v. Seton*, 1 Pet. 299, 7 L. Ed. 152; *Dandridge v. Washington*, 2 Pet. 370, 7 L. Ed. 454; *Mandeville v. Riggs*, 2 Pet. 482, 7 L. Ed. 493; *Caldwell v. Taggart*, 4 Pet. 190, 7 L. Ed. 828; *Breedlove v. Nicolet*, 7 Pet. 413, 8 L. Ed. 731; *Vattier v. Hinde*, 7 Pet. 252, 8 L. Ed. 675; *Story v. Livingston*, 13 Pet. 359, 10 L. Ed. 200; *Gaines v. Chew*, 2 How. 619, 11 L. Ed. 402; *Gratz v. Cohen*, 11 How. 1, 13 L. Ed. 579; *Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158; *Cov v. Mason*, 17 How. 130, 15 L. Ed. 125; *Taylor v. Carryl*, 20 How. 583, 15 L. Ed. 1028; *Payne v. Hook*, 7 Wall. 425, 19 L. Ed. 260; *Hoe v. Wilson*, 9 Wall. 501, 19 L. Ed. 762; *Ribon v. Railroad Cos.*, 16 Wall. 446, 450, 21 L. Ed.

a multiplicity of suits, and that there may be a complete and final decree between all parties interested;<sup>7</sup> it being the constant aim of a court of equity to do complete justice, by embracing the whole subject, deciding upon and settling the rights of all persons interested in the subject of a suit; to make the performance of the order perfectly safe to those who have to obey it, and to prevent future litigation.<sup>8</sup>

**Persons without Interest Not Proper Parties.**—It is equally true, as a rule of equity pleading, that none shall be made parties either as complainants or defendants, who have no interest in the matters in controversy, or which can be affected by the decree of the court.<sup>9</sup> No one need be made a party complainant, in whom there exists no interest and no one a party defendant from whom nothing is demanded.<sup>10</sup>

367; *Railroad Co. v. Orr*, 18 Wall. 471, 21 L. Ed. 810; *Williams v. Bankhead*, 19 Wall. 563, 571, 22 L. Ed. 184; *Hotel Co. v. Wade*, 97 U. S. 13, 24 L. Ed. 917; *McArthur v. Scott*, 113 U. S. 340, 28 L. Ed. 1015; *Vetterlein v. Barnes*, 124 U. S. 169, 31 L. Ed. 400; *Gregory v. Stetson*, 133 U. S. 579, 33 L. Ed. 792; *Bryan v. Kales*, 134 U. S. 126, 33 L. Ed. 829; *Manson v. Duncanson*, 166 U. S. 533, 41 L. Ed. 1105; *California v. Southern Pac. Co.*, 157 U. S. 229, 39 L. Ed. 683; *Brown v. Guarantee Trust, etc., Co.*, 128 U. S. 403, 32 L. Ed. 468; *Minnesota v. Northern Securities Co.*, 184 U. S. 199, 46 L. Ed. 499.

In equity, a final decree cannot be pronounced, until all parties in interest are brought before the court. *Marshall v. Beverley*, 5 Wheat. 313, 5 L. Ed. 97; *Conn v. Penn.*, 5 Wheat. 424, 5 L. Ed. 125.

"All persons having an interest, although remote, in the subject matter of the bill, must be made parties, or the bill must be so framed as to give them an opportunity to come in and be made parties. The principle that all must be made parties whose interests may be affected by the decree is only departed from where it becomes extremely difficult or inconvenient to enforce the rule." *Railroad Co. v. Orr*, 18 Wall. 471, 21 L. Ed. 810.

**7. Reason for rule.**—*Story v. Livingston*, 13 Pet. 359, 10 L. Ed. 200; *Mechanics' Bank v. Seton*, 1 Pet. 299, 7 L. Ed. 152. And see cases to preceding text.

**8. Caldwell v. Taggart**, 4 Pet. 190, 7 L. Ed. 828; *Mallow v. Hinde*, 12 Wheat. 193, 6 L. Ed. 599; *Williams v. Bankhead*, 19 Wall. 563, 22 L. Ed. 184; *Mandeville v. Riggs*, 2 Pet. 482, 7 L. Ed. 493. See, generally, the titles EQUITY, vol. 5, p. 803; MULTIPLICITY OF SUITS, vol. 8, p. 539.

**9. Persons without interest not proper parties in equity.**—*Livingston v. Woodworth*, 15 How. 546, 14 L. Ed. 809; *Boon v. Chiles*, 8 Pet. 532, 8 L. Ed. 1034; *Kerr v. Watts*, 6 Wheat. 550, 5 L. Ed. 328; *Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. 518, 14 L. Ed. 249; *Selz v. Unna*, 6 Wall. 327, 18 L. Ed. 799; *Payne v. Hook*, 7 Wall. 425, 19 L. Ed. 260; *Krippendorf v. Hyde*, 110 U. S. 276, 25 L. Ed. 145; *Kilbourn v. Sunderland*, 130 U. S. 505, 32 L. Ed. 1005; *De Wolf v.*

*Johnson*, 10 Wheat. 367, 6 L. Ed. 343; *Gaines v. Hennen*, 24 How. 553, 16 L. Ed. 770; *Fitch v. Creighton*, 24 How. 159, 16 L. Ed. 596; *Buffington v. Harvey*, 95 U. S. 9, 24 L. Ed. 381.

A bill for an account and distribution of profits cannot be maintained by a corporation of a savings bank having no pecuniary interest in the corporation. *Huntington v. Savings Bank*, 96 U. S. 388, 24 L. Ed. 777. See the title BANKS AND BANKING, vol. 3, p. 8.

**10. Kerr v. Watts**, 6 Wheat. 550, 5 L. Ed. 328; *Mechanics' Bank v. Seton*, 1 Pet. 299, 7 L. Ed. 152; *Girdley v. Wynant*, 23 How. 500, 16 L. Ed. 411; *Huntington v. Savings Bank*, 96 U. S. 388, 24 L. Ed. 777; *Jerome v. McCarter*, 94 U. S. 734, 24 L. Ed. 136; *Delaware County Comm'rs v. Diebold, etc., Lock Co.*, 133 U. S. 473, 33 L. Ed. 674.

"It is a well-settled rule that no one need be made a party, against whom, if brought to a hearing, the plaintiff can have no decree. 2 Madd. Ch. 184; P. Wms. 310, note 1." *Mechanics' Bank v. Seton*, 1 Pet. 299, 7 L. Ed. 152.

A certificated bankrupt or insolvent, against whom no relief can be had, is not a necessary party to a suit in equity; but if he be made a defendant, he cannot be examined as a witness in the cause, until an order has been obtained, upon motion, for that purpose. *De Wolf v. Johnson*, 10 Wheat. 367, 6 L. Ed. 343.

Where the assignees of a claim on a third party have parted completely with their interest in it and, by a transfer, vested the entire title in others, they are not necessary parties in an equity proceeding by these others to enforce it. *Batesville Institute v. Kauffman*, 18 Wall. 151, 21 L. Ed. 775. See the title ASSIGNMENTS, vol. 2, p. 595.

A., B., C., and D., having a dispute about their rights in a railroad company, entered into a contract of settlement, by which they divided the stock in certain proportions among them. A. refused to carry out the contract. B. filed a bill to compel him to stand to his agreement. A., after answering, filed a cross bill, insisting that B. ought to have made C. and D. parties to his original proceeding. Held, that the bill not seeking any relief against



b. *Rule Subject to Qualifications and Exceptions.*—The general rule as to parties in equity is a rule established for the convenient administration of justice, and is subject to many exceptions and qualifications arising out of public policy and the necessities of particular cases,<sup>11</sup> and is more or less a matter of discretion in the court.<sup>12</sup> The rule, like all general rules, will yield, whenever it is necessary that it should yield, in order to accomplish the ends of justice. It will yield, if the court is able to proceed to a decree, and do justice to the parties before it, without injury to absent persons, equally interested in the litigation, but who cannot conveniently be made parties to the suit.<sup>13</sup> Thus, for instance, exceptions to the rule have been admitted, from considerations of necessity or of paramount convenience, when some of the persons interested are out of the jurisdiction,<sup>14</sup> or not in being,<sup>15</sup> or are unknown,<sup>16</sup> or when the persons interested are too numerous to be all brought in.<sup>17</sup> The necessity for the relaxation of the rule is more especially apparent in the courts of the

B. and C., it was not necessary that they should be parties. *French v. Shoemaker*, 14 Wall. 314, 20 L. Ed. 852.

Prior mortgagees are not necessary parties to the bill of a junior mortgagee, which seeks only the foreclosure or the sale of the equity of redemption. *Jerome v. McCarter*, 94 U. S. 734, 24 L. Ed. 136.

Where a release is fraudulently obtained from one of two joint contractors, the releasing contractor is not an indispensable party to a bill filed by his co-contractor against the other party to the contract. *Canal Co. v. Gordon*, 6 Wall. 561, 18 L. Ed. 894.

In proceedings to set aside a conveyance of real estate, made in fraud of the rights of creditors, it is not necessary to make a mortgagee of the estate a party, his rights under the mortgage not being brought into question. *Venable v. United States Bank*, 2 Pet. 107, 7 L. Ed. 364.

11. *Rule subject to many exceptions and qualifications.*—*Mechanics' Bank v. Seton*, 1 Pet. 299, 7 L. Ed. 152; *Smith v. Swormstedt*, 16 How. 288, 302, 14 L. Ed. 942; *Elmendorf v. Taylor*, 10 Wheat. 152, 6 L. Ed. 289; *Payne v. Hook*, 7 Wall. 425, 431, 19 L. Ed. 260; *Ribon v. Railroad Cos.*, 16 Wall. 446, 450, 21 L. Ed. 367; *Williams v. Bankhead*, 19 Wall. 563, 22 L. Ed. 184; *McArthur v. Scott*, 113 U. S. 340, 28 L. Ed. 1015.

12. *Application of rule discretionary with court.*—*Mechanics' Bank v. Seton*, 1 Pet. 299, 7 L. Ed. 152; *Mallow v. Hinde*, 12 Wheat. 193, 6 L. Ed. 599; *Elmendorf v. Taylor*, 10 Wheat. 152, 6 L. Ed. 289; *Vetterlein v. Barnes*, 124 U. S. 169, 31 L. Ed. 400.

"Courts of equity require that all the parties concerned in interest shall be brought before them, that the matter in controversy may be finally settled. This equitable rule, however, is framed by the court itself, and is subject to its discretion. It is not, like the description of parties, an inflexible rule, a failure to observe which turns the party out of court, because it has no jurisdiction over his cause; but being introduced by the court itself, for the purposes of justice, is susceptible of modification, for the promo-

tion of those purposes." *Elmendorf v. Taylor*, 10 Wheat. 152, 6 L. Ed. 289.

13. *Payne v. Hook*, 7 Wall. 425, 19 L. Ed. 260; *Story v. Livingston*, 13 Pet. 359, 10 L. Ed. 200; *Hotel Co. v. Wade*, 97 U. S. 13, 24 L. Ed. 917.

In *Mechanics' Bank v. Seton*, 1 Pet. 299, 7 L. Ed. 152, it is held that the rule ought to be restricted to parties, whose interest is involved in the issue and to be affected by the decree.

14. *Exception as to persons out of jurisdiction.*—*McArthur v. Scott*, 113 U. S. 340, 28 L. Ed. 1015.

"The rule which requires that all persons concerned in interest, however remotely, should be made parties to the suit, though applicable to most cases in the courts of the United States, is not applicable to all. In the exercise of its discretion, the court will require the plaintiff to do all in its power to bring every person concerned in interest before the court. But if the case may be completely decided, as between the litigant parties, the circumstance that an interest exists in some other person, whom the process of the court cannot reach, as, if such party be a resident of some other state, ought not to prevent a decree upon its merits." *Elmendorf v. Taylor*, 10 Wheat. 152, 6 L. Ed. 289, quoted in *Mallow v. Hinde*, 12 Wheat. 193, 6 L. Ed. 599.

The organization of the federal courts has always required them to dispense with parties in chancery not within their jurisdiction, unless their presence was an absolute necessity. *Traders' Bank v. Campbell*, 14 Wall. 87, 20 L. Ed. 832.

The want of proper parties is not a good plea, if the bill suggests that such parties are out of the jurisdiction of the court. *Milligan v. Milledge*, 3 Cranch 220, 2 L. Ed. 417.

15. *Persons not in being.*—*McArthur v. Scott*, 113 U. S. 340, 28 L. Ed. 1015. See post, "Parties by Representation," III, A. 3.

16. *Unknown parties.*—*Mandeville v. Riggs*, 2 Pet. 482, 7 L. Ed. 493.

17. *Where persons interested too numerous to be brought in.*—*McArthur v. Scott*, 113 U. S. 340, 28 L. Ed. 1015. See



United States, where, oftentimes, the enforcement of the rule would oust them of their jurisdiction, and deprive parties entitled to the interposition of a court of equity of any remedy whatever,<sup>18</sup> and by the act of congress of 1839, and the 47th rule of equity practice, express provision is made for adjudication of suits in the absence of persons who, though proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or because their joinder would oust the jurisdiction of the court as to the parties before the court. It is expressly provided, however, that the judgment or decree thus rendered shall not conclude or prejudice absent parties.<sup>19</sup>

2. CLASSIFICATION—*a. In General.*—According to several decisions of the United States supreme court parties to suits in equity have been divided into three classes, namely, indispensable, necessary, and formal parties.<sup>20</sup> For the

post, "Parties by Representation," III, A, 3.

18. Relaxation of rule in United States courts.—*Payne v. Hook*, 7 Wall. 425, 19 L. Ed. 260.

It is the settled practice in the courts of the United States, if the case can be decided on its merits between those who are regularly before them, although other persons, not within their jurisdiction, may be collaterally or incidentally concerned, who must have been made parties, if they had been amenable to its process, that these circumstances shall not expel other suitors who have a constitutional and legal right to submit their case to a court of the United States; provided the decree may be made without affecting their interests; this rule has also been adopted by the court of chancery in England. *Vattier v. Hinde*, 7 Pet. 252, 8 L. Ed. 675.

19. Act of Feb. 28th, 1839.—To obviate any objection that might be raised by reason of the nonjoinder or inability to serve absent defendants, it was provided by the act of February 28, 1839, c. 36, § 5 Stat. 321, subsequently carried into the Revised Statutes, as § 737, that "when there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district within which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and nonjoinder of parties who are not inhabitants of nor found within the district as aforesaid, shall not constitute matter of abatement or objection of the suit." *Greeley v. Lowe*, 155 U. S. 58, 39 L. Ed. 69; *Hagan v. Walker*, 14 How. 29, 14 L. Ed. 312; *Union Bank v. Stafford*, 12 How. 327, 13 L. Ed. 1008; *Northern Indiana R. Co. v. Michigan, etc., R. Co.*, 15 How. 233, 14 L. Ed. 674; *Ober v. Gallagher*, 93 U. S. 199, 23 L. Ed. 829. See the title JUDGMENTS AND DECREES, vol. 7, p. 567.

By equity rule 47 it is provided that in

all cases where it shall appear to the court that persons who might otherwise be deemed necessary or proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction as to the parties before it, the court may in its discretion proceed in the cause without making such persons parties, and in such case the decree shall be without prejudice to the rights of the absent parties. *Fisher v. Shropshire*, 147 U. S. 133, 37 L. Ed. 109; *McGahan v. Bank*, 156 U. S. 218, 39 L. Ed. 403; *McCoy v. Rhodes*, 11 How. 131, 13 L. Ed. 634. See the title JUDGMENTS AND DECREES, vol. 7, p. 544.

20. Classification of parties.—*Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158; *Minnesota v. Northern Securities Co.*, 184 U. S. 199, 46 L. Ed. 499; *Cunningham v. Macon, etc., R. Co.*, 109 U. S. 446, 27 L. Ed. 992; *Williams v. Bankhead*, 19 Wall. 563, 22 L. Ed. 184; *Barney v. Baltimore*, 6 Wall. 280, 18 L. Ed. 825. See, also, *Russell v. Clarke*, 7 Cranch 69, 3 L. Ed. 271.

"In the case of *Barney v. Baltimore*, 6 Wall. 280, 18 L. Ed. 825, this court, after reviewing the former decisions on this subject, remarks that there is a class of persons having such relations to the matter in controversy, merely formal or otherwise, that, while they may be called proper parties, the court will take no account of the omission to make them parties. There is another class whose relations to the suit are such that, if their interest and their absence are formally brought to the attention of the court, it will require them to be made parties, if within its jurisdiction, before deciding the case. But, if this cannot be done, it will proceed to administer such relief as may be in its power between the parties before it. And there is a third class, whose interest in the subject matter of the suit, and in the relief sought, is so bound up with that of the other parties, that their legal presence as parties in the proceeding is an absolute necessity, without which the court cannot proceed." *Traders' Bank v. Campbell*, 14 Wall. 87, 20 L. Ed. 832.

purposes of this title the class of parties technically termed necessary parties will be treated under the classification "parties with separable interest in controversy."<sup>21</sup>

b. *Indispensable Parties.*—**In General.**—Where a person will be directly affected by a decree, he is an indispensable party,<sup>22</sup> unless the parties are too numerous to be brought before the court, when the case is subject to a special rule.<sup>23</sup> All those persons come under this classification of indispensable parties, who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.<sup>24</sup> Though, where a

21. See post, "Parties with Separable Interest in Controversy," III, A, 2, c.

22. **Persons to be directly affected by decree indispensable parties.**—*Williams v. Bankhead*, 19 Wall. 563, 22 L. Ed. 184; *Manson v. Duncanson*, 166 U. S. 533, 41 L. Ed. 1105; *Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158; *Cameron v. McRoberts*, 3 Wheat. 591, 4 L. Ed. 467; *Hoe v. Wilson*, 9 Wall. 501, 19 L. Ed. 762; *Mallow v. Hinde*, 12 Wheat. 193, 197, 6 L. Ed. 599; *Russell v. Clarke*, 7 Cranch 69, 3 L. Ed. 271; *Lewis v. Darling*, 16 How. 1, 14 L. Ed. 819; *Ribon v. Railroad Cos.*, 16 Wall. 446, 21 L. Ed. 367; *St. Louis, etc., R. Co. v. Wilson*, 114 U. S. 60, 29 L. Ed. 66; *Massachusetts, etc., Const. Co. v. Cane Creek Tp.*, 155 U. S. 283, 39 L. Ed. 152; *Metropolitan Bank v. St. Louis Dispatch Co.*, 149 U. S. 436, 37 L. Ed. 799; *Christian v. Atlantic, etc., R. Co.*, 133 U. S. 233, 33 L. Ed. 589; *Traders' Bank v. Campbell*, 14 Wall. 87, 20 L. Ed. 832; *Gregory v. Stetson*, 133 U. S. 579, 33 L. Ed. 792; *Swan Land, etc., Co. v. Frank*, 148 U. S. 603, 37 L. Ed. 577.

23. *Williams v. Bankhead*, 19 Wall. 563, 22 L. Ed. 184. See post, "Parties by Representation," III, A, 3.

24. *Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158; *Minnesota v. Northern Securities Co.*, 184 U. S. 199, 46 L. Ed. 499; *Robertson v. Carson*, 19 Wall. 94, 22 L. Ed. 178; *Barney v. Baltimore*, 6 Wall. 280, 18 L. Ed. 825; *Cunningham v. Macon, etc., R. Co.*, 109 U. S. 446, 27 L. Ed. 992; *Kendig v. Dean*, 97 U. S. 423, 24 L. Ed. 1061.

"The general rule in equity, in accordance with the fundamental principles of justice, is that all persons interested in the object of a suit, and whose rights will be directly affected by the decree, must be made parties to the suit." *McArthur v. Scott*, 113 U. S. 340, 28 L. Ed. 1015.

**Instances of parties held indispensable.**—Where a proceeding in equity concerns the disposal of a specific fund, a person claiming the fund, and liable by a decree to have it wholly swept from him, is an indispensable party. *Williams v. Bankhead*, 19 Wall. 563, 22 L. Ed. 184.

Corporations are indispensable parties to a bill which affects corporate interests. *Swan Land, etc., Co. v. Frank*, 148 U. S. 603, 37 L. Ed. 577. See the title CORPORATIONS. vol. 4. p. 766.

Where certain heirs at law seek to set aside a sale of their ancestor's realty made under a decree of a competent court ordering, at a creditor's instance, such sale for the payment of a debt due him, they should make the creditor on whose application the sale was made a party. All the heirs also should be parties. It is not enough that those who bring the suit profess to file their bill "for themselves and the other heirs at law," these last being known and not numerous. *Hoe v. Wilson*, 9 Wall. 501, 19 L. Ed. 762.

A trustee who has large powers over the trust estate and important duties to perform with respect to it, is a necessary party to a suit brought by a stranger to defeat the trust. *McArthur v. Scott*, 113 U. S. 340, 28 L. Ed. 1015.

Where a debtor had conveyed to a trustee real estate to be sold for the benefit of creditors, and the trustee dying before the conveyance of the property to a purchaser, another trustee was appointed by the court, upon the application of the creditors, to execute the trust, in a proceeding relative to the execution of the trust, and the conveyance of the estate, it is necessary that the heirs at law of the first trustee shall be parties to the same; as the legal title to the estate did not pass to the substituted trustee, by the appointment, but remained in the legal heirs. *Greenleaf v. Queen*, 1 Pet. 138, 7 L. Ed. 85.

Where money was borrowed from a bank upon a promissory note, signed by the principal and two sureties, and the principal debtor, by way of counter security, conveyed certain property to a trustee, for the purpose of indemnifying his sureties, it was necessary to make the trustee and the cestui que trust parties to a bill filed by the bank, asserting a special lien upon the property thus conveyed. *McRea v. Branch Bank*, 19 How. 376, 15 L. Ed. 688. See the title TRUSTS AND TRUSTEES.

"Where the object of an action or suit is to recover the possession of real or personal property, the one in possession is a necessary and indispensable (and not a formal) party. The case of *Wilson v. Oswego Tp.*, 151 U. S. 56, 38 L. Ed. 70, is decisive on this point. In that case a suit was commenced in a state court in



decree can be made as to those present without affecting the rights of those who are absent, the court will proceed,<sup>25</sup> yet, if the interests of those present and of those absent are inseparable, the obstacle is insuperable.<sup>26</sup> The act of

Missouri to recover possession of certain bonds in the custody of the Union Savings Association. There were several defendants, among them one Montague, and an intervenor, Oswego township, who, claiming the bonds, removed the case on the ground of diverse citizenship to the federal court. Such removal was adjudged to be erroneous, this court holding that 'the Union Savings Association, being the bailee or trustee of the bonds, was a necessary and indispensable party to the relief sought by the petition, and that defendant, being a citizen of the same state with the plaintiff, there was no right of removal on the part of Montague, or of the intervening defendant, the Oswego township, on the ground that the Union Savings Association was a formal, unnecessary, or nominal party.' *Massachusetts, etc., Const. Co. v. Cane Creek Tp.*, 155 U. S. 283, 285, 39 L. Ed. 152.

Part owners or tenants in common in real estate of which partition is asked in equity have an interest in the subject matter of the suit, and in the relief sought, so intimately connected with that of their cotenants, that if these cannot be subjected to the jurisdiction of the court, the bill will be dismissed. *Barney v. Baltimore*, 6 Wall. 280, 18 L. Ed. 825.

Where a legacy, for which suit is instituted, is given jointly to several persons in different families, and the legatees take equally, the number in either family being ascertained by the will, all the claimants ought to be brought before the court; the right of each individual depends on the number who are entitled, and this number is a fact which must be inquired into, before the amount to which any one is entitled can be fixed; if this fact were to be examined in every case, it would subject the executors to be harassed by a multiplicity of suits, and if it were to be fixed by the first decree, would not bind persons who were not parties. *Pray v. Belt*, 1 Pet. 670, 7 L. Ed. 309.

Where a sale of mortgaged property in Louisiana was made under proceedings in insolvency, and the heirs of the insolvent filed a bill to set aside the sale on the ground of irregularity, it was necessary to make the mortgagees parties. They had been paid their share of the purchase money, and had an interest in upholding the sale. The fact that such persons are beyond the jurisdiction of the court is not a sufficient reason for omitting to make them parties. *Coiron v. Millaudon*, 19 How. 113, 15 L. Ed. 575. See the title MORTGAGES AND DEEDS OF TRUST, vol. 8, p. 452.

Where, in a bill filed for discovery and relief, the party relied upon a deed said

to have been lost, but which had never been formally executed to convey the estate; and upon a receipt of the purchase money, binding the party to convey the same; the person alleged to have executed the lost deed, and who gave the receipt, should have been made a party to the proceeding; although he had, subsequently, by a legal and formal conveyance, duly executed, conveyed the estate to others; and thus, so far as he could, divested himself of all title in the same. *Findlay v. Hinde*, 1 Pet. 241, 7 L. Ed. 123.

"In the case of *Simms v. Guthrie*, 9 Cranch 19, 25, 3 L. Ed. 642, this court declared the general rule to be, that, 'regularly, the claimants who have an equitable title, ought to make those whose title they assert as well as the person for whom they claim as conveyance, parties to the suit.' 'And that for omitting to do so, an original bill may be dismissed.'" *Findlay v. Hinde*, 1 Pet. 241, 7 L. Ed. 128.

Where the object of a bill is to obtain conveyances from two persons of certain lands which they were supposed to hold as tenants in common, and to which the plaintiffs assert an equitable title, it is irregular to make a decree respecting the title, until both the defendants are before the court. *Conn v. Penn*, 5 Wheat. 424, 5 L. Ed. 125.

Upon a bill filed by the United States, proceeding as ordinary creditors, against the debtor of their debtor, for an account, etc., the original debtor to the United States ought to be a party, and the account taken between him and his debtor. *United States v. Howland*, 4 Wheat. 108, 4 L. Ed. 526.

25. See post, "Parties with Separable Interest in Controversy," III, A, 2, c.

26. *Ribon v. Railroad Cos.*, 16 Wall. 446, 21 L. Ed. 367; *Mallow v. Hinde*, 12 Wheat. 193, 6 L. Ed. 599; *Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158; *Barney v. Baltimore*, 6 Wall. 280, 18 L. Ed. 825; *Cunningham v. Macon, etc.*, R. Co., 109 U. S. 446, 27 L. Ed. 992; *California v. Southern Pac. Co.*, 157 U. S. 229, 39 L. Ed. 683; *Goodman v. Niblack*, 102 U. S. 556, 26 L. Ed. 229; *Bank v. Carrollton Railroad*, 11 Wall. 624, 20 L. Ed. 82.

"There is a third class, whose interests in the subject matter of the suit, and the relief sought, are so bound up with that of the other parties that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed. In such cases, the court refuses to entertain the suit when these parties cannot be subjected to its jurisdiction." *Kendig v. Dean*, 97 U. S. 423, 24 L. Ed. 1061, quoting from *Barney v. Baltimore*, 6 Wall. 280, 18 L.



congress of 1839 and the 47th rule of equity practice give no warranty for the idea that parties whose presence was before indispensable could thereafter be dispensed with.<sup>27</sup>

c. *Parties with Separable Interest in Controversy.*—**In General.**—The second class of parties consists of those persons having an interest in the controversy and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but 'if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties.<sup>28</sup> Where a person is interested in a controversy, but will not be directly affected by a decree made

Ed. 825. See, also, *Russell v. Clarke*, 7 Cranch 69, 3 L. Ed. 271.

Where a bill is filed to enforce a claim or lien upon a specific fund within reach of the court, and such of the defendants as are neither inhabitants of nor found within the district do not voluntarily appear, the circuit court has jurisdiction to adjudicate upon their right to, or interest in, the fund, if they be notified of the pendency of the suit by service or publication, in the mode prescribed by § 738 of the Revised Statutes. In such a case, where it appears by the bill that certain nonresidents are indispensable parties, and they are not made parties, the bill is bad on demurrer, and should be dismissed without prejudice. *Goodman v. Niblack*, 102 U. S. 556, 26 L. Ed. 229.

Although in general a bill in chancery will not be dismissed for want of proper parties, the rule resting as it does upon the supposition that the fault may be remedied, and the necessary parties supplied, does not apply when this is impossible, and whenever a decree cannot be made without prejudice to one not a party. In such a case the bill must be dismissed. Hence, in a case where, if all the partners were made parties to the bill, the court in which the bill was filed would, from the character of its jurisdiction (which was confined to persons resident within particular districts, which one of the partners here was not), be without any jurisdiction of the controversy, the bill must be dismissed. *Bank v. Carrollton Railroad*, 11 Wall. 624, 20 L. Ed. 82.

Generally, as to dismissal for want of indispensable parties, see the title DISMISSAL, DISCONTINUANCE AND NONSUIT, vol. 5, p. 383.

As to objections for want of indispensable parties, duty of court to notice, etc., see post. "Raising and Waving Objections," III, D.

27. **General rule as to indispensable parties not affected by act of congress, 1839, nor 47th rule of equity practice.**—*Minnesota v. Northern Securities Co.*, 184 U. S. 199, 46 L. Ed. 499; *Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158; *Swan Land, etc., Co. v. Frank*, 148 U. S. 603, 37 L. Ed. 577; *Greeley v. Lowe*, 155 U. S.

58, 39 L. Ed. 69; *California v. Southern Pac. Co.*, 157 U. S. 229, 39 L. Ed. 683; *Hagan v. Walker*, 14 How. 29, 14 L. Ed. 312; *Barney v. Baltimore*, 6 Wall. 280, 18 L. Ed. 825; *Gregory v. Stetson*, 133 U. S. 579, 33 L. Ed. 792. See the titles CREDITORS' SUITS, vol. 5, p. 38; JUDGMENTS AND DECREES, vol. 7, p. 544.

The general rule that suits in equity cannot be entertained and decrees be rendered, when necessary or indispensable parties, whether corporations or individuals, are not brought before the court, is not affected by § 1 of the act of February 28, 1839, c. 36, re-enacted in § 737 of the Revised Statutes of the United States, as the federal supreme court has repeatedly held. *Swan Land, etc., Co. v. Frank*, 148 U. S. 603, 37 L. Ed. 577.

28. **Persons with separable interests proper but not indispensable parties.**—*Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158; *Vattier v. Hinde*, 7 Pet. 252, 8 L. Ed. 675; *Minnesota v. Northern Securities Co.*, 184 U. S. 199, 46 L. Ed. 499; *Ribon v. Railroad Cos.*, 16 Wall. 446, 21 L. Ed. 367; *Traders' Bank v. Campbell*, 14 Wall. 87, 20 L. Ed. 832; *Barney v. Baltimore*, 6 Wall. 280, 18 L. Ed. 825; *Canal Co. v. Gordon*, 6 Wall. 561, 18 L. Ed. 894; *Cunningham v. Macon, etc., R. Co.*, 109 U. S. 446, 27 L. Ed. 992; *Hotel Co. v. Wade*, 97 U. S. 13, 24 L. Ed. 917; *California v. Southern Pac. Co.*, 157 U. S. 229, 39 L. Ed. 683; *McBurney v. Carson*, 99 U. S. 567, 25 L. Ed. 378; *Horn v. Lockhart*, 17 Wall. 570, 21 L. Ed. 657; *Williams v. United States*, 138 U. S. 514, 34 L. Ed. 1026. And see *Russell v. Clarke*, 7 Cranch 69, 3 L. Ed. 271; *Cameron v. McRoberts*, 3 Wheat. 591, 4 L. Ed. 467; *Osborn v. United States Bank*, 9 Wheat. 738, 6 L. Ed. 204; *Harding v. Handy*, 11 Wheat. 103, 132, 6 L. Ed. 429; *Simms v. Guthrie*, 9 Cranch 19, 3 L. Ed. 642; *West v. Smith*, 8 How. 402, 12 L. Ed. 1130; *Gavilords v. Kelshaw*, 1 Wall. 81, 17 L. Ed. 612.

When objection is taken to the jurisdiction of the circuit court of the United States by reason of the citizenship of some of the parties to a suit, the question is whether to a decree authorized by the case presented they are indispensable par-

in his absence, he is not an indispensable party, but he should be made a party if possible, and the court will not proceed to a decree without him if he can be reached.<sup>29</sup>

d. *Formal Parties.*—**In General.**—The third and last class of parties in equity, known as formal or nominal parties, consists of those persons who, while not interested in the controversy between the immediate litigants, yet have an interest in the subject matter which may be conveniently settled in the suit, and thereby prevent further litigation.<sup>30</sup> Such persons may be parties or not, at the option of the complainant.<sup>31</sup>

**Joinder or Nonjoinder as Affecting Jurisdiction of Federal Court.**—It is settled that the jurisdiction of the federal courts will not be defeated by

ties. If their interests are severable from those of other parties, and a decree without prejudice to their rights can be made, the jurisdiction of the court should be retained and the suit dismissed as to them. *Horn v. Lockhart*, 17 Wall. 570, 21 L. Ed. 657, citing *Barney v. Baltimore*, 6 Wall. 280, 18 L. Ed. 825.

**Illustrations.**—In a bill in equity in the circuit court, by one distributee of an intestate's estate against an administrator, it is not indispensable that such distributee make the other distributees parties, if the court is able to proceed to a decree, either through a reference to a master or some other proper way, to do justice to the parties before it without injury to absent parties equally interested. *Payne v. Hook*, 7 Wall. 425, 19 L. Ed. 260.

On a bill filed by an executor, against a devisee of lands charged with the payments of debts, for an account of the trust fund, etc., the creditors are not indispensable parties to the suit; the fund may be brought into court, and distributed, under its direction, according to the rights of those who may apply for it. *Potter v. Gardner*, 12 Wheat. 498, 6 L. Ed. 706.

Where one of four joint tenants makes a deed of trust (a mortgage) of land conveyed to the four—the deed of trust purporting to convey the whole estate—it is not necessary, on a bill filed to have the land sold under the deed of trust (in other words, to foreclose the mortgage), to make the three who do not convey parties defendant to the bill. *Stephen v. Beall*, 22 Wall. 329, 22 L. Ed. 786.

In a suit to recover property sold by executors under one will when the complainant claimed under a subsequent will, it was not necessary to make such executors parties. *Gaines v. Hennen*, 24 How. 553, 16 L. Ed. 770.

Where a bill was filed in the circuit court of the United States for the county of Alexandria, by a legatee, against the executor and residuary devisee, praying for the sale of the real estate in order to pay legacies, the personal estate being exhausted, it was not necessary to make a special devisee of land in Virginia who resided in Virginia, a party defendant.

*West v. Smith*, 8 How. 402, 12 L. Ed. 1130.

It is proper to make a prior encumbrancer, who holds the legal title, a party to the bill, in order that the whole title may be sold under the decree; for the purpose of such a decree, the prior encumbrancer is a necessary party; but the court may order a sale subject to the encumbrance, without having the prior encumbrancer before it, and in fit cases it will do so. *Hagan v. Walker*, 14 How. 29, 14 L. Ed. 312.

If the prior encumbrancer is out of the jurisdiction, or cannot be joined without defeating it, it is a fit cause to dispense with his presence, and order a sale subject to his encumbrance, which will not be affected by the decree. *Hagan v. Walker*, 14 How. 29, 14 L. Ed. 312. See the titles EXECUTORS AND ADMINISTRATORS, vol. 6, p. 119; MORTGAGES AND DEEDS OF TRUST, vol. 8, p. 452.

**29.** *Williams v. Bankhead*, 19 Wall. 563, 22 L. Ed. 184. And see *Traders' Bank v. Campbell*, 14 Wall. 87, 20 L. Ed. 832; *Kendig v. Dean*, 97 U. S. 423, 24 L. Ed. 1061.

**30. Formal parties.**—*Williams v. Bankhead*, 19 Wall. 563, 22 L. Ed. 184; *Barney v. Baltimore*, 6 Wall. 280, 18 L. Ed. 825; *Traders' Bank v. Campbell*, 14 Wall. 87, 20 L. Ed. 832; *Cunningham v. Macon, etc., R. Co.*, 109 U. S. 446, 27 L. Ed. 992; *Kendig v. Dean*, 97 U. S. 423, 24 L. Ed. 1061. See, also, *Shields v. Barrow*, 17 How. 120, 15 L. Ed. 158; *Minnesota v. Northern Securities Co.*, 184 U. S. 199, 46 L. Ed. 499; *Russell v. Clarke*, 7 Cranch 69, 3 L. Ed. 271; *Wormley v. Wormley*, 8 Wheat. 421, 451, 5 L. Ed. 651; *Carneal v. Banks*, 10 Wheat. 188, 6 L. Ed. 298.

**31. Option of complainant as to formal parties.**—*Williams v. Bankhead*, 19 Wall. 563, 22 L. Ed. 184; *Shields v. Barrow*, 17 How. 120, 15 L. Ed. 158.

"A defendant may be a proper, but not an indispensable party to the relief asked. In a variety of cases it is in the discretion of the plaintiff as to whom he will join as defendants. Consistently with established rules of pleading he may be governed often by considerations of mere convenience." *Barney v. Latham*, 103 U. S. 205, 26 L. Ed. 514.



the mere joinder or nonjoinder of formal parties.<sup>32</sup>

3. PARTIES BY REPRESENTATION—*a. In General.*—While, as has been seen, all persons interested in the object of the suit, and whose rights will be directly affected by the decree, must, as a general rule, be made parties to the suit,<sup>33</sup> yet, from considerations of necessity or paramount convenience, it is a well-established doctrine of equity practice, that, under certain circumstances, persons whose interests are properly represented in a suit will be held to be equally bound by the decree rendered therein, as though themselves parties of record.<sup>34</sup> In every case, however, there must be such parties before the court as to insure a fair trial of the issue in behalf of all.<sup>35</sup>

*b. When Proper.*—(1) *Persons Acting in Fiduciary Capacity.*—A very usual application of the rule as to parties by representation is found in the prosecution or defense of suits by persons sustaining trust relations to others, as representatives of the persons to whom they sustain such relations; thus, for instance, it applies in the case of trustees,<sup>36</sup> assignees for the benefit of credit-

**32. Joinder or nonjoinder as affecting federal jurisdiction.**—*Wormley v. Wormley*, 8 Wheat. 421, 451, 5 L. Ed. 651; *Wilson v. Oswego Tp.*, 151 U. S. 56, 38 L. Ed. 70. See the titles BAILMENTS, vol. 2, p. 790; COURTS, vol. 4, p. 941.

**33. General rule as to indispensable parties.**—See ante, "Indispensable Parties," III, A, 2, b.

**34. Conclusiveness of decree upon persons not parties of record but properly represented.**—*Manson v. Duncanson*, 166 U. S. 533, 41 L. Ed. 1105; *Rand v. Walker*, 117 U. S. 340, 29 L. Ed. 907; *McArthur v. Scott*, 113 U. S. 340, 28 L. Ed. 1015; *Shaw v. Railroad Co.*, 100 U. S. 605, 25 L. Ed. 757; *Railroad Co. v. Howard*, 7 Wall. 392, 19 L. Ed. 117; *Wabash, etc., Canal Co. v. Beers*, 2 Black 448, 17 L. Ed. 327; *Zabriskie v. Cleveland, etc., R. Co.*, 23 How. 381, 16 L. Ed. 488; *Georgetown v. Alexandria Canal Co.*, 12 Pet. 91, 9 L. Ed. 1012; *Mason v. Muncaster*, 9 Wheat. 445, 6 L. Ed. 131. See, generally, the title RES ADJUDICATA.

Stockholders in a corporation need not be individually made parties in a creditor's suit where their interest is fully represented both by the railroad company and by a committee chosen and appointed by them. *Railroad Co. v. Howard*, 7 Wall. 392, 19 L. Ed. 117. See the title STOCK AND STOCKHOLDERS.

In *Mason v. Muncaster*, 9 Wheat. 445, 6 L. Ed. 131, it was held that the individual parishioners, residing out of Alexandria county, were no more necessary to be made parties to the bill praying a sale of the glebe, and other parochial property than the individuals residing within the county. Both were represented in the only way known to the laws, by the vestry duly appointed to manage parochial concerns. See the title RELIGIOUS SOCIETIES.

**35. Must be sufficient parties to insure fair trial of issue.**—See post, "Numerous Parties," III, A, 3, b, (2).

**36. Trustees.**—*Manson v. Duncanson*, 166 U. S. 533, 41 L. Ed. 1105; *Elwell v. Fosdick*, 134 U. S. 500, 33 L. Ed. 998;

*Beals v. Illinois, etc., R. Co.*, 133 U. S. 290, 33 L. Ed. 608; *Vetterlein v. Barnes*, 124 U. S. 169, 31 L. Ed. 400; *Rand v. Walker*, 117 U. S. 340, 29 L. Ed. 907; *Shaw v. Railroad Co.*, 100 U. S. 605, 25 L. Ed. 757; *Carey v. Brown*, 92 U. S. 171, 23 L. Ed. 479; *Kerrison v. Stewart*, 93 U. S. 155, 23 L. Ed. 843.

"The general rule is, that in suits respecting trust property, brought either by or against the trustees, the cestuis que trust as well as the trustees are necessary parties. Story's Eq. Pl., § 207. To this rule there are several exceptions. One of them is, that where the suit is brought by the trustee to recover the trust property or to reduce it to possession and in no wise affects his relation with his cestuis que trust, it is unnecessary to make the latter parties. *Horsly v. Fawcett*, 11 Beav. 569, was a case of this kind. The objection taken here was taken there. The Master of the Rolls said, 'If the object of the bill were to recover the fund with a view to its administration by the court, the parties interested must be represented. But it merely seeks to recover the trust moneys, so as to enable the trustee hereafter to distribute them agreeably to the trusts declared. It is, therefore, unnecessary to bring before the court the parties beneficially interested.' Such is now the settled rule of equity pleading and practice. *Adams v. Bradley et al.*, 6 Mich. 346; *Ashton v. The Atlantic Bank*, 3 Allen, 217; *Boyden v. Partridge et al.*, 2 Gray. 191; *Swift and Others v. Stebbins*, 4 Stew. & P. 447; *The Association, etc., v. Beekman, Adm'r, et al.*, 21 Barb. 555; *Alexander v. Cana*, 1 De G. & Sm. Ch. 415; *Potts v. The Thames Haven and Dock Co.*, 7 Eng. Law & Eq. 262; *Story v. Livingston*, 13 Pet. 359, 10 L. Ed. 200." *Carey v. Brown*, 92 U. S. 171, 23 L. Ed. 479. See, also, *Vetterlein v. Barnes*, 124 U. S. 169, 31 L. Ed. 400.

"It is certainly true, as was said in *Kerrison v. Stewart*, 93 U. S. 155, 160, 23 L. Ed. 843, that 'under some circumstances a trustee may represent his beneficiaries in all things relating to their



ors,<sup>37</sup> assignees in bankruptcy,<sup>38</sup> executors and administrators,<sup>39</sup> receivers, etc.<sup>40</sup>

(2) *Numerous Parties.*—**In General.**—The rule is well established that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others; and a bill may also be maintained against a portion of a numerous body of defendants, representing the common interest.<sup>41</sup> Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would often-times prevent the prosecution of a suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court.<sup>42</sup> Thus, for instance, when there are some fifteen hundred persons represented by the complainants, and over double that number by the defendants, it is manifest that to require all the parties to be brought upon the record, as is required in a suit at law, would amount to a denial of justice.<sup>43</sup> The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained.<sup>44</sup> In all cases, however, where exceptions to the general rule are allowed, and a few are permitted to sue or defend on behalf of the many, by representation, care must be taken that

common interest in the trust property. He may be invested with such powers and subjected to such obligations that those for whom he holds will be bound by what is done against him, as well as by what is done by him. The difficulty lies in ascertaining whether he occupies such a position, not in determining its effect if he does. If he has been made such a representative, it is well settled that his beneficiaries are not necessary parties to a suit by him against a stranger to enforce the trust, \* \* \* or to one by a stranger against him to defeat it in whole or in part." *Rand v. Walker*, 117 U. S. 340, 29 L. Ed. 907.

The trustee to whom a railroad company executed a mortgage upon its property, to secure the payment of its bonds, represents the bondholders in all legal proceedings carried on by him affecting his trust, to which they are not actual parties, and whatever binds him, if he acts in good faith, binds them. *Shaw v. Railroad Co.*, 100 U. S. 605, 25 L. Ed. 757. See the titles RES ADJUDICATA; TRUSTS AND TRUSTEES.

**37. Assignees for benefit of creditors.**—*Manson v. Duncanson*, 166 U. S. 533, 41 L. Ed. 1105. See the title ASSIGNMENT FOR THE BENEFIT OF CREDITORS, vol. 2, p. 629.

**38. Assignees in bankruptcy.**—*Buffington v. Harvey*, 95 U. S. 99, 24 L. Ed. 381. See the title BANKRUPTCY, vol. 2, pp. 886, 908.

**39. Executors and administrators.**—*Dandridge v. Washington*, 2 Pet. 370, 7 L. Ed. 454; *Potter v. Gardner*, 12 Wheat. 498, 6 L. Ed. 706. See the title EXECU-

TORS AND ADMINISTRATORS, vol. 6, p. 178.

**40. Receivers.**—*Porter v. Sabin*, 149 U. S. 473, 37 L. Ed. 815. See the titles RECEIVERS; STOCK AND STOCKHOLDERS.

**41. Suits by or against representatives of numerous parties.**—*Wallace v. Adams*, 204 U. S. 415, 15 L. Ed. 547; *New Orleans v. Warner*, 180 U. S. 199, 45 L. Ed. 493; *Scott v. Donald*, 165 U. S. 107, 41 L. Ed. 648; *United States v. Old Settlers*, 148 U. S. 427, 37 L. Ed. 509; *McArthur v. Scott*, 113 U. S. 340, 28 L. Ed. 1015; *Ribon v. Railroad Cos.*, 16 Wall. 446, 21 L. Ed. 367; *Wabash, etc., Canal Co. v. Beers*, 2 Black 448, 17 L. Ed. 327; *Zabriskie v. Cleveland, etc., R. Co.*, 23 How. 381, 16 L. Ed. 488; *Bacon v. Robertson*, 18 How. 480, 15 L. Ed. 499; *Ayres v. Carver*, 17 How. 591, 15 L. Ed. 179; *Smith v. Swarmstedt*, 16 How. 288, 14 L. Ed. 942; *Marshall v. Baltimore, etc., R. Co.*, 16 How. 314, 14 L. Ed. 953; *Georgetown v. Alexandria Canal Co.*, 12 Pet. 91, 9 L. Ed. 1012; *Beatty v. Kurtz*, 2 Pet. 566, 7 L. Ed. 521; *Mandeville v. Riggs*, 2 Pet. 482, 7 L. Ed. 493.

**42. Smith v. Swarmstedt**, 16 How. 288, 14 L. Ed. 942.

**43. Smith v. Swarmstedt**, 16 How. 288, 14 L. Ed. 942.

"The right might be defeated by objections to parties, from the difficulty of ascertaining them, or if ascertained, from the changes constantly occurring by death or otherwise." *Smith v. Swarmstedt*, 16 How. 288, 14 L. Ed. 942.

**44. Smith v. Swarmstedt**, 16 How. 288, 14 L. Ed. 942.

persons are brought on the record fairly representing the interest or right involved so that it may be fully and honestly tried.<sup>45</sup>

**Necessity for Community of Interest.**—The interest that will enable the court to dispense with the presence of all the parties, when numerous, except a determinate number, is not only an interest in the question, but one in common in the subject matter of the suit.<sup>46</sup>

**Applications of Rule.**—Among the more familiar instances of parties having a common interest, who, by reason of their numbers, may sue or be sued by representation, are creditors,<sup>47</sup> holders of bonds or warrants,<sup>48</sup> stockholders,<sup>49</sup>

**45. Sufficient persons must be brought on record to insure fair trial.**—McArthur *v.* Scott, 113 U. S. 340, 28 L. Ed. 1015; Smith *v.* Swormstedt, 16 How. 288, 14 L. Ed. 942; United States *v.* Old Settlers, 148 U. S. 427, 37 L. Ed. 509.

**46. Necessity for community of interest.**—Scott *v.* Donald, 165 U. S. 107, 41 L. Ed. 643; Smith *v.* Swormstedt, 16 How. 288, 14 L. Ed. 942; Ayres *v.* Carver, 17 How. 591, 15 L. Ed. 179; Beatty *v.* Kurtz, 2 Pet. 556, 7 L. Ed. 521. See, also, United States *v.* Old Settlers, 148 U. S. 427, 37 L. Ed. 509.

There are cases in which it is competent for some persons to come into a court of equity as plaintiffs, for themselves and others having similar interests; such is the familiar example of what is called a creditors' bill. But in all these cases, the parties have an interest in the subject matter, which enables them to sue; and the others are treated as a kind of plaintiffs with those named, although they themselves are not named. *Georgetown v. Alexandria Canal Co.*, 12 Pet. 91, 9 L. Ed. 1012.

"Mr. Justice Story, in his valuable treatise on Equity Pleadings, after discussing this subject with his usual research and fullness, arranges the exceptions to the general rule, as follows: 1. Where the question is one of a common or general interest, and one or more sue or defend for the benefit of the whole. 2. Where the parties form a voluntary association for public or private purposes, and those who sue or defend may fairly be presumed to represent the rights and interests of the whole; and 3. Where the parties are very numerous, and though they have or may have separate and distinct interests, yet it is impracticable to bring them all before the court. In this latter class, though the rights of the several persons may be separate and distinct, yet there must be a common interest or a common right, which the bill seeks to establish or enforce. As an illustration, bills have been permitted to be brought by the lord of a manor against some of the tenants, and vice versa, by some of the tenants in behalf of themselves and the other tenants, to establish some right—such as suit to a mill, or right of common, or to cut turf. So by a parson of a parish

against some of the parishioners to establish a general right to tithes—or conversely, by some of the parishioners in behalf of all to establish a parochial modus." Smith *v.* Swormstedt, 16 How. 288, 14 L. Ed. 942.

"In all these and the like instances given in the books, there is a community of interest growing out of the nature and condition of the right in dispute; for, although there may not be any privity between the numerous parties, there is a common title out of which the question arises, and which lies at the foundation of the proceedings." Scott *v.* Donald, 165 U. S. 107, 41 L. Ed. 648.

**47. Creditors.**—*Georgetown v. Alexandria Canal Co.*, 12 Pet. 91, 9 L. Ed. 1012. See the title CREDITORS' SUITS, vol. 5, pp. 22, 37.

**48. Holders of bonds or warrants.**—*New Orleans v. Warner*, 180 U. S. 199, 45 L. Ed. 493; *Wabash, etc., Canal Co. v. Beers*, 2 Black 448, 17 L. Ed. 327. And see the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES, vol. 8, p. 650.

**49. Stockholders of corporations.**—*Bacon v. Robertson*, 18 How. 480, 15 L. Ed. 499; *Zabriskie v. Cleveland, etc., R. Co.*, 23 How. 381, 16 L. Ed. 488.

"The stockholders are interested in these questions, and are then proper parties to the bill. The number of the parties renders it impracticable to bring all before the court, and therefore the suit may be prosecuted in the form which has been employed in this suit. This court sustained such a bill in the case of Smith *v.* Swormstedt, 16 How. 288, 14 L. Ed. 942." *Bacon v. Robertson*, 18 How. 480, 15 L. Ed. 499.

Where a bill was filed against the stockholders of a voluntary association for the purposes of banking, and the process was returned "served" upon some of the parties named in the bill, and as to others, who were not within the reach of the process, "not found," the court stated that it was not meant to say, that in cases of this nature, it is necessary to bring all the stockholders before the court, before any decree can be made. *Mandeville v. Riggs*, 2 Pet. 482, 7 L. Ed. 493. See the title STOCK AND STOCKHOLDERS.



members of voluntary societies or companies,<sup>50</sup> parishioners, etc.<sup>51</sup> In suits affecting the rights of residuary legatees or of next of kin, while the general rule is that all the members of the class must be made parties,<sup>52</sup> yet where they are numerous, and only some of them, together with the executor and trustee under the will, are made parties, it has been held that the court, upon being satisfied that it has a sufficient number before it to secure a fair trial of the question at issue, may hear the cause.<sup>53</sup> The decree must, however, be without prejudice to the rights of those who are not made parties, and who do not come in before the decree.<sup>54</sup>

**Form and Requisites of Bill.**—Where a suit is brought by or against a few individuals as representing a numerous class, that fact must be alleged of record, so as to present to the court the question whether sufficient parties are before it to properly represent the rights of all,<sup>55</sup> and the bill should be so framed as to give those interested who are not parties, an opportunity to come in and be made parties.<sup>56</sup>

(3) *Persons Not in Being, Remaindermen, Reversioners, etc.*—It is well established that under certain circumstances the owner of the first estate of freehold, representing the whole estate, and identified in interest with all who come

**50. Members of voluntary societies, etc.**—Beatty v. Kurtz, 2 Pet. 566, 7 L. Ed. 521.

Commissioners appointed by the Methodist Episcopal Church South, may file a bill in chancery, in behalf of themselves and those whom they represent against the trustees of the book concern, for a division of the property. Smith v. Swormstedt, 16 How. 288, 14 L. Ed. 942.

"In courts of equity, where there are very numerous associates having all the same interest, they may plead and be impleaded through persons representing their joint interests; and, as in the case between the northern and southern branches of the Methodist Church, lately decided by this court, the fact that individuals adhering to each division were known to reside within both states of which the parties to the suit were citizens, was not considered as a valid objection to the jurisdiction." Marshall v. Baltimore, etc., R. Co., 16 How. 314, 14 L. Ed. 953.

**51. Parishioners.**—"It is not necessary to decide the case on this point; because we think it one of those cases, in which certain persons, belonging to a voluntary society, and having a common interest, may sue in behalf of themselves and others having the like interest, as part of the same society, for purposes common to all, and beneficial to all. Thus, some of the parishioners may sue a parson to establish a general modus, without joining all; and some of the members of a voluntary society or company, when the parties are very numerous, may sue for an account against others, without joining all. Cooper's Eq. Plead. 40, 41; Mitf. Plead. 145." Beatty v. Kurtz, 2 Pet. 566, 585, 7 L. Ed. 521. See the title ASSOCIATIONS, vol. 2, p. 634.

**52. General rule as to residuary legatees, etc.**—McArthur v. Scott, 113 U. S. 340, 28 L. Ed. 1015.

**53. McArthur v. Scott**, 113 U. S. 340, 28 L. Ed. 1015.

The court did not consider it necessary to make the residuary legatees parties, in a proceeding, the sole object of which was to ascertain and distribute among the nephews of the testatrix, the amount to which they were entitled for the expenses of education; the residuary legatees have, undoubtedly, an interest in reducing every demand on the estate; whatever remains, sinks into the residuum and that residuum is diminished as well by the claims of creditors and specific legatees, as by this. In all such cases, the executors represent the residuary legatees, and guard their interests; it is a part of that duty which requires them to protect the interests of the estate; in such suits, the residuary legatees are never made parties; to require it, would be an intolerable burden on those who have claims on an estate in the hands of executors. Dandridge v. Washington, 2 Pet. 370, 7 L. Ed. 454.

**54. Decree to be without prejudice to parties not coming in prior thereto.**—McArthur v. Scott, 113 U. S. 340, 28 L. Ed. 1015.

**55. Allegation that parties of record sue or defend in representative capacity.**—McArthur v. Scott, 113 U. S. 340, 28 L. Ed. 1015; Railroad Co. v. Orr, 18 Wall. 471, 21 L. Ed. 810.

**Amendment at hearing to show such fact.**—"The court will generally at the hearing allow a bill, which has originally been filed by one individual of a numerous class in his own right, to be amended so as to make such individual sue on behalf of himself and the rest of the class." Richmond v. Irons, 121 U. S. 27, 30 L. Ed. 864, quoting from Dan. Ch. Pr. (4th Ed.), c. 5, § 1, p. 245.

**56. Bill must afford opportunity for absent persons to come in as parties.**—Railroad Co. v. Orr, 18 Wall. 471, 21 L. Ed. 810.



after him, sufficiently represents those yet unborn.<sup>57</sup> In the case of an estate tail, for instance, it has been held to be sufficient, in order to bind contingent remaindermen, to bring before the court the first tenant in tail, and if no tenant in tail, in being, the first person entitled to the inheritance, and if no such person, then the tenant for life.<sup>58</sup> In a bill to enforce a debt charged upon real estate devised to one for life, with contingent remainder to his unborn son, the executor and tenant for life are sufficient parties.<sup>59</sup> In the case of a strict partition, by division of the land itself, it is sufficient to make the present owner, or, in some cases, the tenant for life of each share, a party, because the interest of those who come after him is not otherwise affected than by being changed from an estate in common to an estate in severalty.<sup>60</sup>

4. POWER OF EQUITY TO RELIEVE REGARDLESS OF POSITION OF PARTIES ON RECORD.—A court of equity looks to substance rather than to form, and when it has jurisdiction of parties it grants the appropriate relief without regard to whether they come as plaintiff or defendant.<sup>61</sup>

**B. Complainants**—1. INTEREST ENTITLING TO SUE.—In equity, as at law, as has already been seen, a direct and real interest is essential in order that one may be a proper party,<sup>62</sup> and no one need be made a party complainant, in whom there exists no interest,<sup>63</sup> and the bringing of a suit by a plaintiff who shows no interest of any kind in the suit, is fatal to the bill if taken on demurrer or answer.<sup>64</sup> Save in a few instances, where, by statute or the settled practice of the courts, the plaintiff is permitted to sue for the benefit of another, he is bound to show an interest in the suit personal to himself,<sup>65</sup> and even in a proceeding which he prosecutes for the benefit of the public, as, for example, in cases of nuisance, he must generally aver an injury peculiar to

57. Owner of first freehold estate as representing persons yet unborn.—*McArthur v. Scott*, 113 U. S. 340, 28 L. Ed. 1015.

58. Sufficient representation to bind remaindermen, etc.—*McArthur v. Scott*, 113 U. S. 340, 28 L. Ed. 1015. See, also, *Miller v. Texas, etc., R. Co.*, 132 U. S. 662, 33 L. Ed. 487; *Knotts v. Stearns*, 91 U. S. 638, 23 L. Ed. 252. See, generally, the titles REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS; RES ADJUDICATA.

The rule stated in the text was laid down by Lord Redesdale, in *Gifford v. Hort*, 1 Sch. & Lef. 386, 408, and the reason assigned was that "where all the parties are brought before the court that can be brought before it, and the court acts on the property according to the rights that appear, without fraud, its decision must of necessity be final and conclusive." *McArthur v. Scott*, 113 U. S. 340, 28 L. Ed. 1015.

59. Executor and tenant for life as representing person unborn.—*McArthur v. Scott*, 113 U. S. 340, 28 L. Ed. 1015.

60. Tenants for life as representative parties in strict partition proceedings.—*McArthur v. Scott*, 113 U. S. 340, 28 L. Ed. 1015. See the title PARTITION.

61. Position of parties on record immaterial.—*Littlefield v. Perry*, 21 Wall. 205, 22 L. Ed. 577.

"By the flexibility of chancery practice, a person whose interests in the subject of litigation are on the same side with the complainant may be made a defendant."

*United States v. Union Pac. R. Co.*, 98 U. S. 569, 25 L. Ed. 143.

As to making persons parties defendant who refuse to join as plaintiffs, see post, "Joinder as Defendants of Persons Refusing to Join as Plaintiffs," III, C, 3, b.

As to relief as between codefendants, see the title JUDGMENTS AND DECREES, vol. 7, p. 568.

62. See ante, "Necessity for Interest in Litigation," II, C.

63. See ante, "Interest as Criterion," III, A, 1.

64. Objection of want of interest fatal if taken on demurrer or answer.—*House v. Mullen*, 22 Wall. 42, 22 L. Ed. 838.

"It is true, as a rule of equity pleading, that none should be made parties, either as complainants or defendants, who have no interest in the matters in controversy, or which can be affected by the decree of the court. Vide *Story, Eq. Pl.*, ch. 4, p. 231; so too in § 232 of the same work it is said: 'In cases where the want of interest applies, it is equally fatal when applicable to one of several plaintiffs as it is when applicable to several defendants. Indeed, the objection in the former case is fatal to the whole suit, whereas, in the latter case, it is fatal (if taken in due time) only as against the defendant improperly joined.'" *Livingston v. Woodworth*, 15 How. 546, 14 L. Ed. 809.

65. Necessity for plaintiff to show personal interest.—*Tyler v. Judges*, 17 C. U. S. 405, 45 L. Ed. 252.

himself, as distinguished from the great body of his fellow citizens.<sup>66</sup>

2. **RULE AS TO REAL PARTIES IN INTEREST.**—It is a general rule of equity practice that suits shall be brought in the name of the real party in interest;<sup>67</sup> and it is this rule of equity that forms the basis of the provisions of the various codes and practice acts requiring actions to be brought in the name of the real party in interest.<sup>68</sup>

3. **JOINDER.**—**In General.**—The test, generally speaking, as to whether two or more plaintiffs may properly join in a bill in equity, is the community of their interests. Where such community of interest exists they may properly unite.<sup>69</sup> Where, however, there is no community of interest, such joinder is improper, and a bill will be bad for multifariousness, or misjoinder, where the interest of the coplaintiffs are distinct and unconnected.<sup>70</sup>

**Necessity for Joining Formal Parties to Written Instrument.**—Even in equity, a suit on a written instrument must be in the name of all who are formal parties to it, and retain an interest in it.<sup>71</sup>

**C. Defendants**—1. **NECESSITY.**—In proceedings not against the thing, but against the person, a person capable of appearing as defendant, against whom a decree can be pronounced, must be a party to the cause before a decree can be regularly pronounced.<sup>72</sup>

2. **INTEREST AS DETERMINING WHO SHOULD BE MADE DEFENDANTS.**—As has been already stated, interest in the subject matter of the suit is the criterion as to who should be made parties plaintiff or defendant, and no one need be made a party defendant from whom nothing is demanded.<sup>73</sup>

66. **Necessity for showing peculiar injury.**—*Tyler v. Judges*, 179 U. S. 405, 45 L. Ed. 252; *Georgetown v. Alexandria Canal Co.*, 12 Pet. 91, 9 L. Ed. 1012; *Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. 518, 14 L. Ed. 249. See the title **NUISANCES**, vol. 8, p. 933.

67. **Suit to be brought in name of real party in interest.**—*Chew v. Brumagen*, 13 Wall. 497, 20 L. Ed. 663.

"It is settled in this court, that the person for whose benefit a trust is created, who is the ultimate receiver of money, may sustain a suit in equity, to have it paid directly to himself." *Marshall, C. J. Russell v. Clarke*, 7 Cranch 69, 3 L. Ed. 271.

68. See post, "Requirement That Action Be Brought in Name of Real Party in Interest," V, A, 1.

69. **Instances of proper joinder.**—It is not irregular for two mercantile firms to unite as complainants in equity in a creditor's bill. *Nelson v. Hill*, 5 How. 127, 12 L. Ed. 81. See the title **CREDITORS' SUITS**, vol. 5, p. 38.

An assignee of an exclusive right to use ten machines within the city of Louisville, or ten miles round, may join his assignor with him in a suit for a violation of the patent right, under the circumstances of this case. *Woodworth v. Wilson*, 4 How. 712, 11 L. Ed. 1171.

"A further objection was taken, that W. Woodworth, one of the complainants, was improperly joined with E. V. Bunn, the assignee of the exclusive right in Louisville and ten miles around it. The court is of opinion, that the interest of Woodworth in the assignment, as appears from the record, is sufficient to justify

his being made a party jointly with the assignee." *Woodworth v. Wilson*, 4 How. 712, 11 L. Ed. 1171.

If several claimants of portions of an estate unite in filing a bill, this does not make it multifarious. *Shields v. Thomas*, 18 How. 253, 15 L. Ed. 368.

Where a joint judgment has been rendered at law against two or more persons, they have an unquestionable right to unite in their application to a court of equity, for an injunction to such judgment. *Stephens v. McCargo*, 9 Wheat. 502, 6 L. Ed. 145.

70. **Effect of joining plaintiffs whose interest are conflicting.**—*House v. Mullen*, 22 Wall. 42, 22 L. Ed. 838; *Walker v. Powers*, 104 U. S. 245, 26 L. Ed. 729; *Yeaton v. Lenox*, 8 Pet. 123, 8 L. Ed. 889. See, also, *Nelson v. Hill*, 5 How. 127, 12 L. Ed. 81. See, generally, the title **MULTIFARIOUSNESS**, vol. 8, p. 532. And see post, "Manner of Raising," III, D, 1.

71. **Joinder of all formal parties to written instrument.**—*Railroad Co. v. Orr*, 18 Wall. 471, 21 L. Ed. 810.

72. **Necessity for person capable of appearing as defendant.**—*Governor v. Madrazo*, 1 Pet. 110, 7 L. Ed. 73.

"Parties defendant are as necessary to cross bills as to original bills, and their appearance in both cases is enforced by process in the same manner." *Washington Railroad v. Bradleys*, 10 Wall. 299, 19 L. Ed. 894. See the title **CROSS BILLS**, vol. 5, p. 142.

73. **Interest as determining proper parties defendant.**—See ante, "Interest as Criterion," III, A, 1.

Where one of four joint tenants makes



3. **JOINDER**—a. *In General*.—As a general rule, in order that persons may properly be joined as parties defendant in a suit in equity, they should be connected in interest and in liability.<sup>74</sup> And a bill will be multifarious which seeks to enforce against different individuals, demands which are wholly disconnected.<sup>75</sup> While parties should not be subjected to expense and inconvenience in litigating matters in which they have no material interest, multiplicity of suits should be avoided by uniting in one bill all who have an interest in the principal matter in controversy, although the interest may have arisen under distinct contracts.<sup>76</sup> It is not indispensable that all the parties should have an interest in all the matters contained in the suit; it will be sufficient if each party has an interest in some material matters in the suit, and they are connected with the others.<sup>77</sup> The case against one defendant may be so entire as to be incapable of being prosecuted in several suits; and yet some other defendant may be a necessary party to some portion only of the case stated. In the latter case the objection of multifariousness cannot be allowed to prevail.<sup>78</sup>

b. *Joinder as Defendants of Persons Refusing to Join as Plaintiffs*.—Where

a deed of trust (a mortgage) of land conveyed to the four—the deed of trust purporting to convey the whole estate—it is not necessary, on a bill filed to have the land sold under the deed of trust (in other words, to foreclose the mortgage), to make the three who do not convey parties defendant to the bill. *Stephen v. Beall*, 22 Wall. 329, 22 L. Ed. 786.

**"A defendant may be a proper, but not indispensable, party to the relief asked.** In a variety of cases it is in the discretion of the plaintiff as to whom he will join as defendants. Consistently with established rules of pleading, he may be governed often by considerations of mere convenience." *Barney v. Latham*, 103 U. S. 205, 214, 26 L. Ed. 514.

**74. Only those connected in interest and liability properly joined as defendants.**—*Gaines v. Chew*, 2 How. 619, 11 L. Ed. 402; *Nelson v. Hill*, 5 How. 127, 12 L. Ed. 81; *Brown v. Guarantee Trust, etc., Co.*, 128 U. S. 403, 32 L. Ed. 468; *Barney v. Latham*, 103 U. S. 205, 26 L. Ed. 514; *Oliver v. Piatt*, 3 How. 333, 11 L. Ed. 622.

The sureties of an administrator on his official bond may properly be joined with him in an equity proceeding for an erroneous and fraudulent administration of the estate by him, and where, if a balance should be found against the administrator, those sureties would be liable. *Payne v. Hook*, 7 Wall. 425, 19 L. Ed. 260.

When a bill by a widow, claiming real estate, alleges that certain persons named, being several in number, all claim through a deed made by her during coverture, which deed the bill alleges was void for want of her free consent in making it, no demurrer lies to the bill on the ground that the defendants were improperly joined, inasmuch as they had separate and distinct interests which could not be joined in one suit. *House v. Mullen*, 22 Wall. 42, 22 L. Ed. 838.

Where there were two mercantile firms

and some of the members common to both, a creditor's bill was not multifarious when filed against the personal representatives of two of the deceased partners of the two firms and also against the surviving partner of one of the firms. *Nelson v. Hill*, 5 How. 127, 12 L. Ed. 81.

**75. See the title MULTIFARIOUSNESS**, vol. 8, p. 532.

**76. Persons whose interest arises under different contracts.**—*Gaines v. Chew*, 2 How. 619, 11 L. Ed. 402.

A bill filed against the executors of an estate and all those who purchased from them, is not, upon that account alone, multifarious. *Gaines v. Chew*, 2 How. 619, 11 L. Ed. 402.

**77. Brown v. Guarantee Trust, etc., Co.**, 128 U. S. 403, 32 L. Ed. 468.

The fact that one of the deeds of trust covers the entire property, and that some of the creditors who were made defendants have liens upon various portions of that property, makes it eminently proper, and indeed indispensable, if a clear title is to be given by a sale, to adjudicate all the claims in one suit and where all such claims are joined in a bill it is not open to the objection that it is multifarious. *Grant v. Phoenix Life Ins. Co.*, 121 U. S. 105, 30 L. Ed. 905.

**78. Brown v. Guarantee Trust, etc., Co.**, 128 U. S. 403, 32 L. Ed. 468.

"We are of opinion that the bill is in no just sense multifarious. It is true that it embraces the claims of both the companies; but their interests are so mixed up in all these transactions, that entire justice could scarcely be done, at least not conveniently done, without a union of the proprietors of both companies; and if they had not been joined, the bill would have been open to the opposite objection that all the proper parties were not, before the court, so as to enable it to make a final and conclusive decree touching all their interests, several as well as joint." *Oliver v. Piatt*, 3 How. 333, 412, 11 L. Ed. 622.



a person either natural or artificial who is properly a party plaintiff, refuses to act as such, he may properly be joined as a party defendant. Thus, for instance, where a corporation refuses to bring a suit to assert or protect the rights of such corporation, and a suit is brought for that purpose by stockholders, it is proper to make the corporation a party defendant.<sup>79</sup>

**D. Raising and Waiving Objections**—1. **MANNER OF RAISING.**—**Non-joinder.**—Where it appears from the bill that certain persons who are indispensable parties have not been joined, the objection is properly raised by demurrer.<sup>80</sup> Where the defect does not so appear, the objection must be made by plea or answer.<sup>81</sup> The defendant must, however, point out the person or persons who, he insists, ought to be made parties.<sup>82</sup>

**Misjoinder.**—See the title **MULTIFARIOUSNESS**, vol. 8, p. 532.

2. **TIME OF RAISING.**—**Objection for Nonjoinder.**—An objection to parties or the want of parties should be made in the court below,<sup>83</sup> and an objection that persons who were proper but not indispensable parties were not joined comes too late in the appellate court.<sup>84</sup> Where, however, indispensable parties have been omitted, the objection may be taken at any time upon the hearing, or in the appellate court,<sup>85</sup> and the latter court will reverse and remand a case

**79. Joinder as defendants of persons refusing to sue as plaintiffs.**—*Davenport v. Dows*, 18 Wall. 626, 21 L. Ed. 938; *Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401; *Porter v. Sabin*, 149 U. S. 473, 37 L. Ed. 815.

Where a bill is filed by stockholders to enjoin the setting up of a claim for purchase money, against the lands of a company whose capital stock is divided into shares, the ground of the bill being that the party now setting up the claim, induced the complainants to buy their shares by fraudulently representing that the property sold to the company was unincumbered, and that he had no interest in it—the agents of the company also joining in such misrepresentations—the company may be properly made a defendant, though no relief is prayed for against it, but rather relief in its favor. *Jones v. Bolles*, 9 Wall. 364, 19 L. Ed. 734.

If the corporation becomes insolvent, and a receiver of all its estate and effects is appointed by a court of competent jurisdiction, the right to enforce this and all other rights of property of the corporation vests in the receiver, and he is the proper party to bring suit, and, if he does not himself sue, should properly be made a defendant to any suit by stockholders in the right of the corporation. *Porter v. Sabin*, 149 U. S. 473, 37 L. Ed. 815. See the titles **CORPORATIONS**, vol. 4, p. 621; **RECEIVERS**; **STOCK AND STOCKHOLDERS**.

**80. Demurrer proper where defect apparent upon bill.**—*Goodman v. Niblack*, 102 U. S. 556, 26 L. Ed. 229; *Carey v. Brown*, 92 U. S. 171, 23 L. Ed. 479; *Story v. Livingston*, 13 Pet. 359, 10 L. Ed. 200; *Greenleaf v. Queen*, 1 Pet. 138, 7 L. Ed. 85.

**81. Necessity for plea or answer if defect not apparent from bill.**—*Carey v.*

*Brown*, 92 U. S. 171, 23 L. Ed. 479; *Story v. Livingston*, 13 Pet. 359, 10 L. Ed. 200; *Greenleaf v. Queen*, 1 Pet. 138, 7 L. Ed. 85. See, generally, the title **DEMURRERS**, vol. 5, p. 298.

As to nonjoinder of defendants as ground for plea in abatement, see the title **ABATEMENT, REVIVAL AND SURVIVAL**, vol. 1, p. 31.

**82. Designation of omitted parties.**—A bill may be dismissed, where the plaintiff, when called upon to make proper parties, refuses, or is guilty of unreasonable delay, in doing so; but this must be done on demurrer, plea or answer, pointing out the person or persons who, the defendant insists, ought to be made parties. *Greenleaf v. Queen*, 1 Pet. 138, 7 L. Ed. 85.

**83. Objection to be made in court below.**—*Carey v. Brown*, 92 U. S. 171, 23 L. Ed. 479; *Mechanics' Bank v. Seton*, 1 Pet. 299, 7 L. Ed. 152.

**84. Objection for want of proper but not indispensable parties too late on appeal.**—*Carey v. Brown*, 92 U. S. 171, 23 L. Ed. 479; *Gibbs v. Diekma*, 131 U. S., appx. clxxxvi, 26 L. Ed. 176. See the title **APPEAL AND ERROR**, vol. 2, p. 111.

**85. Objection for want of indispensable parties available at hearing or on appeal.**—*Coiron v. Millaudon*, 19 How. 113, 15 L. Ed. 575.

Generally, as to indispensable parties, see ante, "Indispensable Parties," III, A, 2, b.

Although an objection, for want of proper parties, may be taken at the hearing, yet the objection ought not to prevail, upon the final hearing of an appeal; except in very strong cases, and where the court perceives a necessary and indispensable party is wanting. *Mechanics' Bank v. Seton*, 1 Pet. 299, 7 L. Ed. 152.

defective as to indispensable parties, although such deficiency has not been made a point in the court below.<sup>86</sup>

**Objection for Misjoinder.**—See the title MULTIFARIOUSNESS, vol. 8, p. 532.

3. **POWER OF COURT TO NOTICE DEFECT OF PARTIES SUA SPONTE.**—Though a defect of persons who are proper parties only will be waived if not raised at the proper time,<sup>87</sup> yet it has been held that if, at the hearing, the court finds that an indispensable party is not on the record, it should refuse to proceed.<sup>88</sup> The established practice of courts of equity to dismiss the plaintiff's bill, if it appears that to grant the relief prayed for would injuriously affect persons materially interested in the subject matter who are not made parties to the suit, is founded upon clear reasons, and may be enforced by the court sua sponte, though not raised by the pleadings or suggested by the counsel.<sup>89</sup>

**E. Bringing in New Parties**—1. **NECESSITY AND MANNER.**—**In General.**—If the complainant desires to make new parties, he amends his bill and makes them.<sup>90</sup> If the interest of the defendant requires their presence, he takes the objection of nonjoinder, and the complainant is forced to amend, or his bill is dismissed.<sup>91</sup> If, at the hearing, the court finds that an indispensable party is not on the record, it refuses to proceed until such person is brought in, if possible.<sup>92</sup> It has been held that these remedies cover the whole subject, and

**86. Reversal and remand for defect of parties.**—See the title APPEAL AND ERROR, vol. 2, p. 111.

**87.** See ante, "Time of Raising," III, D, 2.

**88. Duty of court to refuse to proceed without indispensable parties.**—*Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158.

**89.** *Minnesota v. Northern Securities Co.*, 184 U. S. 199, 46 L. Ed. 499, citing *Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158; *Hipp v. Babin*, 19 How. 271, 15 L. Ed. 633; *Parker v. Winnipiseogee Lake, etc., Co.*, 2 Black 545, 17 L. Ed. 333. See the title DISMISSAL, DISCONTINUANCE AND NONSUIT, vol. 5, p. 383.

"Zephaniah Jones, the complainant in the suit in which the decree of sale was made, and the other heirs at law of Ann R. Dermott, are indispensable parties. No relief can be given in the case before us which will not seriously and permanently affect their rights and interests. According to the settled rules of equity jurisprudence, the case cannot proceed without their presence before the court. The objection was not taken by the defendant, but the court should, sua sponte, have caused the bill to be properly amended, or have dismissed it, if the amendment were not made. Instead of this being done the cause was heard and decided upon its merits. This was a manifest error. The decree must, therefore, be reversed, and the cause remanded to the court below. In that court both parties can take leave to amend and can modify their pleadings so as to exhibit the case as they may desire respectively to present it." *Hoe v. Wilson*, 9 Wall. 501, 503, 19 L. Ed. 762.

**90. Amendment by plaintiff desiring to make new parties.**—*Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158. See the title AMENDMENT, vol. 1, p. 293.

**91. Amendment on defendant's objec-**

**tion for nonjoinder.**—*Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158; *Greenleaf v. Queen*, 1 Pet. 138, 7 L. Ed. 85; *Gratz v. Cohen*, 11 How. 1, 13 L. Ed. 579. See ante, "Raising and Waiving Objections," III, D. And see the title DISMISSAL, DISCONTINUANCE AND NONSUIT, vol. 5, p. 383.

**92. Refusal of court to proceed in absence of indispensable parties.**—See ante, "Indispensable Parties," III, A, 2, b; "Power of Court to Notice Defect of Parties Sua Sponte," III, D, 3.

"Thus, in a case in which a remainderman in tail brought a bill against the tenant for life, to have the title deeds brought into court, and there were annuitants on the reversion, and a child interested under a trust term of years, prior to the limitation to the plaintiff, that is, incumbrancers prior and posterior to the plaintiff, Lord Hardwicke, 3 Atk. 570, refused a decree without first making them parties." *Caldwell v. Taggart*, 4 Pet. 190, 7 L. Ed. 828.

Where a bill in chancery was filed by a legatee against the person who had married the daughter and residuary devisee of the testator (there having been no administration in the United States upon the estate), this daughter or her representatives if she were dead, ought to have been made a party defendant. But if the complainant appears to be entitled to relief, the court will allow the bill to be amended, and even if it be an appeal, will remand the case for this purpose. *Lewis v. Darling*, 16 How. 1, 14 L. Ed. 819.

"When it appears to a court of equity that a case, otherwise presenting ground for its action, cannot be dealt with because of the absence of essential parties, it is usual for the court, while sustaining the objection, to grant leave to the complainant to amend by bringing in such

a cross bill to make new parties is not only improper and irregular, but wholly unnecessary.<sup>93</sup>

**Intervention.**—See post, "Intervention," VI.

2. **TIME.—In General.**—New parties can be admitted as late as the final hearing.<sup>94</sup>

**As to making new parties on remand,** see the title **MANDATE AND PROCEEDINGS THEREON**, vol. 8, p. 97.

#### IV. Parties at Common Law.

**A. In General.**—In courts of common law the forms of action limit a suit to the persons whose legal right has been affected, and those who have impaired or injured it.<sup>95</sup>

**B. Plaintiffs**—1. **GENERAL RULES DETERMINING PROPER PARTIES PLAINTIFF**—a. *Capacity to Sue.*—See ante, "Capacity to Sue or Be Sued," II, B.

b. *Legal Interest as Determining Right to Sue*—(1) *General Rule.*—At common law no person having no legal interest in the cause of action can maintain a suit in his or her own name,<sup>96</sup> but the action should be brought in the name of the party whose legal right has been affected,<sup>97</sup> or by his personal representative.<sup>98</sup>

(2) *Action by Nominal for Use Plaintiff.*—By reason of the above rule limiting the right of action to the person having the legal interest, the real party in interest was often allowed to bring an action in the name of the holder of the legal title, as, for instance, in the case of assignments of choses in action,<sup>99</sup> actions by beneficial owner of promissory notes in name of payee,<sup>1</sup> actions on bonds taken in the name of a public officer but for the benefit of individuals, etc.<sup>2</sup> When an action is in its origin instituted in the name of one for the use of another, the cestui que use is, by the law of Maryland, regarded as the real party to the suit.<sup>3</sup>

2. **IN ACTIONS EX CONTRACTU.**—At common law, an action on contract

parties. But when it likewise appears that necessary and indispensable parties are beyond the reach of the jurisdiction of the court, or that, when made parties, the jurisdiction of the court will thereby be defeated, for the court to grant leave to amend would be useless. Section 2 of article 3 of the constitution of the United States." *Minnesota v. Northern Securities Co.*, 184 U. S. 199, 46 L. Ed. 499.

93. *Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158. See the title **CROSS BILLS**, vol. 5, p. 143.

94. *Admission as late as final hearing.*—*West v. Smith*, 8 How. 402, 12 L. Ed. 1130.

As to the rule that amendments are permitted at any stage of the progress of the case where an essential party has been omitted, see the title **AMENDMENTS**, vol. 1, p. 290.

95. *Legal right as determining proper parties.*—*Taylor v. Carryl*, 20 How. 583, 15 L. Ed. 1028.

96. *Person without legal interest incapable of suing in own name.*—*Illinois Cent. R. Co. v. Adams*, 180 U. S. 28, 45 L. Ed. 410.

97. *Action to be in name of person whose legal right affected.*—*Tyler v. Judges*, 179 U. S. 405, 45 L. Ed. 252, quoting, in the language of the text, from

*Chitty Pl.*, p. 1. And see *Taylor v. Carryl*, 20 How. 583, 15 L. Ed. 1028; *Glenn v. Marbury*, 145 U. S. 499, 36 L. Ed. 790; *Martin v. Ihmsen*, 21 How. 394, 16 L. Ed. 134; *Chew v. Brumagen*, 13 Wall. 497, 20 L. Ed. 663.

"A trustee is a real person capable of being a citizen or an alien, who has the whole legal estate in himself. At law, he is the proprietor, and he represents himself, and sues in his own right." *United States Bank v. Deveau*, 5 Cranch 61, 3 L. Ed. 38. See the title **TRUSTS AND TRUSTEES**.

98. *By personal representative.*—*Tyler v. Judges*, 179 U. S. 405, 45 L. Ed. 252. See the titles **BONDS**, vol. 3, p. 426; **EXECUTORS AND ADMINISTRATORS**, vol. 6, p. 178, and cross references there found.

99. *Right of real party in interest to sue in name of holder of legal title.*—See the titles **ASSIGNMENTS**, vol. 2, p. 489, et seq.; **BILLS, NOTES AND CHECKS**, vol. 3, p. 357.

1. See the title **BILLS, NOTES AND CHECKS**, vol. 3, p. 357.

2. See the title **BONDS**, vol. 3, p. 427.

3. *Cestui que use regarded as real party to suit.*—*Gaither v. Farmers'*, etc., Bank, 1 Pet. 37, 7 L. Ed. 43.



must be brought in the name of the person in whom the legal interest in the contract was vested.<sup>4</sup>

3. IN ACTIONS EX DELICTO.—An action of tort, must, at common law, be brought in the name of the person whose legal right has been affected, and who is legally interested in the property at the time the injury thereto was committed.<sup>5</sup>

4. JOINDER.—In General.—The common law will not tolerate a joint action, except by persons who have a joint interest; if the cause of action be several, the suit must be several.<sup>6</sup>

**Necessity for Joinder Where Contract Joint Only.**—It is an elementary principle of the common law, that where a contract is joint and not several, all the joint obligees who are alive must be joined as plaintiffs.<sup>7</sup> If one of the joint obligees be dead, a suggestion of that fact is sufficient to show a right to sue in the names of the survivors.<sup>8</sup>

**If the interest and cause of action of the promisees under an agreement be several,** each may maintain an action against the promisor.<sup>9</sup>

4. **Proper parties plaintiff in actions ex contractu.**—Tyler v. Judges, 179 U. S. 405, 45 L. Ed. 252, quoting Chitty Pleading, p. 2. See, also, Van Ness v. Forrest, 8 Cranch 30, 3 L. Ed. 478.

**Privity of contract as essential to maintenance of action of assumpsit.**—See the title ASSUMPSIT, vol. 2, pp. 638, 653.

5. **Proper parties plaintiff in actions ex delicto.**—Tyler v. Judges, 179 U. S. 405, 45 L. Ed. 252, quoting from Chitty Pleading, p. 69.

6. **Joint interest essential to proper joinder of plaintiffs.**—Oliver v. Alexander, 6 Pet. 143, 8 L. Ed. 349.

**Where one person has a general and another has a special property in certain articles,** it is proper for both to join in a suit to recover such articles or damages for their taking. *Geekie v. Kirby Carpenter Co.*, 106 U. S. 379, 27 L. Ed. 157. See the title TROVER AND CONVERSION.

**As to the practice, in courts of admiralty, of allowing a joint action by seamen for their wages,** see the title ADMIRALTY, vol. 1, p. 160.

7. **Necessity for joinder of all living joint obligees.**—Farni v. Tesson, 1 Black 309, 17 L. Ed. 67; *United States v. Burns*, 12 Wall. 246, 20 L. Ed. 388. See the titles BONDS, vol. 3, p. 427; CONTRACTS, vol. 4, p. 569; COVENANT, ACTION OF, vol. 5, p. 2; COVENANTS, vol. 5, p. 18.

"It is a rule of general application, both at law and in equity, that a suit upon a written instrument must be brought in the name of all who are formal parties to it, and who retain an interest in it." *Hunt, J. Railroad Co. v. Orr*, 18 Wall. 471, 21 L. Ed. 810.

**Where a lease was made by several owners of a house, reserving rent to each one in proportion to his interest, and there was a covenant on the part of the lessee that he would keep the premises in good repair and surrender them in like repair, this covenant was joint as respects the lessors, and one of them (or two**

**representing one interest) cannot maintain an action for the breach of it by the lessee.** *Calvert v. Bradley*, 16 How. 580, 14 L. Ed. 1066. See the title COVENANTS, vol. 5, p. 18.

"It is settled that if one of two covenantees does not execute the instrument, he must join in the action, because whatever may be the beneficial interest of either, their legal interest is joint, and if each were to sue, the court could not know for which to give judgment. *Slingsby's Case*, 5 Co., 18, b.; *Petrie v. Bury*, 3 Barn. & C., 353. And the rule has recently been carried so far as to hold, that where a joint covenantee had no beneficial interest, did not seal the deed, and expressly disclaim under seal, the other covenantee could not sue alone. *Wetherell v. Langton*, 1 Wels. H. & G., 634." *Philadelphia, etc., R. Co. v. Howard*, 13 How. 307, 308, 14 L. Ed. 157.

**In an action of covenant on a joint contract all the obligees who are alive must be joined as plaintiffs although only one of them sealed the instrument.** See the title COVENANT, ACTION OF, vol. 5, p. 2.

8. **Suit by survivors where one joint obligee is dead.**—Farni v. Tesson, 1 Black 309, 17 L. Ed. 67. See the title ABATEMENT, REVIVAL, AND SURVIVAL, vol. 1, p. 43.

9. **Separate suits by promisees whose interests are several.**—*Beckwith v. Talbot*, 95 U. S. 289, 24 L. Ed. 496; *Shipman v. Straitsville Cent. Min. Co.*, 158 U. S. 356, 39 L. Ed. 1015. See the title CONTRACTS, vol. 4, p. 569.

"Sergeant Williams, in his note to *Eccleston v. Clipsham*, 1 Saund. 154, says: 'Though a man covenant with two or more jointly, yet if the interest and cause of action of the covenants be several and not joint, the covenant shall be taken to be several, and each of the covenantees may bring an action for his particular damage, notwithstanding the words of the covenant are joint.' In the present case, the cause of action was

**C. Defendants**—1. **IN GENERAL**.—At common law an action must be brought against the party who committed or caused the injury,<sup>10</sup> or against his personal representative.<sup>11</sup>

2. **JOINDER**—a. *In Actions Ex Contractu*—(1) *In General*.—In order that persons may properly be joined as parties defendant in an action ex contractu, there must be a joint undertaking or promise on the part of all.<sup>12</sup>

(2) *Where Contract Joint*.—In case of a joint contract, strictly speaking, the plaintiff must sue all the joint obligors.<sup>13</sup>

(3) *Where Contract Joint and Several*.—On a joint and several obligation suit must, at common law, be brought against all the obligors jointly, or against each one severally,<sup>14</sup> because each is liable for the whole;<sup>15</sup> but a joint suit cannot be maintained against a part, omitting the rest.<sup>16</sup>

b. *In Actions Ex Delicto*.—A person who has suffered injury by the joint

the service performed under the contract; and each performed his own distinct service, and was entitled to distinct and separate compensation therefor. The case is precisely within the category stated by the learned annotator. It is very similar also to that of *Servante and Others v. James*, 10 B. & C. 410, where the master of a vessel covenanted with the several part owners to pay to them severally in certain proportions the moneys which he should receive from the government for carrying the mails; and it was held that the covenant inured to them severally and not jointly, because their interests were several. The case is also quite similar to that of an engagement with seamen for a whaling voyage, where each is to receive for his compensation a certain percentage of the profits of the voyage. Though they work together and in co-operation, they do not become partners, nor does either acquire any interest in the compensation of the others. The interest of each is separate." *Beckwith v. Talbot*, 95 U. S. 289, 292, 24 L. Ed. 496.

"When there are several covenants by the obligors, as, for instance, to 'pay \$300 to A and B, viz: to A \$100, and B \$200,' no doubt each may sue alone on his several covenant. The true rule, as stated by Baron Parke, is, that 'a covenant may be construed to be joint or several, according to the interests of the parties appearing upon the face of the obligation, if the words are capable of such a construction; but it will not be construed to be several, by reason of several interests, if it be expressly joint.'" *Farni v. Teson*, 1 Black 309, 17 L. Ed. 67.

As to right of one of several principals to maintain an action against a factor, see the title **FACTORS AND COMMISSION MERCHANTS**, vol. 6, p. 240.

10. **Action to be against person committing or causing injury**.—*Tyler v. Judges*, 179 U. S. 405, 45 L. Ed. 252; *Taylor v. Carryl*, 20 How. 583, 15 L. Ed. 1028.

11. **Against personal representative**.—*Tyler v. Judges*, 179 U. S. 405, 45 L. Ed. 252, quoting from *Chitty Pleading*, p. 1.

See, generally, the titles **ABATEMENT, REVIVAL AND SURVIVAL**, vol. 1, p. 44; **EXECUTORS AND ADMINISTRATORS**, vol. 6, p. 181.

12. **Joinder improper where liability several**.—*Adriatic Fire Ins. Co. v. Treadwell*, 108 U. S. 361, 27 L. Ed. 754; *Green v. Litter*, 8 Cranch 229, 3 L. Ed. 545.

13. **Plaintiff must sue all joint obligors**.—*Gilman v. Rives*, 10 Pet. 298, 9 L. Ed. 432; *Barney v. Baltimore*, 6 Wall. 280, 18 L. Ed. 825; *Barton v. Petit*, 7 Cranch 194, 3 L. Ed. 313; *Mason v. Eldred*, 6 Wall. 231, 18 L. Ed. 783. And see dissenting opinion of Johnson, J., in *Minor v. Mechanics' Bank*, 1 Pet. 46, 82, 7 L. Ed. 47.

As to necessity for taking judgment against all joint obligors, effect of statutes making joint contracts joint and several, etc., see the title **JUDGMENTS AND DECREES**, vol. 7, p. 544.

As to conclusiveness of judgments against one or more joint obligors, see the title **RES ADJUDICATA**.

14. **Suit on joint and several obligation to be against all or each severally**.—*Amis v. Smith*, 16 Pet. 303, 10 L. Ed. 973; *Pirie v. Tvedt*, 115 U. S. 41, 29 L. Ed. 331; *Minor v. Mechanics' Bank*, 1 Pet. 46, 7 L. Ed. 47; *Mason v. Eldred*, 6 Wall. 231, 18 L. Ed. 783; *Burdette v. Bartlett*, 95 U. S. 637, 24 L. Ed. 534.

15. *Amis v. Smith*, 16 Pet. 303, 10 L. Ed. 973.

16. **Joint suit against less than all obligors improper**.—*Amis v. Smith*, 16 Pet. 303, 10 L. Ed. 973; *Minor v. Mechanics' Bank*, 1 Pet. 46, 7 L. Ed. 47; *United States v. Leffler*, 11 Pet. 86, 9 L. Ed. 642. And see *Breedlove v. Nicolet*, 7 Pet. 413, 8 L. Ed. 731.

On a joint and several bond, the plaintiff may sue one or all of the obligors; but in strictness of law, he cannot sue an intermediate number; he must sue all or one. *Minor v. Mechanics' Bank*, 1 Pet. 46, 7 L. Ed. 47. See the title **BONDS**, vol. 3, p. 428.

As to judgments in actions on joint and several contracts, see the titles **JUDGMENTS AND DECREES**, vol. 7, p. 544; **RES ADJUDICATA**.



action of two or more wrongdoers, may have his remedy against all or either,<sup>17</sup> subject, however, to the condition that satisfaction once obtained is a bar to any further proceeding.<sup>18</sup>

**D. Raising and Waiving Objections**—1. **NONJOINER**—a. *Nonjoinder of Joint Obligees*.—As has been seen, all joint obligees who are alive, must be joined as plaintiffs,<sup>19</sup> and a defendant can object to a nonjoinder of plaintiffs, not only by demurrer, but under the plea of the general issue, or on motion to arrest the judgment.<sup>20</sup>

b. *Nonjoinder of Joint Obligors*.—As has been seen, all joint obligors ought to be made parties to the suit,<sup>21</sup> and such joinder may be compelled by a plea in abatement for the nonjoinder. But such an objection can only be taken advantage of by a plea in abatement; for if one party only is sued, it is not matter in bar of the suit, or in arrest of judgment, upon the finding of the jury, or of variance in evidence upon the trial.<sup>22</sup>

c. *Joinder of Intermediate Number of Joint and Several Obligors*.—As has been seen, while the plaintiff in an action on a joint and several obligation may sue one or all of the obligors, he cannot sue an intermediate number, but must sue all jointly or each separately.<sup>23</sup> Such error, must, however, be taken advantage of by plea in abatement, and will be waived by pleading to the merits.<sup>24</sup> The reason is, that the obligation is still the deed of all who are sued, though not solely their deed; and therefore, there is no variance in point of law, between the deed declared on, and that proved. It is still the joint deed of the

**17. Joint tortfeasors may be sued jointly or severally.**—The *Beaconsfield*, 158 U. S. 303, 39 L. Ed. 993; *Atlantic*, etc., R. Co. v. *Laird*, 164 U. S. 393, 41 L. Ed. 485; *Sessions v. Johnson*, 95 U. S. 347, 24 L. Ed. 596; *The Atlas*, 93 U. S. 302, 23 L. Ed. 863; *Minor v. Mechanics' Bank*, 1 Pet. 46, 7 L. Ed. 47; *Lovejoy v. Murrey*, 3 Wall. 1, 18 L. Ed. 129; *Thorp v. Hammond*, 12 Wall. 408, 20 L. Ed. 419. And see *Greer v. Mezes*, 24 How. 268, 16 L. Ed. 661; *United States v. Piatt*, 157 U. S. 113, 39 L. Ed. 639; *United States v. Salisbury*, 157 U. S. 121, 39 L. Ed. 642; *Washington Gas Light Co. v. Lansden*, 172 U. S. 534, 43 L. Ed. 543; *Powers v. Chesapeake*, etc., R. Co., 169 U. S. 92, 42 L. Ed. 673; *Alabama*, etc., R. Co. v. *Thompson*, 200 U. S. 206, 50 L. Ed. 441.

"Persons engaged in committing the same trespass are joint and several trespassers, and not joint trespassers exclusively. Like persons liable on a joint and several contract, they may be all sued in one action; or one may be sued alone, and cannot plead the nonjoinder of the others in abatement; and so far is the doctrine of several liability carried, that the defendants, where more than one are sued in the same action, may sever in their pleas, and the jury may find several verdicts, and on several verdicts of guilty may assess different sums as damages." *Miller, J. Lovejoy v. Murrey*, 3 Wall. 1, 18 L. Ed. 129.

Where two persons are equally concerned in a fraud perpetrated upon the government, one by presenting in behalf of both a sworn statement containing false and fraudulent allegations whereby the postmaster general was induced to amend the original contract, allowing increased

compensation, the other by presenting for payment false and fraudulent vouchers comporting therewith, upon the faith of which the money was paid, they are jointly and severally bound to refund the sum so paid and received in violation of § 3961 of the Revised Statutes. *United States v. Piatt*, 157 U. S. 113, 39 L. Ed. 639. To same effect see *United States v. Salisbury*, 157 U. S. 121, 39 L. Ed. 642. See the titles FRAUD AND DECEIT, vol. 6, p. 434; POSTAL LAWS.

**18. Satisfaction as bar to further proceeding.**—The *Beaconsfield*, 158 U. S. 303, 39 L. Ed. 993.

As to judgments in actions against joint tortfeasors, see the titles JUDGMENTS AND DECREES, vol. 7, p. 544; RES ADJUDICATA.

As to nolle prosequi against one or more defendants in actions ex delicto, see the title DISMISSAL, DISCONTINUANCE AND NONSUIT, vol. 5, pp. 363, 364.

**19.** See ante, "Joinder," IV, B, 4.

**20. Manner of objecting to nonjoinder of plaintiffs.**—*Farni v. Tesson*, 1 Black 309, 17 L. Ed. 67. See the titles JUDGMENTS AND DECREES, vol. 7, p. 544; PLEADING.

**21.** See ante, "In Actions Ex Contractu," IV, C, 2, a.

**22. Objection to be taken by plea in abatement.**—See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 31.

**23.** See ante, "Where Contract Joint and Several," IV, C, 2, a, (3).

**24. Objection to be raised by plea in abatement—Waiver by plea to merits.**—See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 31.



parties sued, although others have joined in it.<sup>25</sup>

2. **MISJOINDER.—In General.**—At common law the objection for misjoinder of parties defendant should be made by answer or plea in a way so as to give the plaintiff a better writ,<sup>26</sup> but at common law where two or more parties are sued as partners, and there is no denial of the partnership, and no plea alleging a misjoinder, it is doubtful whether after verdict such an objection could be taken.<sup>27</sup>

**Misjoinder of Defendants as Ground for Dismissal.**—See the title **DISMISSAL, DISCONTINUANCE AND NONSUIT**, vol. 5, p. 370.

**As to right of plaintiff to discontinue, dismiss, or enter nolle prosequi as to one or more defendants** without affecting his rights as to the other; see the title **DISMISSAL, DISCONTINUANCE AND NONSUIT**, vol. 5, p. 361, et seq.

## V. Parties under Codes and Statutes.

**A. Parties Plaintiff**—1. **REQUIREMENT THAT ACTION BE BROUGHT IN NAME OF REAL PARTY IN INTEREST.—In General.**—In those states of this country whose procedure is governed by a code or practice act, the usual provision as to parties plaintiff is that a suit or action shall be brought in the name of the real party in interest.<sup>28</sup>

**Exceptions to Rule.**—Most if not all the codes and practice acts contain exceptions to the above general rule, by virtue of which certain enumerated persons or classes of persons are allowed to sue without joining with them the persons for whose benefit the action is prosecuted. Among the persons usually thus enumerated, are executors and administrators,<sup>29</sup> trustees of an express trust,<sup>30</sup>

25. **Reason for rule.**—*Minor v. Mechanics' Bank*, 1 Pet. 46, 7 L. Ed. 47.

26. **Misjoinder to be raised by answer or plea, etc.**—*Bibb v. Allen*, 149 U. S. 481, 37 L. Ed. 817.

27. *Bibb v. Allen*, 149 U. S. 481, 37 L. Ed. 817.

28. **Code provision as to suits by real party in interest.**—*Lyon v. Bertram* (Cal.), 20 How. 149, 15 L. Ed. 847; *Arkansas, etc., Co. v. Belden Min. Co.* (Col.), 127 U. S. 379, 32 L. Ed. 346; *Baker v. Wood* (Col.), 157 U. S. 212, 39 L. Ed. 677; *Delaware County Comm'rs v. Diebold, etc., Locks Co.* (Ind.), 133 U. S. 473, 33 L. Ed. 674; *Davis v. Bilsland* (Mont.), 18 Wall. 659, 21 L. Ed. 969; *Sweeney v. Lomme* (Mont.), 22 Wall. 208, 22 L. Ed. 727; *Chew v. Brumagen* (N. Y.), 13 Wall. 497, 20 L. Ed. 663; *Albany, etc., Co. v. Lundberg* (N. Y.), 121 U. S. 451, 30 L. Ed. 982; *Thompson v. Railroad Companies* (Ohio), 6 Wall. 134, 18 L. Ed. 765. See, also, *Royal Ins. Co. v. Miller*, 199 U. S. 353, 50 L. Ed. 226.

**As to actions by assignees in own name as real parties in interest**, see the title **ASSIGNMENTS**, vol. 2, p. 594.

**Decision of state supreme court as to proper plaintiffs under code conclusive in United States supreme court.**—In a suit on a replevin bond given to the sheriff, where the question whether the proper party to sue is the sheriff or the party for whose benefit the bond was given, depends upon the code of practice of Montana territory, the federal supreme court will not reverse the decision of the supreme court of that territory on the question; that being a question on the con-

struction of their own code. *Sweeney v. Lomme*, 22 Wall. 208, 22 L. Ed. 727.

"The first error assigned and mainly relied on is that the bond on which the suit is brought having been given to the sheriff, this action cannot be maintained by Lomme, the party for whose benefit it was really given. This question has been decided differently by different state courts under precisely the same code of practice. In several of these it has been held that the real party in interest is always the proper plaintiff, while in others it is held that the suit must be brought by the obligor in the bond for the use of the party in interest. Without expressing any opinion of our own on the question, we hold that as it is one which arises under their own code of practice, we should, in this conflict of authority, adopt the ruling of the supreme court of Montana in the consideration of it. This assignment of error is, therefore, not well taken." *Sweeney v. Lomme*, 22 Wall. 208, 22 L. Ed. 727.

29. **Executors or administrators.**—*Chew v. Brumagen*, 13 Wall. 497, 20 L. Ed. 663; *Albany, etc., Co. v. Lundberg*, 121 U. S. 451, 30 L. Ed. 982. See, generally, the title **EXECUTORS AND ADMINISTRATORS**, vol. 6, p. 179.

30. **Trustees of express trust.**—*Chew v. Brumagen*, 13 Wall. 497, 20 L. Ed. 663; *Albany, etc., Co. v. Lundberg*, 121 U. S. 451, 497, 30 L. Ed. 982. See, generally, the title **TRUSTS AND TRUSTEES**.

"A person with whom, or in whose name, a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section." Al-

and persons expressly authorized by statute.<sup>31</sup>

**Application of Rule and Exceptions Thereto to Proceedings in Federal Courts.**—Where the code of a state contains the above general rule as to suits by the real party in interest, and enumerates certain exceptions thereto, such provisions are applicable to actions at law in the courts of the United States held within such state.<sup>32</sup> A plaintiff in the state court may remain plaintiff on the record in a federal court, and prosecute his suit in that court as he is authorized by state laws to prosecute in the state courts.<sup>33</sup>

2. **JOINDER**—a. *Permissive*.—Under the various codes and practice acts it is the general rule that all parties having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs;<sup>34</sup> and it is immaterial in what proportions they may be concerned.<sup>35</sup>

b. *Necessity for Joining Those United in Interest*.—It is a usual provision of the various codes and practice acts that those united in interest must be joined as

bany, etc., *Co. v. Lundberg*, 121 U. S. 451, 30 L. Ed. 982, quoting from § 449 of the New York Code of Civil Procedure.

"Under this provision, the court of appeals of that state has held that an agent of a corporation, to whom, 'as executive agent of the company,' a promise is made to pay money, is 'a person with whom, or in whose name, a contract is made for the benefit of another,' and may therefore sue in his own name on the promise. *Considerant v. Brisbane*, 22 N. Y. 389. The rule thus established is applicable to actions at law in the courts of the United States held within the State of New York. *Rev. Stat.*, § 914; *Sawin v. Kenny*, 93 U. S. 289, 23 L. Ed. 926; *Weed Sewing Machine Co. v. Wicks*, 3 Dillon, 261, *United States v. Tracy*, 8 Benedict, 1." *Albany, etc., Co. v. Lundberg*, 121 U. S. 451, 453, 30 L. Ed. 982.

31. **Persons expressly authorized by statute**.—*Chew v. Brumagen*, 13 Wall. 497, 20 L. Ed. 663; *Albany, etc., Co. v. Lundberg*, 121 U. S. 451, 30 L. Ed. 982.

Thus, for instance, express statutory provision is often made as to the proper party plaintiff in actions for death by wrongful act, actions for seduction, suits to recover land held adversely, etc. For a full treatment of proper parties plaintiff in such actions, see the specific titles.

32. **Application of code provision to suits in federal courts held within state**.—*Albany, etc., Co. v. Lundberg*, 121 U. S. 451, 30 L. Ed. 982; *Delaware County Comm'rs v. Diebold, etc.*, *Lock Co.*, 133 U. S. 473, 33 L. Ed. 674; *Lyon v. Bertram*, 20 How. 149, 15 L. Ed. 847; *Thompson v. Railroad Companies*, 6 Wall. 134, 18 L. Ed. 765.

33. See the titles **COURTS**, vol. 4, p. 1138; **REMOVAL OF CAUSES**.

"The law of Ohio directs that all suits be brought in the name of the real party in interest. This constitutes a title to sue, when the suit is brought in the state court, in conformity with it; and in all cases transferred from the state to the federal court, under the 12th section of the judiciary act, this title will be recognized and preserved; and when a declaration is required by the rules of the circuit court,

it may be filed in the name of the party who was the plaintiff in the state court." *Thompson v. Railroad Companies*, 6 Wall. 134, 18 L. Ed. 765.

34. **Persons properly joined as plaintiffs**.—*Lyon v. Bertram*, 20 How. 149, 15 L. Ed. 847; *Chew v. Brumagen*, 13 Wall. 497, 20 L. Ed. 663.

Article 156 of the law of civil procedure for Cuba and Porto Rico (War Department Translation of 1899), provides as follows: "Causes of action against several persons, or by several persons against one, arising from the same source of title or based upon the same cause of action, may be joined and brought in one action." In *Royal Ins. Co. v. Miller*, 199 U. S. 353, 50 L. Ed. 226, the court, after quoting the above provision, said: "We consider the provision of the code of procedure above quoted as analogous to the provision in the codes of a number of the states of the Union, by which an action is required to be brought in the name of the real parties in interest, and it is allowable to join as parties plaintiff those having an interest in the recovery sought."

35. **Proportions in which concerned immaterial**.—*Lyon v. Bertram*, 20 How. 149, 15 L. Ed. 847.

"It was objected that the proof shows that the assignment by Flint, Peabody & Co. was made to the plaintiffs in the suit, and that the declaration alleges that they assigned their interest in the claim to John Bertram, one of the plaintiffs. The code of California requires that actions shall be prosecuted in the name of the real party in interest, and that all parties having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs. The plaintiffs are shown to be the parties jointly interested in the subject of the action, and in the claim for relief. It is quite immaterial in what proportions they may be concerned. Their case is substantially established, when their joint interest is shown, and the error in respect to the degree of the interest of the several parties is not such a variance as will be considered." *Lyon v. Bertram*, 20 How. 149, 15 L. Ed. 847.



plaintiffs or defendants,<sup>36</sup> unless the consent of one who should have been joined as plaintiff cannot be obtained, when he may be made a defendant.<sup>37</sup>

**B. Parties Defendant**—1. **GENERAL RULE AS TO PROPER PARTIES DEFENDANT.**—The ordinary provision of the various codes and practice acts as to proper parties defendant, is to the effect that any person may be a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination and settlement of the question involved therein.<sup>38</sup>

2. **JOINDER**—a. *Joinder of Persons Severally Liable on Same Obligation or Instrument.*—In several of the states it is expressly provided by statute that persons severally liable upon the same obligation or instrument, including the parties to bills of exchange or promissory notes, may all or any of them be included in the same action, at the option of the plaintiff;<sup>39</sup> and a similar provision is found in § 827 of the Revised Statutes of the United States, relating to the District of Columbia.<sup>40</sup>

b. *Necessity for Joining Those United in Interest.*—As has been already seen, it is usually required by the various codes and practice acts that those united in interest must be joined as plaintiffs or defendants.<sup>41</sup>

**36. Compulsory joinder of those united in interest.**—*Chew v. Brumagen*, 13 Wall. 497, 20 L. Ed. 663.

**37. Persons made defendants who refuse to join as plaintiffs.**—*Chew v. Brumagen*, 13 Wall. 497, 20 L. Ed. 663.

**38. Code provision as to proper parties defendant.**—*Chew v. Brumagen*, 13 Wall. 497, 20 L. Ed. 663.

**Provision of New York code as to defendants in suits for immediate possession of property.**—Section 1502 of the code of civil procedure of New York provides that: "Where the complainant demands judgment for the immediate possession of the property, if the property is actually occupied, the occupant thereof must be made defendant in the action. If it is not so occupied, the action must be brought against some person exercising acts of ownership thereupon or claiming title thereto, or an interest therein at the time of the commencement of action." *Lowndes v. Huntington*, 153 U. S. 1, 38 L. Ed. 615.

**As to joinder of husband and wife, who are in possession of land, as defendants in a suit brought for its recovery by the true owner thereof, see the title HUSBAND AND WIFE, vol. 6, p. 734.**

**39. State statutes allowing joinder of parties severally liable, on same obligation, etc.**—*Burdette v. Bartlett*, 95 U. S. 637, 24 L. Ed. 534. See the title **BILLS, NOTES AND CHECKS**, vol. 3, p. 358.

**40. "By § 827 of the Revised Statutes of the United States relating to the District of Columbia, it is enacted as follows, viz: 'Where money is payable by two or more persons jointly or severally, as by joint obligors, covenantors, makers, drawers, or indorsers, one action may be sustained and judgment recovered against all or any of the parties by whom the money is payable, at the option of the plaintiff. But an action against one or some of the parties by whom the money is payable may, while the litigation therein continues, be pleaded in bar of another action against**

**another or others of the said parties.' 14 Stat. 405, § 20. This is a portion of an act of congress entitled 'An act to amend the law of the District of Columbia in relation to judicial proceedings therein.' In the case before us, an action was commenced and the process served upon two of the several makers of a promissory note and one of the indorsers thereof, there being other makers and other indorsers of the note. The statute is not happily expressed, whatever may have been the intention of its framers. It is contended, on the one hand, that it was designed merely to modify the common-law rule, that, in case of a joint and several contract, all the parties must be sued in one action, or a separate action be brought against each, and to allow the plaintiff to sue one or more of the parties in one action, and to omit a portion of them, at his pleasure. It is insisted, on the other hand, that it is an enactment in the spirit of the provisions of numerous state statutes, permitting the holder of a note to join the makers and indorsers, at his discretion, in the same action. The latter, we are told in the brief, has been the uniform construction of the statute by the courts of the district since its passage, more than ten years since, and we are of the opinion that it is a sound construction. The words, 'as by joint obligors, covenantors, makers, drawers, or indorsers,' are inserted by way of illustration, and, like many other intended illuminations, serve but to darken the subject. Omitting these words (as parenthetical), the statute provides that one action may be sustained against all or any of the parties by whom payable, where money is payable by two or more persons jointly or severally." *Burdette v. Bartlett*, 95 U. S. 637, 24 L. Ed. 534.**

**41. Joinder of parties united in interest.**—See ante, "Necessity for Joining Those United in Interest," V, A, 2, b.

**The Civil Code of Louisiana, article**



c. *Effect of Statutory Changes in Common-Law Rules as to Joint Contracts.*—In a number of the states joint contracts are by statute made joint and several, so that actions thereon may be maintained against any or all of the obligors.<sup>42</sup> So also, in some jurisdictions, it is expressly provided by statute that judgments may be rendered for or against one or more of several plaintiffs, or for or against one or more defendants, and that though all of the defendants may have been summoned, a judgment may be rendered against any one of them, provided judgment could have been rendered against him if the action

2080, directs that "in every suit on a joint contract, all the obligors must be made defendants," and the succeeding article directs that "judgment must be rendered against each defendant separately, for his proportion of the debt or damages." *Breedlove v. Nicolet*, 7 Pet. 413, 8 L. Ed. 731.

42. **Joint contracts made joint and several by statute.**—By a statute of Alabama, it is enacted, that every joint promissory note shall be deemed and construed to have the same effect in law as a joint and several promissory note; and whenever a writ shall issue against any two or more joint and several drawers of a promissory note, it shall be lawful, at any time after the return of the writ, to discontinue such action against any one or more of the defendants, on whom the writ shall not have been executed, and to proceed to judgment against the others. This statute converts a joint into a several promise; and enables the holder to maintain an action against any one of the makers. *Smith v. Clapp*, 15 Pet. 125, 10 L. Ed. 684.

"By the code of practice of Arkansas, which was in force when this judgment was rendered, it was provided, that, 'Where two or more persons are jointly bound by contract, the action thereon may be brought against all or any of them, at the plaintiff's option' (§ 4480, Gantt's Dig., 1874); that 'judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants' (§ 4701); and that, 'though all the defendants have been summoned, judgment may be rendered against any of them severally, where the plaintiff would be entitled to judgment against such defendants if the action had been against them alone' (§ 4704)." *Sawin v. Kenny*, 93 U. S. 289, 23 L. Ed. 926.

By a statute of Mississippi, all promises, contracts and liabilities of copartners, are to be deemed and adjudged joint and several; and in all suits on contracts in writing, made by two or more persons, it is lawful to declare against any one or more of them. This is such a severance of the contract as puts in the power of the plaintiff to hold any portion of them jointly, and the others severally, bound by the contract; and there is no obligation on the part of the plaintiff to put the defendants in such condition, by his pleadings, as to compel each to contribute his portion for the benefit of the others.

*Amis v. Smith*, 16 Pet. 303, 10 L. Ed. 973, citing *Minor v. Mechanics' Bank*, 1 Pet. 46, 7 L. Ed. 47.

An action of debt was instituted in the district court of the United States, on an obligation under the hands and seals of two persons; the action was against one of the parties to the instrument. The laws of Mississippi allow an action on such an instrument to be maintained against one of the parties only. *Rogers v. Batchelor*, 12 Pet. 221, 9 L. Ed. 1063. See the title DEBT, THE ACTION OF, vol. 5, p. 209.

**Actions on contracts in solido under Louisiana code.**—The commercial partnership, the makers of the note upon which the suit was instituted, was composed of three persons, one of whom was a resident citizen of Alabama, and out of the jurisdiction of the court, when the suit was brought, and the remaining two, the defendants, were resident citizens of Louisiana. Held, that although the suit being against two of the three obligors might not be sustained at common law, yet as the courts of Louisiana do not proceed according to the rules of the common law, their code being founded on the civil law, this suit was properly brought. The note being a commercial contract, is what the law of Louisiana denominates a contract in solido; by which each party is bound severally as well as jointly, and may be sued severally as well as jointly. *Breedlove v. Nicolet*, 7 Pet. 413, 8 L. Ed. 731.

"The first error assigned, that the suit is brought against two of three obligors, might be fatal at common law. But the courts of Louisiana do not proceed according to the rules of the common law. Their code is founded on the civil law, and our inquiries must be confined to its rules. The note being a commercial partnership contract, in what the law of Louisiana denotes a contract in solido, by which each party is bound severally as well as jointly, and may be sued severally or jointly. The civil code of Louisiana, article 2080, directs, 'that in every suit on a joint contract, all the obligors must be made defendants;' and the succeeding article directs that 'judgment must be rendered against each defendant separately, for his proportion of the debt or damages.'" Article 2086 says, "there is an obligation in solido on the part of the debtors, where they are all obliged to the

had been against him alone.<sup>43</sup> Such provisions of a state statute furnish a rule of practice for the courts of the United States in that state.<sup>44</sup>

**C. Raising and Waiving Objections.—Nonjoinder.**—Under code practice, it would seem that nonjoinder of parties may be objected to by demurrer, when the defect is apparent of record,<sup>45</sup> or by answer when not so apparent,<sup>46</sup> and if not so taken will be considered to be waived.<sup>47</sup>

**Misjoinder.**—Under the modern codes it would seem that no objection for misjoinder can be made after verdict.<sup>48</sup>

**D. Bringing in New Parties.—In General.**—By the codes of some states it is provided that the court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in.<sup>49</sup>

**Intervention.**—See post, "Intervention," VI.

**E. Amendments as to Parties.**—See the title AMENDMENTS, vol. 1, p. 298.

## VI. Intervention.

**A. Definition.**—An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant.<sup>50</sup>

same thing, so that each may be compelled for the whole." Article 2088 says, "an obligation in solido is not presumed; it must be expressly stipulated." This rule ceases to prevail only in cases where an obligation in solido takes place of right, by virtue of some provisions of the law.' Pothier, from whom this article appears to be taken, part 2, ch. 3, art. 8, gives in No. 266, as one of the instances in which the law presumes it, 'where partners in commerce contract some obligation in respect of their joint concern.' This, then, is a contract in solido, on which the parties may be sued severally or jointly, and by which each is liable for the whole. The civil code, so far as we are informed, does not affirm or deny that a suit may be sustained on such a contract, against two of three obligors." *Breedlove v. Nicolet*, 7 Pet. 413, 8 L. Ed. 731.

**43. Rendition of judgment against portion of defendants summoned, etc.**—See the title JUDGMENTS AND DECREES, vol. 7, p. 544.

**44. Such statutes rules of practice in federal courts.**—*Sawin v. Kenny*, 93 U. S. 289, 23 L. Ed. 926. See the title COURTS, vol. 4, p. 1139.

**45. Objection by demurrer where nonjoinder apparent of record.**—*Delaware County Comm'rs v. Diebold, etc.*, Lock Co., 133 U. S. 473, 33 L. Ed. 674. See, generally, the title DEMURRERS, vol. 5, p. 298.

**46. Objection by answer where defect not apparent of record.**—*Delaware County Comm'rs v. Diebold, etc.*, Lock Co., 133 U. S. 473, 33 L. Ed. 674. See, generally, the title PLEADING.

**47. Objection waived unless properly raised.**—See *Delaware County Comm'rs v. Diebold, etc.*, Lock Co., 133 U. S. 473, 33 L. Ed. 674. And see the title APPEAL AND ERROR, vol. 2, p. 110.

**48. Objection for misjoinder too late after verdict.**—"At common law the objection for misjoinder should be made by answer or plea in a way so as to give the plaintiff a better writ; but at common law where two or more parties are sued as partners, and there is no denial of the partnership and no plea alleging a misjoinder, it is doubtful whether after verdict such an objection could be taken. But however that may be, under the modern codes, including that of Alabama, no such objection can be made after verdict. In this case the plaintiff in error did business under the name of B. S. Bibb & Company, and he should not be heard, when sued as a partner of that firm, to say that he alone composed the firm, and was, therefore, not liable because joined with another defendant who was not a member." *Bibb v. Allen*, 149 U. S. 481, 37 L. Ed. 817.

**49. Duty of court to bring in necessary parties.**—*Smith v. Gale*, 144 U. S. 509, 36 L. Ed. 521, quoting from § 89 of the Dakota Code of Civil Procedure.

**50. Intervention defined.**—The definition given in the text is taken from § 90 of the Dakota code of civil procedure. *Smith v. Gale*, 144 U. S. 509, 36 L. Ed. 521.

The definition given in the Louisiana code, which is substantially borrowed from the French code of procedure, is: "An intervention or interpleader is a demand by which a third person requires to

**B. Who May Intervene—1. IN GENERAL.—In Equity and under Codes.**—It is the common practice of courts of equity to permit strangers to the litigation, claiming an interest in its subject matter, to intervene on their own behalf to assert their titles.<sup>51</sup> Under the codes of some of the states it is expressly provided that any person may, before the trial, intervene in any action or proceeding, who has an interest in the matter in litigation, in the success of either party, or an interest against both.<sup>52</sup>

**As to intervention in admiralty proceedings,** see the titles **ADMIRALTY**, vol. 1, p. 169; **COLLISION**, vol. 3, p. 942.

**2. INTEREST ENTITLING TO INTERVENE.**—The interest which entitles one to intervene must be a direct interest, by which the intervening party is to obtain immediate gain, or suffer loss by the judgment which may be rendered between the original parties.<sup>53</sup>

be permitted to become a party in a suit between other persons, either by joining the plaintiff in claiming the same thing, or something connected with it, or by uniting with the defendant in resisting the claims of the plaintiff; or it may be lawful for him, where his interest requires it, to oppose both." From the dissenting opinion of Curtis, J., in *Florida v. Georgia*, 17 How. 478, 501, 15 L. Ed. 181.

**51. Equity practice as to intervention.**—*Krippendorf v. Hyde*, 110 U. S. 276, 25 L. Ed. 145. And see *Joy v. St. Louis*, 138 U. S. 1, 34 L. Ed. 843; *Ketchum v. St. Louis*, 101 U. S. 306, 25 L. Ed. 999; *French v. Gapen*, 105 U. S. 509, 26 L. Ed. 951; *Stanley v. Schwalby*, 147 U. S. 508, 37 L. Ed. 259; *Phelps v. Oaks*, 117 U. S. 236, 29 L. Ed. 888.

**As to intervention in proceedings to foreclose mortgages,** see the title **MORTGAGES AND DEEDS OF TRUST**, vol. 8, p. 452.

**As to intervention in proceedings confirming private land claims,** see the title **PUBLIC LANDS**.

**52. Code provision as to who may intervene.**—The statement found in the text is taken from § 90 of the Dakota code of civil procedure, and similar provisions are found in the codes of several of the states. *Smith v. Gale*, 144 U. S. 509, 36 L. Ed. 521.

**As to intervention by persons whose property has been unlawfully seized in attachment proceedings,** see the title **ATTACHMENT AND GARNISHMENT**, vol. 2, p. 687.

**As to intervention by stockholders in suits against corporations,** see the title **STOCK AND STOCKHOLDERS**.

**As to intervention by the contractor constructing a canal,** after a portion of such canal has been sold and the funds brought into court, in order that his rights may be determined, see the title **CANALS**, vol. 3, p. 549.

**As to the right of judgment creditors to make themselves parties to a creditor's bill,** see the title **CREDITORS' SUITS**, vol. 5, p. 39.

**As to the right of all holders of municipal securities of the same nature and kind to come in and prove their claims**

without formal intervention or special leave, after a decree in favor of one holder of such securities, suing on behalf of all, see the title **MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES**, vol. 8, p. 650.

**As to the right of an assignee to intervene where the assignment is made pendente lite,** see the title **ASSIGNMENTS**, vol. 2, p. 596.

**As to intervention of United States in proceedings to establish territorial boundaries,** see the title **BOUNDARIES**, vol. 3, p. 503.

**As to intervention by a United States district attorney,** in a suit to which the United States, while not technically a party, yet has property rights which are involved in the determination of the suit, see the title **DISTRICT AND PROSECUTING ATTORNEYS**, vol. 5, p. 399.

**Effect of dismissal upon party's right to subsequently intervene.**—See the title **RES ADJUDICATA**.

**53. Direct interest essential to right to intervene.**—*Smith v. Gale*, 144 U. S. 509, 36 L. Ed. 521, following the interpretation, by the Louisiana supreme court, in *Gasquet v. Johnson*, 1 La. 425, of a similar section in the Louisiana Code.

The supreme court of California, in construing a similar provision of the code of that state, held that "the interest mentioned in the statute, which entitles a person to intervene in a suit between other parties, must be in the matter in litigation, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment. \* \* \* To authorize an intervention, therefore, the interest must be that created by a claim to the demand or some part thereof in suit, or lien upon the property, or some part thereof, which is the subject of litigation." *Smith v. Gale*, 144 U. S. 509, 36 L. Ed. 521, quoting from the opinion of Field, J., in *Horn v. Volcano Water Co.*, 13 Cal. 62.

"In *Lewis v. Harwood*, 28 Minnesota 428, the cases from Louisiana and California were cited with approval. In that case the persons who sought to intervene held attachments upon some property



**C. Time for Exercising Right to Intervene.—In General.**—It may be stated as a general rule that the right to intervene should be exercised before the trial, and within a reasonable time.<sup>54</sup> It has been held, however, that a person who has not been named as a defendant to a bill may appear at the hearing, with the consent of all the parties;<sup>55</sup> and parties have been allowed, under some circumstances, to intervene even after a decree pro confesso.<sup>56</sup>

**As to intervention in the appellate court,** see the title *APPEAL AND ERROR*, vol. 2, p. 71.

**As to intervention on remand,** see the title *MANDATE AND PROCEEDINGS THEREON*, vol. 8, p. 97.

**D. Procedure—1. MANNER OF INTERVENING.—In General.**—The proper method of intervening in an action or proceeding between other persons, is by complaint or petition,<sup>57</sup> filed by leave of court.<sup>58</sup>

**Allegations of Complaint or Petition.**—The complaint or petition filed by the intervenor must set forth the ground upon which the intervention rests.<sup>59</sup> The intervention must be not only to protect the direct and immediate interest of the intervenor, but the latter is bound to make that interest appear by proper allegations in his petition.<sup>60</sup>

**Order of Court as Essential to Right to Intervene.**—If one wishes to intervene and become a party to a suit in which he is interested, he must not only petition the court to that effect, but his petition must be granted;<sup>61</sup> and while it is not necessary for him to show that he has actually been admitted by an express order entered upon the record, he must at least make it appear that

subsequent to those of the plaintiff in the suit. The suit was upon certain promissory notes executed to the plaintiff by the defendants and the intervenors claimed that the notes were without consideration and fraudulent; that the plaintiff's attachments were fraudulent and that the suits and attachments were in execution of a collusive scheme between the plaintiff and defendant to defraud the intervenors who were bona fide creditors of the defendant. It was held that the complaint of the intervenors did not disclose such an interest in the subject matter of the suit as to entitle them to intervene, and that the plaintiff's motion to dismiss the same should be granted. The decision was put upon the ground that when the judgment was entered against the defendants, the whole subject matter of the suit was disposed of; and that the writ of attachment was a part of the remedy and had nothing to do with the cause of action. 'If property is seized by virtue of the writ to which another has a better right, the vindication of such right involves another and independent judicial inquiry.' *Smith v. Gale*, 144 U. S. 509, 36 L. Ed. 521.

**54. Right to be claimed within reasonable time.**—*Smith v. Gale*, 144 U. S. 509, 36 L. Ed. 521, in which it was held that the right to intervene might be properly refused in a case like the one at bar, where the action had been pending two years and was about to be tried.

**55. Appearance at hearing with consent of all parties.**—*Anderson v. Watt*, 138 U. S. 694, 34 L. Ed. 1078.

**56. Allowance of intervention subsequent to decree pro confesso.**—In *Ex parte Jordan*, 94 U. S. 248, 24 L. Ed. 123,

subsequently to a decree pro confesso, additional parties were, by leave of the court, permitted to intervene as defendants, in the same manner and with like effect, as if named in the original and supplemental bills.

**57. By complaint or petition.**—*Smith v. Gale*, 144 U. S. 509, 36 L. Ed. 521; *Ex parte Cutting*, 94 U. S. 14, 24 L. Ed. 49. And see *French v. Gopen*, 105 U. S. 509, 26 L. Ed. 951; *Krippendorf v. Hyde*, 110 U. S. 276, 25 L. Ed. 145; *Gumbel v. Pitkin*, 124 U. S. 131, 31 L. Ed. 374; *Harrison v. Nixon*, 9 Pet. 483, 9 L. Ed. 201.

**Effect of filing plea of intervention as general appearance.**—See the title *APPEARANCE*, vol. 2, p. 441.

**58. Necessity for obtaining leave of court.**—*Smith v. Gale*, 144 U. S. 509, 36 L. Ed. 521; *Ex parte Jordan*, 94 U. S. 248, 24 L. Ed. 123. And see cases cited to preceding text.

By § 90 of the Dakota Code, the complaint must be filed by leave of the court, a limitation upon the right of intervention which presupposes a certain amount of discretion in the court. *Smith v. Gale*, 144 U. S. 509, 36 L. Ed. 521.

**As to requirement of security for costs as condition of allowing intervention,** see the title *COSTS*, vol. 4, p. 822.

**59. Grounds of intervention must be set out.**—*Smith v. Gale*, 144 U. S. 509, 36 L. Ed. 521.

**60. Necessity for showing direct interest of intervenor.**—*Smith v. Gale*, 144 U. S. 509, 36 L. Ed. 521.

**61. Necessity that petition be granted.**—*Ex parte Cutting*, 94 U. S. 14, 24 L. Ed. 49.

he has acted or been treated as a party.<sup>62</sup>

2. **OBJECTIONS.**—Should the original parties to the suit desire to contest the right of one seeking to intervene therein, they should object when the petition for intervention is filed.<sup>63</sup> Objection to the complaint of an intervenor on the ground that it does not disclose such interest in the subject matter of the suit as to entitle him to intervene, is properly taken by motion to dismiss.<sup>64</sup>

**E. Review of Decision on Application to Intervene.**—As to the general rule that an appeal does not lie from an order of the court below denying a motion in a pending suit to permit a person to intervene and become a party thereto, see the title *APPEAL AND ERROR*, vol. 1, p. 966. As to the rule that the grant or refusal of an application to intervene rests in the sound discretion of the trial court, and their action is not reviewable in the appellate court, in the absence of manifest abuse of such discretion, see the title *APPEAL AND ERROR*, vol. 1, p. 993. As to the review of intervention proceedings under the circuit court of appeals act, see the title *APPEAL AND ERROR*, vol. 1, pp. 821, 822. As to the necessity for excepting below to the rulings of the court upon motions for leave to intervene or be substituted in the place of or admitted with other parties, see the title *APPEAL AND ERROR*, vol. 2, p. 112.

**F. Effect of Allowance of Application.—Intervenors Treated as Original Parties to Suit.**—After intervention the new parties are treated, to all intents and purposes, as if they had been original parties to the suit,<sup>65</sup> and are equally bound by the judgment or decree rendered therein.<sup>66</sup>

**Right to Remove Cause as Affected by Intervention.**—See the title *REMOVAL OF CAUSES*.

**62. Petitioner must have acted or been treated as a party.**—*Ex parte Cutting*, 94 U. S. 14, 24 L. Ed. 49; *Myers v. Fenn*, 5 Wall. 205, 18 L. Ed. 613; *French v. Gapen*, 105 U. S. 509, 26 L. Ed. 951.

"We are aware that there are cases in which persons have been treated as parties to a suit after having filed a petition for leave to come in, when no formal order admitting them appears in the record, but in all such cases it will be found that they have acted or have been recognized as parties in the subsequent proceedings in the case. Thus, in *Myers v. Fenn*, 5 Wall. 205, 18 L. Ed. 613, 'the petitions were filed without any order of the court, but no objection was made, and the hearing went on as if an order had been granted;' and in *Harrison v. Nixon*, 9 Pet. 483, 491, 9 L. Ed. 201, 'inquiries were made as to the respective claims,' as asked for, and 'as to all parties who were claimants before the court by bill, petition, or otherwise, their complaint, petition, and proceedings were dismissed.' So, in *Ogilvie v. Knox Ins. Co.*, 2 Black 539, petitions were filed by certain creditors praying to be made parties, and that a receiver might be appointed, which was done; and in *Bronson v. La Crosse, etc.*, R. Co., 2 Wall.

283, 304, 17 L. Ed. 725, certain stockholders in a corporation were permitted to appear in a cause to which the corporation was a party, and present their several claims by answer in the name of the corporation; but this having been afterwards found to be irregular, the answers were considered 'rather by indulgence than a matter of strict right as the answer of the individual stockholders.' *Ex parte Cutting*, 94 U. S. 14, 24 L. Ed. 49.

**For the form of an order granting a petition for leave to intervene**, see *Ex parte Jordan*, 94 U. S. 248, 24 L. Ed. 123.

**63. Objections to be made when petition filed.**—See *French v. Gapen*, 105 U. S. 509, 26 L. Ed. 951.

**64. Objection properly raised by motion to dismiss.**—*Smith v. Gale*, 144 U. S. 509, 36 L. Ed. 521.

**65. Intervenors treated as if original parties.**—*French v. Gapen*, 105 U. S. 509, 26 L. Ed. 951.

**Voluntary appearance of corporation cannot be overruled at instance of intervening stockholders and creditors.**—See the title *APPEARANCES*, vol. 2, p. 455.

**66. Conclusiveness of decision upon intervenors.**—See the title *RES ADJUDICATA*.

# PARTITION.

BY LESTER H. HOOKER.

## I. Voluntary Partition, 66.

- A. Requisites, 66.
- B. Under Power, 66.
- C. Partition by Arbitration, 67.
- D. Presumptions, 67.

## II. Compulsory Partition, 67.

- A. Nature of Proceeding, 67.
- B. Scope of Inquiry, 67.
- C. Partition as a Matter of Right, 68.
- D. Concurrent Remedies, 68.
- E. In Suit for Dissolution of Partnership, 68.
- F. Parties, 68.
  - 1. Who May Compel Partition, 68.
  - 2. Parties Defendant, 68.
- G. Jurisdiction, 68.
  - 1. Title Required, 68.
  - 2. Concurrent Jurisdiction, 68.
  - 3. Jurisdiction of Federal Courts as Affected by State Laws, 68.
  - 4. As Dependent upon Residence of Parties, 69.
  - 5. Partition of Intestates' Estates, 69.
  - 6. Appellate Jurisdiction, 69.
- H. Property Subject, 69.
- I. The Petition, 69.
- J. The Plea, 70.
- K. Notice, 70.
- L. The Division—Manner of Adjusting Equities, 70.
- M. Trustees or Commissioners, 71.
- N. Effect of Irregularities, 71.
- O. Conclusiveness of Proceedings, 71.
- P. Termination of Controversy by Amicable Partition, 72.
- Q. Costs, 72.
- R. Presumption as to Partition, 72.
- S. Resale, 72.
- T. Rights of Purchasers, 72.

## CROSS REFERENCES.

As to proof of records in partition which have been lost or destroyed, see the title **LOST INSTRUMENTS AND RECORDS**, vol. 7, p. 1068.

## I. Voluntary Partition.

**A. Requisites.**—A partition is inchoate, till made by all parties, or till made by one and accepted by the others; there must be a deed of partition, a partition in pais, or such acceptance of a deed of partition, as would amount to an estoppel, before an estate can be held in severalty.<sup>1</sup>

**B. Under Power.**—It is clear that a power to make partition of an estate will not authorize a sale or exchange of it.<sup>2</sup> But a power to "sell and exchange" lands includes the power to make partition of them.<sup>3</sup>

1. Requisites of voluntary partition.—*Dubois v. Hepburn*, 10 Pet. 1, 21, 9 L. Ed. 325.

2. Partition under powers.—*Phelps v.*

*Harris*, 101 U. S. 370, 377, 25 L. Ed. 855.

3. *Phelps v. Harris*, 101 U. S. 370, 25 L. Ed. 855.

Where a testator devising land in Mis-



**C. Partition by Arbitration.**—In a suit where the cotenants are unable to make a partition, it is the usual custom for them to choose some disinterested persons to act as arbitrators to make this division, and when made it has the same binding effect and force as if made by the direct parties to the controversy.<sup>4</sup>

**D. Presumptions.**—After a long possession in severalty, a deed of partition may be presumed.<sup>5</sup> But as to presumption of acquiescence where party has been under disabilities, see the titles *LIMITATION OF ACTIONS AND ADVERSE POSSESSION*, vol. 7, p. 998; *INFANTS*, vol. 6, p. 1015.

## II. Compulsory Partition.

**A. Nature of Proceeding.**—Partition is a judicial act and becomes a record.<sup>6</sup> It is a possessory action;<sup>7</sup> and in most, if not in all, of its aspects, is an adversary proceeding in which a remedial right to the transfer of property is asserted, and resulting in a decree which, either *ex proprio vigore* or as executed, accomplishes such transfer.<sup>8</sup> Partition at law and in equity are different things. The first operates by the judgment of a court of law, and delivering up possession in pursuance of it; which concludes all the parties to it. Partition in equity proceeds upon conveyances to be executed by the parties, and if the parties be not competent to execute the conveyances, the partition cannot be effectually had.<sup>9</sup> A suit for partition, in a probate court, is a special proceeding in California.<sup>10</sup>

**B. Scope of Inquiry.**—A bill for partition cannot be made the means of trying a disputed title.<sup>11</sup> Nor is the question of fraud appropriate to the proceedings in partition; if raised, the proceedings are usually suspended, and the question sent to a court of law.<sup>12</sup>

Mississippi appointed a trustee with power "to dispose of all or any portion of it" that might fall to the devisees and "invest the proceeds in such manner as he might think proper for their benefit," the federal supreme court, without laying down as a general rule that the words "disposed of" import a power to make partition, holds, in view of the opinion of the supreme court of Mississippi on the precise point in a case between the same parties, although not announced under such conditions as made it *res judicata*, that the trustee had power to make partition. *Phelps v. Harris*, 101 U. S. 370, 25 L. Ed. 855.

**4. Partition by arbitration.**—*Phelps v. Harris*, 101 U. S. 370, 383, 25 L. Ed. 855. See post, "Trustees or Commissioners," II, M.

**5. Presumptions.**—*Hepburn v. Auld*, 5 Cranch 262, 3 L. Ed. 96.

**6. Nature of proceeding.**—*Weatherhead v. Baskerville*, 11 How. 329, 360, 13 L. Ed. 717.

**Partition and distribution distinguished.**—There is a difference between distribution and partition. Distribution neither gives a new title to property, nor transfers a distinct right in the estate of the deceased owner, but is simply declaratory as to the persons upon whom the law casts the succession, and the extent of their respective interests; while partition, in most, if not in all, of its aspects, is an adversary proceeding, in which a remedial right to the transfer of property is asserted, and resulting in a decree,

which, either *ex proprio vigore* or as executed, accomplishes such transfer. *Robinson v. Fair*, 128 U. S. 53, 84, 32 L. Ed. 415.

**7. Partition a possessory action.**—*Foxcroft v. Mallett*, 4 How. 353, 11 L. Ed. 1008.

**8. Partition in adversary proceeding.**—*Robinson v. Fair*, 128 U. S. 53, 84, 32 L. Ed. 415.

**9. Distinctions between partition in law and equity.**—*Gay v. Parpart*, 106 U. S. 679, 690, 27 L. Ed. 256.

**10. Partition a special proceeding.**—*Robinson v. Fair*, 128 U. S. 53, 89, 32 L. Ed. 415.

**11. Partition to try title.**—*Clark v. Roller*, 199 U. S. 541, 545, 50 L. Ed. 300; *McCall v. Carpenter*, 18 How. 297, 302, 15 L. Ed. 389.

In an action for partition where the possession adverse to complainants was claimed under a tax title, it was held that the complainants ought to establish their title at law before partition should be decreed. *Clark v. Roller*, 199 U. S. 541, 545, 50 L. Ed. 300.

The circuit court of the United States has no jurisdiction to set aside a decree of partition, rendered in the state probate court, merely upon the ground of error, nor can it refuse to give it full effect, unless the probate court was without jurisdiction of the case. *Robinson v. Fair*, 128 U. S. 53, 86, 32 L. Ed. 415.

**12. Questions of fraud not appropriate to partition.**—*McCall v. Carpenter*, 18 How. 297, 15 L. Ed. 389.

**C. Partition as a Matter of Right.**—Partition is a matter of right and is not to be defeated by the mere unwillingness of one party to have each enjoy his own in severalty.<sup>13</sup>

**D. Concurrent Remedies.**—Where legal and equitable rights may be administered by the same court it is not necessary to have a legal title which has arisen in partition proceedings referred to a court of law for adjudication, but a party who is out of possession but having a right to the same may bring a single action to determine his rights and partition.<sup>14</sup>

**E. In Suit for Dissolution of Partnership.**—Where a suit is instituted for the dissolution of a partnership which has all the necessary elements of a partition suit, it may be held good as a suit for partition.<sup>15</sup>

**F. Parties**—1. **WHO MAY COMPEL PARTITION.**—Where land is held by joint tenants or tenants in common, any one of them may compel a partition.<sup>16</sup> The heir of a member of an association containing articles of renunciation of individual interest in property for a consideration cannot maintain a bill of partition.<sup>17</sup>

2. **PARTIES DEFENDANT.**—Natural justice, and the constant rules of all courts, require that every person who is interested in partition proceedings should be summoned and heard.<sup>18</sup> In the case of a strict partition, by division of the land itself, it is sufficient to make the present owner, or, in some cases, the tenant for life of each share, a party, because the interest of those who come after him is not otherwise affected than by being changed from an estate in common to an estate in severalty.<sup>19</sup>

**G. Jurisdiction**—1. **TITLE REQUIRED.**—Where the title of the plaintiffs appears upon the allegations and proofs to be purely equitable, a bill may be maintained for partition of the land.<sup>20</sup> It has been held that a court of equity will not entertain a bill of partition, where the complainants seek to enforce a merely legal title to land.<sup>21</sup> But the act of congress of August 15, 1876, c. 297, expressly empowers the court, exercising general jurisdiction in equity, in its discretion, to compel all tenants in common of any estate, legal or equitable to make or suffer partition.<sup>22</sup>

2. **CONCURRENT JURISDICTION.**—Courts of equity and law exercise concurrent jurisdiction in some states in partition cases.<sup>23</sup>

3. **JURISDICTION OF FEDERAL COURTS AS AFFECTED BY STATE LAWS.**—The

13. **Partition as a matter of right.**—Willard *v.* Willard, 145 U. S. 116, 36 L. Ed. 644.

14. **Concurrent remedies.**—Parker *v.* Kane, 22 How. 1, 17, 16 L. Ed. 286.

15. **In suit for dissolution of partnership.**—Briges *v.* Sperry, 95 U. S. 401, 404, 24 L. Ed. 390.

16. **Who may compel partition.**—Head *v.* Amoskeag Mfg. Co., 113 U. S. 9, 21, 28, 1 L. Ed. 889; Willard *v.* Willard, 145 U. S. 116, 36 L. Ed. 644.

17. **Goesale *v.* Bimeler**, 14 How. 589, 14 L. Ed. 554.

18. **Parties defendant.**—Walton *v.* Willis, 1 Dall. 351, 354, 1 L. Ed. 171.

Part owners or tenants in common in real estate of which partition is asked in equity, have an interest in the subject matter of the suit and in the relief sought so intimately connected with that of their cotenants, that if these cannot be subjected to the jurisdiction of the court, the bill will be dismissed. Barney *v.* Baltimore City, 6 Wall. 280, 284, 18 L. Ed. 825; Shields *v.* Barrow, 17 How. 130, 15 L. Ed. 158, citing Florida, etc., R. Co. *v.*

Bell, 176 U. S. 321, 44 L. Ed. 486; Greeley *v.* Lowe, 155 U. S. 58, 70, 39 L. Ed. 69.

It is essential that a party who has an estate for life by the curtesy be made a party to partition proceedings. Walton *v.* Willis, 1 Dall. 351, 353, 1 L. Ed. 171.

It is essential to give the court jurisdiction to amend a decree of partition upon the ground of fraud that all the interested parties are before the court. Coy *v.* Mason, 17 How. 580, 583, 15 L. Ed. 125.

19. **McArthur *v.* Scott**, 113 U. S. 340, 401, 28 L. Ed. 1015.

20. **Title required.**—Hopkins *v.* Grimshaw, 165 U. S. 342, 358, 41 L. Ed. 739; Willard *v.* Willard, 145 U. S. 116, 36 L. Ed. 644.

21. **No partition in equity to enforce legal title.**—Hipp *v.* Babin, 19 How. 271, 15 L. Ed. 633.

22. **Willard *v.* Willard**, 145 U. S. 116, 36 L. Ed. 644.

23. **Concurrent jurisdiction.**—Gay *v.* Parpart, 106 U. S. 679, 27 L. Ed. 256.

power of the United States courts when sitting in equitable cases for partition is not controlled or defined by the state statutes.<sup>24</sup>

4. **AS DEPENDENT UPON RESIDENCE OF PARTIES.**—Under the act of August 13, 1888, c. 866, 25 Stat. 433, requiring, in actions between citizens of different states, suits to be brought only in the district of the residence of either the plaintiff or the defendant, it is admissible to bring a suit for partition in a district in which only a part of such defendants reside.<sup>25</sup>

5. **PARTITION OF INTESTATES' ESTATES.**—According to the law of Maryland, act of 1786, which provides for the partition of intestate estates, the jurisdiction of the court does not depend on the fact that one of the heirs was of age, but it attaches when the ancestor dies intestate, and any of the persons entitled to his estate is a minor.<sup>26</sup>

6. **APPELLATE JURISDICTION.**—As to matters of appellate jurisdiction, see the title **APPEAL AND ERROR**, vol. 1, p. 234.

**H. Property Subject.**—Water rights held in common, incapable of partition at law, may be the subject of partition in equity.<sup>27</sup> In equity, as at law, a pending lease for years is no obstacle to partition between owners of the fee.<sup>28</sup>

**I. The Petition.**—Under a statute which leaves it to the discretion of the court as to whether the land shall be set apart in severalty or sold and the proceeds divided, a bill following the statute and seeking partition in either mode, as the court in its discretion may think fit, is in proper and sufficient form.<sup>29</sup> It is not a valid objection to the validity of a partition, where it is collaterally assailed, that no complaint or petition of the applicant for the partition appears in the record as the foundation of the proceedings, as the appointment of commissioners is a determination as to the sufficiency of the petition.<sup>30</sup> The blending of final settlement and distribution, and partition, in the same petition does not render the same invalid.<sup>31</sup>

**24. Jurisdiction of federal courts as affected by state laws.**—*Robinson v. Campbell*, 3 Wheat. 212, 4 L. Ed. 372; *United States v. Howland*, 4 Wheat. 108, 115, 4 L. Ed. 526; *Boyle v. Zacharie*, 6 Pet. 648, 8 L. Ed. 532; *Livingston v. Story*, 9 Pet. 632, 9 L. Ed. 255; *Clark v. Smith*, 13 Pet. 195, 10 L. Ed. 123; *Russell v. Southard*, 12 How. 139, 13 L. Ed. 927; *Neves v. Scott*, 13 How. 268, 271, 14 L. Ed. 140; *Chapman v. Brewer*, 114 U. S. 158, 29 L. Ed. 83; *Reynolds v. Crawfordsville First Nat. Bank*, 112 U. S. 405, 28 L. Ed. 733; *Holland v. Challen*, 110 U. S. 15, 28 L. Ed. 52; *More v. Steinbach*, 127 U. S. 70, 32 L. Ed. 51; *United States v. Landram*, 118 U. S. 81, 30 L. Ed. 58; *Greeley v. Lowe*, 155 U. S. 58, 39 L. Ed. 69. See, generally, the title **COURTS**, vol. 4, p. 1059.

**25. Jurisdiction as dependent upon residence of parties.**—*Greeley v. Lowe*, 155 U. S. 58, 67, 39 L. Ed. 69.

**26. Partition of intestates' estates.**—*Thompson v. Tolmie*, 2 Pet. 157, 7 L. Ed. 381.

In California the partition of estates among the heirs, so as to invest them, separately, with the exclusive possession and ownership, as against coheirs, of distinct parcels of such realty, is a subject matter which may be committed to probate courts according to the jurisdiction usually pertaining to those tribunals. *Robinson v. Fair*, 128 U. S. 53, 84, 32 L. Ed. 415.

**27. Partition of water rights.**—*Head v. Amoskeag Mfg. Co.*, 113 U. S. 9, 21, 29 L. Ed. 889.

**28. Property under lease for years.**—*Willard v. Willard*, 145 U. S. 116, 36 L. Ed. 644.

**29. The petition.**—*Willard v. Willard*, 145 U. S. 116, 36 L. Ed. 644.

**30. Hall v. Law**, 102 U. S. 461, 463, 26 L. Ed. 217.

**31. Robinson v. Fair**, 128 U. S. 53, 88, 32 L. Ed. 415.

Proceedings for the partition of decedent's real estate was commenced by decedent's widow in a probate court of California, the petition being signed by her, as "administratrix." The petition sought a final settlement of her accounts, and a declaration of the interests of the heirs in the undistributed estate. It embraced also her claim as widow and heir, to a share in the estate remaining after the payment of debts and charges, and contained a distinct prayer that partition be had between herself and children. It showed as did the orders preceding the decree of partition, that she sought a settlement of her accounts as administratrix, and a final adjudication of her rights as heir at law in the estate remaining in her hands. It was held that the blending of final settlement, distribution, and partition in the same petition, or in one suit, did not defeat the jurisdiction of the court or render its decree of partition void. The record shows that the question of par-



**J. The Plea.**—Plea non tenent insimul is the plea of general issue in actions of partition at common law. This plea traverses all the essential allegations of the complaint, and defendants are permitted to prove under such plea anything which is material to defeat plaintiff's recovery, and may prove that they were not tenants of the freehold or that they were only tenants at will.<sup>32</sup>

**K. Notice.**—It is essential to justice that all parties should, in fact, have notice.<sup>33</sup> When a decree finds that due legal notice of intended proceedings in partition had been given to all the heirs of a decedent, the finding is, in Illinois, prima facie though not conclusive evidence of the fact.<sup>34</sup> Under the laws of California, the probate court has jurisdiction in partition cases when notice has been given by publication, where the minor children are represented by an attorney appointed by the court.<sup>35</sup>

**L. The Division—Manner of Adjusting Equities.**—If the land is susceptible of equal division, without loss or injury,<sup>36</sup> a division will be made<sup>37</sup> by mutual conveyances of the allotments,<sup>38</sup> unless prevented by the infancy of some of the parties or other circumstances,<sup>39</sup> but if it cannot be so divided, the court will either set it off to one of the parties and order owelty to be paid,<sup>40</sup> or else order the whole estate to be sold,<sup>41</sup> and the proceeds divided

tion was not considered or determined in the probate court until after it had made its decree of final settlement and distribution. *Robinson v. Fair*, 128 U. S. 53, 87, 32 L. Ed. 415.

**32. The plea.**—*Bethel v. Lloyd*, 1 Dall. 2, 1 L. Ed. 11.

**33. Notice.**—*Walton v. Willis*, 1 Dall. 351, 353, 1 L. Ed. 171.

**34. Secrist v. Green**, 3 Wall. 744, 18 L. Ed. 153.

**35. Robinson v. Fair**, 128 U. S. 53, 89, 32 L. Ed. 415.

**36. The division manner of adjusting equities.**—The question whether or not the property may be divided without injury must necessarily be an inquiry arising in the course of the proceedings, and after the jurisdiction of the court attached. *Thompson v. Tolmie*, 2 Pet. 157, 166, 7 L. Ed. 381.

**37. Division of property.**—*Willard v. Willard*, 145 U. S. 116, 36 L. Ed. 644; *Walton v. Willis*, 1 Dall. 351, 354, 1 L. Ed. 171.

**Partition to be in presence of parties.**—In *Walton v. Willis*, 1 Dall. 351, 353, 1 L. Ed. 171, it was held that when a writ de partitione facienda is issued, the sheriff is obliged to summon all the parties to attend; and if they do attend, he must make the partition in their presence.

**38. Mutual conveyances.**—*Green v. Fisk*, 103 U. S. 518, 26 L. Ed. 486; *Gay v. Parpart*, 106 U. S. 679, 691, 27 L. Ed. 256.

A decree in equity is unlike the writ of partition at common law, which in such cases operates on the title by way of estoppel, but in chancery, this difficulty is remedied by a decree that the parties shall make the necessary conveyances to each other, and the court has the power to compel them to do so by attachment. *Gay v. Parpart*, 106 U. S. 679, 690, 27 L. Ed. 256.

**39. Circumstances preventing mutual conveyances.**—If the infancy of any of

the parties, or other circumstances, prevent such mutual conveyances, the decree can only extend to make partition, give possession, and order enjoyment accordingly, until effectual conveyances can be made. *Gay v. Parpart*, 106 U. S. 679, 691, 27 L. Ed. 256.

**40. Owelty of partition.**—*Head v. Amoskeag Mfg. Co.*, 113 U. S. 9, 21, 28 L. Ed. 889.

The fee in the premises which is held by one of the heirs without division cannot vest in him, until he has paid or secured the shares of the valuation money to those who are entitled to receive it. *Walton v. Willis*, 1 Dall. 351, 354, 1 L. Ed. 171.

In Pennsylvania it was held at an early date that the eldest son of the eldest son of an intestate is entitled to an estate which cannot be divided, at the valuation, in the same manner as his father. *Walton v. Willis*, 1 Dall. 351, 353, 1 L. Ed. 171.

The practice in the orphans' courts has been to direct the same inquest, which is appointed to make a partition of real estate; if that cannot be done without prejudicing the whole, then to make the valuation. *Walton v. Willis*, 1 Dall. 351, 354, 1 L. Ed. 171.

Under the laws in Pennsylvania the orphans' court requires that recognizances of something else which the court deems sufficient, and not bonds, shall be given to secure the payment of the respective shares due on the lands of an intestate in case of partition. *Walton v. Willis*, 1 Dall. 351, 354, 1 L. Ed. 171.

**41. Sale of entire estate.**—*Head v. Amoskeag Mfg. Co.*, 113 U. S. 9, 21, 28 L. Ed. 889; *Walker v. Parker*, 13 Pet. 166, 174, 10 L. Ed. 109; *Briges v. Sperry*, 95 U. S. 401, 404, 24 L. Ed. 390; *Phelps v. Harris*, 101 U. S. 370, 378, 25 L. Ed. 855; *Willard v. Willard*, 145 U. S. 116, 36 L. Ed. 644.

A bill for the partition of property

among the parties, according to their respective rights and interests,<sup>42</sup> or invested according to the interests in the several shares.<sup>43</sup> A partition may be had of water rights which are held in common, by limiting the time and use or by the sale of the same and a division of the proceeds.<sup>44</sup>

**M. Trustees or Commissioners.**—A trustee who has authority may make partition,<sup>45</sup> and power given by statute to partition under order of court is not exhausted by one partition but a second may be made under a subsequent order.<sup>46</sup> Any recitals in deeds given by commissioners, appointed for the purpose of making partition which extends beyond the decree of appointment, has no binding force or effect.<sup>47</sup> But where a trustee makes a partition, it is valid and passes title, although the authority of the trustee is incorrectly exercised.<sup>48</sup> Nor it is not a valid objection to the partition that the trustee authorized to make it did not give his personal attention to it, but by agreement with one of the heirs demanding it, submitted it to disinterested persons, whose arbitrament he confirmed by executing the necessary indenture.<sup>49</sup> An order of a court appointing the commissioners is a determination that the application is sufficient, and that due notice of it has been given. This conclusion is not open to collateral attack; it can only be questioned, on appeal or writ of error, by a superior tribunal invested with appellate jurisdiction to review it.<sup>50</sup> Appointment and proceedings of commissioners cannot be collaterally attacked by showing that no petition or complaint appears in the record as the foundation for them.<sup>51</sup>

**N. Effect of Irregularities.**—Where there is a variance between the description of the premises in the summons and writ, or some mere irregularity in the proceedings where it causes no uncertainty, does not render such partition invalid.<sup>52</sup>

**O. Conclusiveness of Proceedings.**—Partition proceedings conclude all

which consists of two separate parcels, and one of these parcels of land constitute the Big Tree Groves of Calaveras, these trees being ranked among the curiosities of the world, it was held that a partition cannot be had without seriously impairing the value of the property, and an order of sale is proper, according to the California code of civil procedure. It is apparent that the joint ownership of this property must make it far more valuable than it would be if split up into small pieces held by persons who would become rivals for the profits arising from visitors. *Briges v. Sperry*, 95 U. S. 401, 404, 24 L. Ed. 390.

**42. Division of proceeds.**—*Willard v. Willard*, 145 U. S. 116, 36 L. Ed. 644.

**43. Investment of proceeds.**—*McArthur v. Scott*, 113 U. S. 340, 401, 28 L. Ed. 1015.

**44. Partition of water rights.**—*Head v. Amoskeag Mfg. Co.*, 113 U. S. 9, 25, 28 L. Ed. 889.

**45. Trustees or commissioners.**—*Phelps v. Harris*, 101 U. S. 370, 383, 25 L. Ed. 855.

**46.** A first statute having authorized trustees to be appointed by the chancellor to divide, as soon "as conveniently may be," certain real estate which they held in trust for A. for life, remainder to his children, one moiety whereof—the statute said—shall be held by them to those uses, and the remaining moiety shall be subdivided by them into so many lots as they think most likely to effect an advan-

tageous sale, the proceeds to be invested and the interest to be paid to tenant for life; held (the chancellor having made an order that the eastern moiety of the estate should be sold, and a third act of assembly having authorized the trustee, under the order theretofore granted, or any subsequent order, either to mortgage or sell the premises which "the chancellor has permitted or may permit him to sell"), that the power to partition the estate was not exhausted by the first partition into an eastern and western portion, and that the chancellor might permit the substituted trustee to sell the southern moiety instead of the eastern. *Williamson v. Suydam*, 6 Wall. 723, 18 L. Ed. 967.

**47.** *McCall v. Carpenter*, 18 How. 297, 302, 15 L. Ed. 389.

**48.** *Phelps v. Harris*, 101 U. S. 370, 383, 25 L. Ed. 855.

**49.** *Phelps v. Harris*, 101 U. S. 370, 25 L. Ed. 855.

**50.** *Hall v. Law*, 102 U. S. 461, 464, 26 L. Ed. 217.

**51.** *Hall v. Law*, 102 U. S. 461, 26 L. Ed. 217.

**52.** *Ewing v. Houston*, 4 Dall. 67, 1 L. Ed. 744.

The failure to repeat, in the order, the names of minor children, is not a matter affecting the jurisdiction of the court over the subject matter and the parties. *Robinson v. Fair*, 128 U. S. 53, 89, 32 L. Ed. 415.

parties thereto,<sup>53</sup> but not persons not made parties.<sup>54</sup> A writ of partition is a mere possessory action, and at most a judgment in a possessory action can bar only an action of as high a nature, that is, a possessory action for the judgment only establishes the right of possession.<sup>55</sup> Where a bill for partition is dismissed for laches and the failure to have jurisdiction against a person who claimed a superior title, and the court later orders a conveyance and sale of the property, the dismissal of the bill does not preclude him from maintaining a subsequent petition to be heard and to oppose the casting of a cloud upon his title.<sup>56</sup> A partition sale is a judicial proceeding which cannot be attacked collaterally, but must be attacked in a direct proceeding instituted for that purpose upon the same grounds as other judicial proceedings, and it is assumed that the court had jurisdiction,<sup>57</sup> and although a partition sale may be merely fictitious in order to effect the partition, it would seem that the transaction cannot be impeached.<sup>58</sup> A court will not compel a conveyance in accordance with a previous erroneous decree, but will examine the equities of the title, and render such a decree as the circumstances of the case justify and would not enforce this erroneous decree.<sup>59</sup>

**P. Termination of Controversy by Amicable Partition.**—An amicable partition, by deed entered into between the parties, will terminate the controversy in suit for partition.<sup>60</sup>

**Q. Costs.**—In partition cases costs cannot be secured from the attached property of nonresidents.<sup>61</sup>

**R. Presumption as to Partition.**—Where under the laws of the state where the lands are situated, a partition is a judicial act, and becomes a record, no presumption will be made that there has been a partition where one of the party was under disability and the records of the partition are lost.<sup>62</sup>

**S. Resale.**—Under a decree of partition, a resale may be had by motion, if notice is served on purchaser.<sup>63</sup>

**T. Rights of Purchasers.**—Where an attorney in a partition suit purchased his client's share in certain land pendente lite, he is chargeable with notice of existing equities and not a bona fide purchaser.<sup>64</sup>

**53. Conclusiveness of proceedings.**—*Parker v. Kane*, 22 How. 1, 13, 16 L. Ed. 286; *Whiteside v. Haselton*, 110 U. S. 296, 28 L. Ed. 152. See, generally, the titles PARTIES, ante, p. 34; RES ADJUDICATA.

**54.** Thus a decree for partition of either kind, which cuts off remaindermen, not then in esse, from having, when they come into being, any interest in either land or proceeds, does not bind them. *McArthur v. Scott*, 113 U. S. 340, 401, 28 L. Ed. 1015.

A decree of partition operates only upon the parties directly interested. *McCall v. Carpenter*, 18 How. 297, 303, 15 L. Ed. 389.

**55.** *Foxcroft v. Mallett*, 4 How. 353, 11 L. Ed. 1008.

**56. Effect of dismissal of bill.**—*Clark v. Roller*, 199 U. S. 541, 544, 545, 50 L. Ed. 300.

**57. Conclusiveness of sale.**—*Thompson*

*v. Tolmie*, 2 Pet. 157, 164, 7 L. Ed. 381; *Grignon v. Astor*, 2 How. 319, 11 L. Ed. 283; *Beauregard v. New Orleans*, 18 How. 497, 15 L. Ed. 469.

**58.** *Phelps v. Harris*, 101 U. S. 370, 378, 25 L. Ed. 855.

**59.** *Gay v. Parpart*, 106 U. S. 679, 699, 27 L. Ed. 256.

**60. Termination of controversy by amicable partition.**—*Walker v. Dilworth*, 2 Dall. 257, 260, 1 L. Ed. 372.

**61. Costs.**—*Freeman v. Alderson*, 119 U. S. 185, 190, 30 L. Ed. 372.

**62. Presumption as to partition.**—*Weatherhead v. Baskerville*, 11 How. 329, 13 L. Ed. 717.

**63. Resale.**—*Stuart v. Gay*, 127 U. S. 518, 32 L. Ed. 191.

**64. Rights of purchasers.**—*Gay v. Parpart*, 106 U. S. 679, 697, 27 L. Ed. 256.



# **PARTNERSHIP.**

BY JOHN D. PARKER.

- I. Definition and Distinctions, 76.**
- II. General Principles, 76.**
  - A. Agency, 76.
  - B. Incidents of Partnership, 78.
  - C. Trust Relation, 78.
    - 1. In General, 78.
    - 2. Where Real Estate Is Conveyed to One Partner, 78.
  - D. Firm Name, 78.
  - E. Good Will, 79.
  - F. Legality of Object, 79.
- III. What Constitutes, 79.**
  - A. In General, 79.
  - B. Participation in Profits as Test, 80.
    - 1. In General, 80.
    - 2. Loan of Money with Participation in Profits, 82.
    - 3. Ownership of Real Property, 82.
      - a. In General, 82.
      - b. Joint-Stock Company, 84.
  - C. Railroad Leases and Agreements, 84.
  - D. Admission of New Member Prior to Incorporation, 84.
  - E. Joint Owners of Letters-Patent, 85.
- IV. Relations Inter Se, 85.**
  - A. In General, 85.
  - B. Articles of Partnership, 85.
  - C. Power to Transact Business, 86.
  - D. Right to Dispose of Partnership Property, 86.
  - E. Right to Profits and Disposition of Assets, 87.
    - 1. In General, 87.
    - 2. Application of Partnership Funds to Individual Debts and Claims, 87.
    - 3. Amount of Profits to Which Each Partner Is Entitled, 88.
    - 4. Violation of Partnership Agreement, 89.
  - F. Accounting and Settlement, 89.
    - 1. In General, 89.
    - 2. By Arbitration, 91.
  - G. Lien of Partner, 91.
  - H. Sale to Copartner, 91.
    - 1. Using Information or Engaging in Business for Personal Advantage, 92.
  - J. Payment of Taxes, 94.
- V. Relation to Third Persons, 94.**
  - A. In General, 94.
  - B. Effect of Agreements between Partners, 96.
  - C. Acts of Partner beyond Scope of Business, 97.
  - D. Liability of Person Holding Out as Partner, 98.
  - E. Liability on Negotiable Instruments, 100.
  - F. Liability for Tort, 101.

- G. Right to Bind Partnership by Deed, 102.
- H. Rights and Priorities of Creditors, 103.
  - 1. In General, 103.
  - 2. Application of Partnership Funds to Individual Debts, 105.
  - 3. Liability of Old Firm for Debts of New, 107.

## **VI. Dissolution, 107.**

- A. By Agreement, 107.
- B. By Expiration of Time, 107.
- C. Dissolution by Sale, 107.
- D. Misconduct of Partner, 108.
- E. Effect of War, 108.
- F. Death of Partner, 109.
  - 1. In General, 109.
  - 2. Winding Up the Business, 109.
    - a. In General, 109.
    - b. Collection of Assets, 110.
    - c. Disposition of Assets, 110.
  - 3. Continuance of Business, 111.
    - a. In General, 111.
    - b. Liability of Person Continuing the Business, 112.
  - 4. Liability of Surviving Partner, 113.
  - 5. Rights of Heirs and Personal Representatives of Deceased Partners, 114.
- G. Bankruptcy and Insolvency, 114.
- H. Assignment for the Benefit of Creditors, 115.
- I. Effect of Dissolution, 115.
- J. Necessity for and Effect of Notice of Dissolution, 115.
- K. Rights upon Dissolution, 116.
  - 1. In General, 116.
  - 2. Conversion of Realty into Personalty, 117.

## **VII. Limited Partnerships, 117.**

## **VIII. Mining Partnerships, 118.**

## **IX. Pleading and Practice, 119.**

- A. Parties, 119.
- B. Jurisdiction, 120.
  - 1. Equity, 120.
  - 2. Admiralty, 121.
- C. Declarations and Bills, 121.
- D. Plea, 121.
- E. Demurrer, 122.
- F. Defenses, 122.
- G. Evidence, 123.
  - 1. Presumption and Burden of Proof, 123.
  - 2. Declarations and Admissions, 124.
    - a. In General, 124.
    - b. Partners, 124.
    - c. Third Persons, 124.
  - 3. Admissibility, 125.
  - 4. Sufficiency of Evidence, 125.
  - 5. Variance, 126.
- H. Witnesses, 126.
- I. Instructions, 126.
- J. Limitation and Laches, 127.
- K. Verdict and Judgment, 128.
  - 1. Necessity for Service of Process, 128.

2. General Verdict, 129.
3. Priority, 129.
4. Correctness and Conclusiveness, 129.
- L. Execution, Attachment and Garnishment, 130.
- M. Appeal and Error, 130.
- N. Actions between Partners, 130.
  1. At Law, 130.
  2. In Equity, 131.
    - a. In General, 131.
    - b. Injunction and Specific Performance, 131.
    - c. Discovery and Account, 132.
      - (1) In General, 132.
      - (2) Rights of Assignees and New Members, 132.
    - d. Dissolution and Sale, 133.
  3. Admiralty, 133.

## CROSS REFERENCES.

See the titles ASSIGNMENTS FOR BENEFIT OF CREDITORS, vol. 2, p. 599; BANKRUPTCY, vol. 2, p. 792; INSOLVENCY, vol. 7, p. 1; INSURANCE, vol. 7, p. 66; JOINT TENANTS AND TENANTS IN COMMON, vol. 7, p. 533; MORTGAGES AND DEEDS OF TRUST, vol. 8, p. 452; PLEDGE AND COLLATERAL SECURITY; PRIZE; RES ADJUDICATA; SHIPS AND SHIPPING.

As to power to fill in blanks in commercial paper given by partnership, see the title ALTERATION OF INSTRUMENTS, vol. 1, p. 268. As to amendment on appeal in cases of partnership, see the title APPEAL AND ERROR, vol. 2, p. 152. As to assignment of breaches on bond given by partners to abide by award, see the title ARBITRATION AND AWARD, vol. 2, p. 487. As to assignment of a contract, by partnership, see the title ASSIGNMENTS, vol. 2, p. 567. As to assignment for benefit of creditors by partnership general and special, see the title ASSIGNMENTS FOR BENEFIT OF CREDITORS, vol. 2, p. 603. As to effect of erroneous inclusion of debt of special partner in schedule, see the title ASSIGNMENTS FOR BENEFIT OF CREDITORS, vol. 2, p. 610. As to distribution of proceeds of assignment for benefit of partnership and individual creditors, see the title ASSIGNMENTS FOR BENEFIT OF CREDITORS, vol. 2, p. 630. As to priority of the United States in partnership property, see the title BANKRUPTCY, vol. 2, p. 921. As to whether a joint debt may be set off against the separate claim of the assignee of one of the partners, see the title BANKRUPTCY, vol. 2, p. 922. As to assignment for the benefit of creditors by banking firm, see the title BANKS AND BANKING, vol. 3, p. 182. As to application of bankrupt acts to partners and partnership estates, see the title BANKRUPTCY, vol. 2, p. 950. As to power of bank to acquire partnership property or engage in partnership business, see the title BANKS AND BANKING, vol. 3, pp. 79, 80. As to indorsement of paper payable to partnership, see the title BILLS, NOTES AND CHECKS, vol. 3, p. 293. As to want of authority of partner as defense against holder of promissory note, see the title BILLS, NOTES AND CHECKS, vol. 3, p. 307. As to presentation of commercial paper at office of partnership, see the title BILLS, NOTES AND CHECKS, vol. 3, p. 320. As to notice of dishonor where drawer and acceptor are partners, see the title BILLS, NOTES AND CHECKS, vol. 3, p. 327. As to competency of partner to testify as to fraud committed by the partner drawing notes, see the title BILLS, NOTES AND CHECKS, vol. 3, p. 362. As to benefit to promisor who becomes partner, see the title CONTRACTS, vol. 4, p. 565. As to the distinction between corporations and limited partnerships, see the title CORPORATIONS, vol. 4, p. 630. As to whether a limited partnership organized under the laws of Pennsylvania is a corporation within the presumption as to citizenship, see the title COURTS, vol. 4, p. 956. As to jurisdiction over joint stock companies, see the title COURTS, vol. 4, p. 956. As to diverse citizenship in actions by and against partners, see the title COURTS, vol. 4, p. 957. As to ancillary jurisdiction in a



suit against a partnership, see the title *COURTS*, vol. 4, p. 984. As to averment of citizenship in suit against partner, see the title *COURTS*, vol. 4, p. 1003. As to suits upon covenant by partners, see the title *COVENANT, ACTION OF*, vol. 5, p. 3. As to declarations showing that party's signature to articles of partnership was unauthorized, see the title *DECLARATIONS AND ADMISSIONS*, vol. 5, p. 217. As to right of executor to pledge partnership property, see the title *EXECUTORS AND ADMINISTRATORS*, vol. 6, p. 141. As to validity of statute requiring payment of fee and filing copy of charter for corporations and partnerships doing business in the state, see the title *FOREIGN CORPORATIONS*, vol. 6, p. 321. As to right of one partner to insure partnership property, see the title *INSURANCE*, vol. 7, p. 110. As to insurance by nominal partnership, see the title *INSURANCE*, vol. 7, p. 110. As to insurable interest of partner in life of copartner, see the title *INSURANCE*, vol. 7, p. 115. As to assignment of policy of insurance to firm, see the title *INSURANCE*, vol. 7, p. 175. As to judicial notice of law partnerships, see the title *JUDICIAL NOTICE*, vol. 7, p. 672. As to seizure and condemnation of partnership property, see the title *PRIZE*. As to removal of causes against partnerships, see the title *REMOVAL OF CAUSES*. As to partnership for the purpose of carrying out a government contract, see the title *UNITED STATES*.

### I. Definition and Distinctions.

A contract of partnership is one by which two or more persons agree to carry on a business for their common benefit, each contributing property or services, and having a community of interests in the profits. It is in effect a contract of mutual agency, each partner acting as a principal in his own behalf and as agent for his copartner.<sup>1</sup>

### II. General Principles.

**A. Agency.**—By the law of partnership each member of the firm is both a principal and an agent to represent and bind the firm and his associate partners in dealings and transactions within the scope of the copartnership.<sup>2</sup> No

**1. Definitions.**—*Meehan v. Valentine*, 145 U. S. 611, 623, 36 L. Ed. 835; *Karrick v. Hannaman*, 168 U. S. 328, 42 L. Ed. 484; *Ward v. Thompson*, 22 How. 330, 334, 16 L. Ed. 249; *Shaeffer v. Blair*, 149 U. S. 248, 257, 37 L. Ed. 721.

"Partnership is usually defined to be a voluntary contract between two or more competent persons, to place their money, effects, labor, and skill, or some one or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them." *Berthold v. Goldsmith*, 24 How. 536, 541, 16 L. Ed. 762. See, also, *Seymour v. Freer*, 8 Wall. 202, 205, 19 L. Ed. 306.

**Partnership distinct from partners themselves.**—*Forsyth v. Woods*, 11 Wall. 484, 486, 20 L. Ed. 207.

It seems even though all the persons who compose the firm may be parties to the contract, the firm as such may not be liable. *Forsyth v. Woods*, 11 Wall. 484, 486, 20 L. Ed. 207.

**Persons who are not partners.**—Persons are not partners in any sense who have never agreed to become partners, have never held themselves out as partners or contributed anything to the capital of the firm or derived any profits whatever from its business. *Hunt v. Oliver*, 118 U. S. 211, 221, 30 L. Ed. 128; *Berthold v. Gold-*

*smith*, 24 How. 536, 16 L. Ed. 762. *Felichy v. Hamilton*, 1 Wash. C. C. 491. See, also, *Beckwith v. Talbot*, 95 U. S. 289, 24 L. Ed. 496.

**Secret partnership.**—According to the common meaning of "secret partnerships" those are deemed secret where the existence of certain persons as partners was not avowed or made known to the public, by any of the partners. *Winship v. United States Bank*, 5 Pet. 529, 554, 8 L. Ed. 216.

**Right to compel account of profits.**—The right to compel an account of profits in equity is one of the most approved criteria of the existence of the partnership. *Pleasants v. Fant*, 22 Wall. 116, 120, 22 L. Ed. 780. See post, "Accounting and Settlement," IV, F.

**2. Agency.**—*Latta v. Kilbourn*, 150 U. S. 524, 543, 37 L. Ed. 1169; *Strang v. Bradner*, 114 U. S. 555, 561, 29 L. Ed. 248; *Andrews v. Congar*, 131 U. S., appx. clxxxiii, 26 L. Ed. 90; *Kimbro v. Bullitt*, 22 How. 256, 266, 16 L. Ed. 313; *Tillier v. Whitehead*,<sup>\*</sup> 1 Dall. 269, 1 L. Ed. 131; *Meehan v. Valentine*, 145 U. S. 611, 623, 36 L. Ed. 835.

"By the general law of partnership, the act of each partner, during the continuance of the partnership, and within the scope of its objects, binds all the others. It is considered the act of each and of all,

express authority is necessary to confer this agency or fiduciary relation in respect to the business of the firm.<sup>3</sup> During the partnership all of the partners are answerable for the acts of each within the scope of the partnership business.<sup>4</sup>

resulting from a general and mutual delegation of authority. Each partner may, therefore, bind the partnership, by his contracts in the partnership business; but he cannot bind it, by any contracts, beyond those limits." *Bell v. Morrison*, 1 Pet. 351, 370, 7 L. Ed. 174.

Mr. Justice Story, at the beginning of his Commentaries on Partnership, said: "Every partner is an agent of the partnership; and his rights, powers, duties and obligations are in many respects governed by the same rules and principles as those of an agent. A partner, indeed, virtually embraces the character both of a principal and of an agent. So far as he acts for himself and his own interest in the common concerns of the partnership, he may properly be deemed a principal; and so far as he acts for his partners he may as properly be deemed an agent. The principal distinction between him and a mere agent is, that he has a community of interest with the other partners in the whole property and business and responsibilities of the partnership; whereas an agent, as such, has no interest in either." *Meehan v. Valentine*, 145 U. S. 611, 620, 36 L. Ed. 835.

"Acts performed by one of the partners, in respect to the partnership concerns, and in the usual course of its business, differ in nothing, so far as their legal consequences are concerned, from those transactions in which they all concur; and for the reason, that, by the commercial law, each partner of a trading firm is presumed to be intrusted by his copartners with a general authority in all the partnership affairs. Accordingly, it was held, in *Hawkin v. Bourne* (8 Mee. and Wels. 710), that one partner, by virtue of the relation he bears to the firm, is constituted a general agent for another, as to all matters within the scope of the partnership dealings, and has conferred upon him, by virtue of that relation, all authorities necessary for carrying on the partnership, and all such as are usually exercised in the business in which they are engaged." *Kimbrow v. Bullitt*, 22 How. 256, 266, 16 L. Ed. 313.

**Transaction of business in usual way.**—When a partnership is formed for a particular purpose, it is understood to be in itself a grant of power to the acting members of the company, to transact its business in the usual way; if that business be to buy and sell, then the individual buys and sells for the company; and every person with whom he trades in the way of his business has a right to consider him as the company, whoever may compose it. It is usual to buy and sell on credit; and if it be so, the partner who purchases on credit, in the name of the

firm, must bind the firm; this is a general authority held out to the world, and to which the world has a right to trust. *Winship v. United States Bank*, 5 Pet. 529, 8 L. Ed. 216.

**Delivery in escrow.**—Where it was contended that where there were several obligees constituting a copartnership a bond may be delivered in escrow to one of the firm, the court was of opinion that a delivery to one was a delivery to all. In the opinion it was said: "It can never be necessary to the validity of a bond, that all the obligees should be convened together at the delivery." *Moss v. Riddle*, 5 Cranch 351, 3 L. Ed. 123.

**All partnerships somewhat limited.**—"All partnerships, says Chancellor Kent, are more or less limited; and there is none that embraces, at the same time, every branch of the business. Such limitations are generally to be found in the terms and stipulations of the articles of copartnership; but they may arise from general usage, or, to a certain extent, from the character of the business, and the nature of the objects to be accomplished." *Kimbrow v. Bullitt*, 22 How. 256, 267, 16 L. Ed. 313. See post, "Limited Partnership," VII.

**3. Necessity for express authority.**—*Latta v. Kilbourn*, 150 U. S. 524, 543, 37 L. Ed. 1169.

"The liability of one partner, for acts and contracts done and made by his copartners, without his actual knowledge or assent, is a question of agency. If the authority is denied by the actual agreement between the partners, with notice to the party who claims under it, there is no partnership obligation. If the contract of partnership is silent, or the party with whom the dealing has taken place has no notice of its limitations, the authority for each transaction may be implied from the nature of business according to the usual and ordinary course in which it is carried on by those engaged in it in the locality which is its seat, or as reasonably necessary or fit for its successful prosecution. If it cannot be found in that, it may still be inferred from the actual though exceptional course and conduct of the business of the partnership itself, as personally carried on with the knowledge, actual or presumed, of the partner sought to be charged." *Irwin v. Williar*, 110 U. S. 499, 503, 28 L. Ed. 225; *Dowling v. Exchange Bank*, 145 U. S. 512, 516, 36 L. Ed. 795.

**4. No necessity for knowledge of copartner.**—*Crawford v. Willing*, 4 Dall. 286, 290, 1 L. Ed. 836.

**Responsibility implied.**—"By 'forming a partnership, the partners declare themselves to the world satisfied with the good faith and integrity of each other,



**B. Incidents of Partnership.**—Where persons are partners the incidents or consequences follow that the acts of one in conducting the partnership business are the acts of all; that each is agent for the firm and for the other partners; that each receives part of the profits as profits, and takes part of the fund to which the creditors of the partnership have a right to look for the payment of their debts; that all are liable as partners upon contracts made by any of them with third persons within the scope of the partnership business; and that even an express stipulation between them that one shall not be so liable, though good between themselves, is ineffectual as against third persons. And participating in profits is presumptive, but not conclusive, evidence of partnership.<sup>5</sup>

**C. Trust Relation.**—1. **IN GENERAL.**—Judge Story, in recapitulating the confidential relations, mentions partner and partner as one of them.<sup>6</sup>

2. **WHERE REAL ESTATE IS CONVEYED TO ONE PARTNER.**—Where real estate is purchased and paid for with partnership funds but conveyed to one of the partners alone, a trust results in favor of the other partners.<sup>7</sup>

**D. Firm Name.**—It is not necessary to the validity of a firm name that it be adopted in the articles of partnership.<sup>8</sup>

and impliedly undertake to be responsible for what they will respectively do within the scope of the partnership concerns.' Story on Partnership, 161." Smyth v. Strader, 4 How. 404, 416, 11 L. Ed. 1031.

**5. Incidents of partnership.**—Meehan v. Valentine, 145 U. S. 611, 623, 36 L. Ed. 835.

Partnerships for commercial purposes, for trading with the world, for buying and selling from and to a great number of individuals, are necessarily governed by many general principles which are known to the public; which subserve the purposes of justice; and which society is concerned in sustaining. One of them is, that a man who shares in the profit, although his name may not be in the firm, is responsible for all its debts; another is, that a partner, certainly the acting partner, has power to transact the whole business of the firm, whatever that may be; and consequently, to bind his partners in such transactions, as entirely as himself; this is a general power, essential to the well-conducting of business, which is implied in the existence of a partnership. Winship v. United States Bank, 5 Pet. 529, 8 L. Ed. 216.

**6. Confidential relations.**—Brooks v. Martin, 2 Wall. 70, 82, 17 L. Ed. 732. See, generally, the title TRUSTS AND TRUSTEES.

"The relation of partners with each other is one of trust and confidence. Each is general agent of the firm and is bound to act in entire good faith to the other. The functions, rights and duties of partners in a great measure comprehend those both of trustees and agents, and the general rules of law applicable to such characters are applicable to them. Neither partner can, in the business and affairs of the firm, clandestinely stipulate for a private advantage to himself; he can neither sell to nor buy from the firm at a concealed profit for himself. Every advantage which he can obtain in the business of the firm must enure to the benefit

of the firm. These principles are elementary." Kimberly v. Arms, 129 U. S. 512, 528, 32 L. Ed. 764, quoting with approval Mitchell v. Reid, 61 N. Y. 123. See Story on Part., §§ 174, 178; Story on Agency, § 211. See post, "Using Information or Engaging in Business for Personal Advantage," IV, I.

**Business conducted by one copartner at a distance from the other.**—Where one partner, who is in sound health, is made sole agent of the partnership by another, who is not, and who relies on him wholly for true accounts, and the party thus made agent manages the business at a distance from the other, communicating to him no information, the relation of partners, whatever it may be in general, becomes fiduciary, and the law governing such relations applies. Brooks v. Martin, 2 Wall. 70, 17 L. Ed. 732.

**Double trust.**—Where a person was not merely a partner but was the agent of the firm for the transaction of its business and as such was allowed a salary beyond the interest coming to him as partner, it was held that he stood clothed with a double trust which imposes upon him the utmost good faith in his dealings. Whatever he may have obtained in disregard of such trust a court of equity will lay hold of and subject to the benefit of the partnership. Kimberly v. Arms, 129 U. S. 512, 527, 528, 32 L. Ed. 764.

**7. Real estate conveyed to one partner.**—Riddle v. Whitehill, 135 U. S. 621, 34 L. Ed. 282. See the title TRUSTS AND TRUSTEES.

**8. Validity of firm name.**—Where, in the articles of partnership, no firm name was mentioned as agreed upon, and the concern went into operation under the articles, the books being kept, and the bills and accounts relating to their transactions being made out, at their warehouse, in the name of "Hoffman & Johnson," it cannot be questioned, but that a name, thus assumed, recognized and pub-



**E. Good Will.**—See the title *GOOD WILL*, vol. 6, p. 567. Upon the dissolution of a partnership if one of the partners continues the business with the consent of the other, he is entitled to the good will.<sup>9</sup>

**F. Legality of Object.**—The courts will not enforce supposed rights under partnerships formed for illegal purposes.<sup>10</sup>

### III. What Constitutes.

**A. In General.**—Where there is a community of interest in the property and also a community of interest in the profit and loss, it is clear that there is an actual partnership between the parties themselves and as to third persons,<sup>11</sup>

licly used, became the legitimate name and style of the firm; not less so than if it had been adopted by the articles of partnership. *LeRoy v. Johnson*, 2 Pet. 186, 187, 7 L. Ed. 391.

**9. Right to good will.**—In *Menendez v. Holt*, 128 U. S. 514, 32 L. Ed. 526, it was held that when a partner retires from a firm, assenting to, or acquiescing in the retention by the other partners of the old place of business, and the future conduct of the business by them under the old name, the good will remains with the latter, as of course, and that, under such circumstances, the right to use a trademark passes to the remaining partners as a part of such good will. See, also, *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 548, 35 L. Ed. 247.

"It may be that where a firm is dissolved and ceases to exist under the old name, each of the former partners would be allowed to obtain 'his share' in the good will, so far as that might consist in the use of trademarks, by continuing such use in the absence of stipulation to the contrary." *Menendez v. Holt*, 128 U. S. 514, 522, 32 L. Ed. 526.

**10. Accounting.**—"About the earliest illustration of this doctrine is almost traditional in the famous case of *The Highwayman*. It is stated that Lord Kenyon once said, by way of illustration, that he would not sit to take an account between two robbers on Hounslow Heath, and it was questioned whether the legend in regard to the highwayman did not arise from that saying. It seems, however, that the case was a real one. He did file a bill in equity for an accounting against his partner, although it was no sooner filed and its real nature discovered than it was dismissed with costs, and the solicitors for the plaintiff were summarily dealt with by the court as for a contempt in bringing such a case before it. (1 *Lindley on Partnership*, 5th Ed. 94, note n; 9 *Law Quarterly Review* (London), pp. 105-197.)" *McMullen v. Hoffman*, 174 U. S. 639, 654, 43 L. Ed. 1117. Compare *Brooks v. Martin*, 2 Wall. 70, 17 L. Ed. 732; *Kinsman v. Parkhurst*, 18 How. 289, 293, 15 L. Ed. 385. See the title *ILLEGAL CONTRACTS*, vol. 6, p. 737.

**Illegal contract in reference to water-works for city of Portland.**—*McMullen v. Hoffman*, 174 U. S. 639, 43 L. Ed. 1117. See, also, *Gaines v. New Orleans*, 6 Wall.

642, 18 L. Ed. 950; *Gaines v. Lizardi*, 154 U. S., appx., 555, 18 L. Ed. 967; *McBlair v. Gibbes*, 17 How. 232, 15 L. Ed. 132.

**Administration of estate.**—The acceptance of letters of administration being a trust—(granted because of the confidence reposed in the grantee)—a loss sustained by a surety in the administration bond, who has entered into the suretyship under a representation from a firm of which the administrator was a member, that they intended to take into the possession of the partnership all the assets of the intestate, to make the administration a matter of partnership business, and to share as partners the gains and losses resulting from the administration, so that in signing the bond he would become the surety of the firm and not of the individual partner, cannot be recovered by the surety from the firm. Such a transaction is against the policy of the law. *Forsyth v. Woods*, 11 Wall. 484, 20 L. Ed. 207.

**Society of separatists.**—There is no legal objection to such a partnership as that of the society called Separatists and the fact that their articles of association or constitutions of 1819 and 1824 contained a renunciation of individual property did not make it so. It cannot be considered a forfeiture of individual rights for the community to succeed to his share because it was a matter of voluntary contract. *Goesele v. Bimeler*, 14 How. 589, 14 L. Ed. 554.

**Restraint of trade.**—*McMullen v. Hoffman*, 174 U. S. 639, 43 L. Ed. 1117. See, generally, the title *RESTRAINT OF TRADE*.

The agreement that one only of the parties should continue the manufacture of certain machines was not void as being in restraint of trade. *Kinsman v. Parkhurst*, 18 How. 289, 15 L. Ed. 385.

**11. Community of interest.**—*Berthold v. Goldsmith*, 24 How. 536, 541, 16 L. Ed. 762. See ante, "Definition and Distinctions," I.

An agreement between the owners of a stock of goods prescribed the conditions upon which H. was taken into partnership by L. & W. in respect to the property placed in his hands as capital stock for the L. & W. Company. He was to open "a new set of books" of the "new concern" or of "new firm," the profits of such business to be divided at stated periods, upon the basis of eight-tenths to L. & W.

and the converse of this is also true.<sup>12</sup> The contribution of money or property is not essential to the creation of the partnership. It is competent for the partners in consideration of one member taking entire charge and control of the business to give him an interest though not necessarily an equal interest in the property which is to constitute, at the outset, the whole capital of the partnership.<sup>13</sup>

**B. Participation in Profits as Test**—1. IN GENERAL.—The right to participate in the profits is presumptive but not conclusive evidence of the existence of a partnership.<sup>14</sup> Participation in the profits will not alone create a partnership between the parties themselves as to the property, contrary to their intention.<sup>15</sup> Actual partnership, as between a creditor and the dormant partner, is considered by the law to subsist where there has been a participation in the profits, although the participant may have expressly stipulated with his asso-

and two-tenths to H. and the losses to be borne in the same ratio. A clause in the agreement also provided that "the partnership only pertains to that of merchandising and has no connection in any shape or manner with any business the said L. & W. may have jointly or severally outside." The court held that the written agreement showed a purpose to put the goods themselves into partnership and to establish a community of property as well as a community of profit and loss among its several members. *Paul v. Cullum*, 132 U. S. 539, 33 L. Ed. 430.

12. *Beckwith v. Talbot*, 95 U. S. 289, 24 L. Ed. 496.

13. *Paul v. Cullum*, 132 U. S. 539, 33 L. Ed. 430.

14. **Participation in profits.**—*Meehan v. Valentine*, 145 U. S. 611, 620, 36 L. Ed. 835.

"A participation in the profits will ordinarily establish the existence of a partnership between the parties in favor of third persons, in the absence of all other opposing circumstances," but that it is not "to be regarded as anything more than mere presumptive proof thereof, and therefore liable to be repelled and overcome by other circumstances, and not as of itself overcoming or controlling them;" and therefore "if the participation in the profits can be clearly shown to be in the character of agent, then the presumption of partnership is repelled." And again: "The true rule, *ex aequo et bono*, would seem to be that the agreement and intention of the parties themselves should govern all the cases. If they intended a partnership in the capital stock, or in the profits, or in both, then that the same rule should apply in favor of third persons, even if the agreement were unknown to them. And on the other hand, if no such partnership were intended between the parties, then that there should be none as to third persons, unless where the parties had held themselves out as partners to the public, or their conduct operated as a fraud or deceit upon third persons." Story on Partnership, §§ 1, 38, 49, quoted in *Meehan v. Valentine*, 145 U. S. 611, 620, 36 L. Ed. 835.

There may be such a community of

interest in the profits without regard to loss, and without any community of interest whatever in the property, as will establish the partnership relation. *Berthold v. Goldsmith*, 24 How. 536, 542, 16 L. Ed. 762.

15. **Real intention of parties.**—*Berthold v. Goldsmith*, 24 How. 536, 542, 16 L. Ed. 762. See, also, *Drennan v. London Assur. Co.*, 113 U. S. 51, 28 L. Ed. 919; *Paul v. Cullum*, 132 U. S. 539, 551, 33 L. Ed. 430.

"Mere participation in profits would give no such interest contrary to the real intention of the parties. Persons cannot be made to assume the relation of partners, as between themselves, when their purpose is that no partnership shall exist. There is no reason why they may not enter into an agreement whereby one of them shall participate in the profits arising from the management of particular property without his becoming a partner with the others, or without his acquiring an interest in the property itself, so as to effect a change of title." *London Assur. Co. v. Drennan*, 116 U. S. 461, 472, 29 L. Ed. 688.

**Partnership and community of interest distinguished.**—"Partnership and community of interest, independently considered, are not always the same thing; for the first, as between the partners themselves, is founded upon the copartnership agreement which prescribes the relation they bear to each other, and of itself creates the community of interest; but the last may exist, notwithstanding there has been no agreement between the parties. Part owners of a ship, for example, are uniformly treated as tenants in common and not as partners, although it cannot be denied that there is a community of interest between them in every part of the vessel, and each is entitled to a share of her earnings in proportion to his undivided interest, and must also share the loss. Joint owners of merchandise may consign it for sale abroad to the same consignee; and if each gives separate instructions for his own share, it is well-settled law that these interests are several, and that they are not to be treated as



ciates against all the usual incidents to that relation.<sup>16</sup> Actual participation in the profits, as principal, in general, creates a partnership as between the participant and third persons, whatever may have been the real relation of the former to the firm,<sup>17</sup> but the rule has no application to a case of mere service or special agency, where the employee has no power in the firm and no such interest in the profits as will enable him to go into a court of equity to enforce a lien for the same or to compel an account. Unless such employee is in some way interested in the profits of the business, as principal, he cannot be regarded as falling within the general rule, because, when not so interested, his condition is not different from that of an ordinary creditor.<sup>18</sup>

partners in the adventure." *Berthold v. Goldsmith*, 24 How. 536, 541, 16 L. Ed. 762.

"Where a broker or other agent purchases goods for several persons, each agreeing to take a certain portion of the entire parcel, it is clear, if there is no arrangement that the goods shall be sold on joint account, that the transaction does not amount to a partnership, although there is undeniably a community of interest in the goods so purchased. These examples will be sufficient to show that while every partnership is founded on a community of interest, it is nevertheless incorrect to suppose that every community of interest necessarily constitutes the relation of partnership within the meaning of the commercial law. Whenever it appears that there is a community of interest in the capital stock and also a community of interest in the profit and loss, then it is clear that the case is one of actual partnership between the parties themselves, and of course it is so as to third persons. All of the decided cases, however, agree that it is seldom or never essential that both of these ingredients should concur in the case in order to establish that relation. Cases occur, undoubtedly, where a community of interest in the property, without any regard to the profits, will almost necessarily lead to the conclusion that the relation between the parties was that of partnership; and, under some circumstances, that conclusion will follow, although the sale of the property for the joint interest may not be contemplated by the parties." *Berthold v. Goldsmith*, 24 How. 536, 541, 16 L. Ed. 762.

**Partners of agent.**—The partners of the agent would not be parties to his contract with his principal, even if he agreed to make them sharers in the profits of it. *Law v. Cross*, 1 Black 533, 17 L. Ed. 185.

"That Cross was a member of each of these firms, was but an accident in the case, and would not necessarily make them parties to the contract more than if any other individual or firm had been his agents; and even if Cross had agreed to make them equal shares in the profits arising from the contract, they did not thereby become parties to it. The firm had no contract with Law on which they could sustain a suit, or be liable to him.

Much stress was made in the argument of this case, that the firm, in their correspondence with Law, giving information of what had been done, used the words 'we' and 'us.' There was certainly no grammatical impropriety in the use of these pronouns; but the inference that the firm were not acting for Mr. Cross, and that Law had made some contract with them which does not otherwise appear, is certainly not a necessary one either in law or in fact. Every letter of instruction as to purchase of coal was sent by Law to Cross individually." *Law v. Cross*, 1 Black 533, 537, 17 L. Ed. 185.

**16. Stipulations between partners.**—*Berthold v. Goldsmith*, 24 How. 536, 542, 16 L. Ed. 762; *Meehan v. Valentine*, 145 U. S. 611, 620, 36 L. Ed. 835. See post, "Effect of Agreements between Partners," V, B.

**17. Participation in profits as principal.**—*Berthold v. Goldsmith*, 24 How. 536, 542, 16 L. Ed. 762; *Meehan v. Valentine*, 145 U. S. 611, 620, 36 L. Ed. 835.

**18. Servants, agents or employees.**—*Berthold v. Goldsmith*, 24 How. 536, 16 L. Ed. 762; *Meehan v. Valentine*, 145 U. S. 611, 620, 36 L. Ed. 835.

"Merchants are obliged to have clerks, and oftentimes find it necessary to employ brokers or special agents to effect sales, and it is no more detrimental to their creditors that such employees should be paid out of the profits of their trade than from any other source of income within their disposal. Unless the supposed dormant partner is in some way interested in the profits of the business, as principal, it is plain that he cannot bring suit as a partner, and go into equity and compel an account; nor can it be held that he has any such lien on the profits as a court of equity may enforce; and if not, then his condition is the same as that of an ordinary creditor, and he must pursue his remedy against his employer. *Denny et al. v. Cabot et al.*, 6 Met. 90; *Vanderburg v. Hull*, 20 Wen. 70. Repeated decisions have recognized this distinction, and although it may happen, as heretofore, that cases will arise on the one side or the other of the line, approaching in their facts so near to each other that the difference between them may appear to be unsubstantial, yet the distinction itself,



2. LOAN OF MONEY WITH PARTICIPATION IN PROFITS.—A mere loan of money with participation in the profits will not constitute the lender a partner.<sup>19</sup>

3. OWNERSHIP OF REAL PROPERTY—*a. In General.*—There is no doubt that

we think, is well founded in reason, and that the only difficulty is in the application of the principle on which it rests. *Hallet v. Desban*, 14 Lou. An. 529." *Berthold v. Goldsmith*, 24 How. 536, 543, 16 L. Ed. 762.

In an engagement with seamen for a whaling voyage, where each is to receive for his compensation a certain percentage of the profits of the voyage, though they work together and in co-operation, they do not become partners, nor does either acquire any interest in the compensation of the others. The interest of each is separate. *Beckwith v. Talbot*, 95 U. S. 289, 293, 24 L. Ed. 496.

"In whatever form the rule is expressed, it is universally held that an agent or servant, whose compensation is measured by a certain proportion of the profits of the partnership business, is not thereby made a partner, in any sense. So an agreement that the lessor of a hotel shall receive a certain portion of the profits thereof by way of rent does not make him a partner with the lessee." *Meehan v. Valentine*, 145 U. S. 611, 623, 36 L. Ed. 835.

Suit was brought to recover on a contract between the plaintiff and two others on the one part and the defendant on the other, whereby they were to herd and care for a large herd of cattle and defendant was to give them one-half of what the cattle should sell for. It was held that this did not constitute a partnership as there was no community of interest in the capital employed, nor in the profits and losses. The cattle remained the entire property of the defendant. If the whole herd had perished by distemper, it would have been his loss alone, and the other parties would only have been interested in the loss of compensation for their services. In the opinion it is said: "The allegation that the plaintiff was interested jointly with the defendant's two sons, and, therefore, could not maintain a separate action for his equal share of the profits, is equally untenable. Their interests were separate. They were all employed and hired by the defendant to herd his cattle. The evidence shows that each supported himself, found his own assistance, and paid his own expenses. Each was to have as his compensation one-third of half the increased value of the cattle at the end of the employment. Neither was interested in the compensation due to the other." It is further said: "In the present case, the material fact is that the plaintiff and his associates were employees, and not proprietors. They were in the service of the defendant, and employed in and about his property and business, and not their own. Hence they were not partners, either with each other

or with him. They were not liable for any losses. The entire responsibility for these was on him. They were only interested in the losses as they might affect the amount of their ultimate compensation." *Beckwith v. Talbot*, 95 U. S. 289, 293, 24 L. Ed. 496.

To enlarge his business, Goldsmith, the original plaintiff, authorized a third person to go to St. Louis to negotiate an arrangement with some commission house there to accept consignments of cigars from him and to sell the same on his account, agreeing with the persons so authorized to give him half the profits, with a guaranty that his compensation should amount to eighteen hundred dollars per annum. He made the arrangement with the defendants, stipulating as to their commissions and that the cigars should be shipped at Baltimore, in bond, subject to duties and charges, and notified the plaintiff of the terms and conditions; whereupon the plaintiff wrote the defendants a letter, concluding with these words: "All shipped to your house. I will hold you responsible;" and sent two invoices of cigars, which were duly received. Afterwards, the person who negotiated the arrangement wrote an order to the defendants to deliver all the cigars, not sold, to another firm, upon receiving whatever sums they had advanced. That firm paid the advances, received the cigars and sold them, but no portion of the proceeds ever came to the hands of the plaintiff. One of the defenses was, that the person who gave the order was a partner and in such capacity had a right to direct a transfer of the cigars, and thus exonerate the defendants from all liability. It was held that cases might arise where the difference between mere service, special agency or employment and that of partnership might be so slight that it might appear to be unsubstantial yet the distinction itself was founded in reason and the only difficulty was in the application of the principle on which it rests. No such difficulty, however, occurred in this case for the defendants were a party to the arrangement and knew the relations which the person who negotiated it sustained to them and the plaintiff and that they also knew that the goods had been sent by the plaintiff and received by them on the terms and the conditions specified in the plaintiff's letter. He was not, therefore, a partner in fact or as between the plaintiff and the defendants. *Berthold v. Goldsmith*, 24 How. 536, 16 L. Ed. 762. See, also, *Meehan v. Valentine*, 145 U. S. 611, 36 L. Ed. 835.

19. Loan of money.—Where a party loaned to a partnership a sum of money

a copartnership may exist in the purchase and sale of real property, equally as in any other lawful business.<sup>20</sup> The fact that real property is held in the joint names of several owners, or in the name of one for the benefit of all, is no evidence of partnership between the parties with respect to it. In the absence of proof of its purchase with partnership funds for partnership purposes, such property is deemed to be held by them as joint tenants, or as tenants in common; and none of the several owners possesses authority to sell or bind the interest of his co-owners.<sup>21</sup>

for which the partnership was to pay him legal interest at all events and also pay him one-tenth of the net yearly profits of the business, if those profits should exceed a certain sum, this was held not to constitute him a partner where the manifest intention of the parties as apparent upon the face of the agreement was to create the relation of debtor and creditor and not that of partner and there was nothing in the agreement itself or in the conduct of the partners themselves to show that he assumed any other relation and where no control over the business had been exercised by him. *Meehan v. Valentine*, 145 U. S. 611, 36 L. Ed. 835, distinguishing *Beauregard v. Case*, 91 U. S. 134, 23 L. Ed. 263.

"The rule formerly laid down, and long acted on as established, was that a man who received a certain share of the profits as profits, with a lien on the whole profits as security for his share, was liable as a partner for the debts of the partnership, even if it had been stipulated between him and his copartners that he should not be so liable; but that merely receiving compensation for labor or services, estimated by a certain proportion of the profits, did not render one liable as a partner. Story on Partnership, c. 4; 3 Kent Com. 25 note, 32-34." *Meehan v. Valentine*, 145 U. S. 611, 619, 36 L. Ed. 835.

**Creditor.**—An agreement and power of attorney were held in the case of *Davis v. Patrick*, 122 U. S. 138, 30 L. Ed. 1090, to constitute the defendant a creditor and not a partner and hence not liable as a partner on contracts with third persons.

**20. Purchase and sale of real property.**—*Thompson v. Bowman*, 6 Wall. 316, 317, 18 L. Ed. 736.

The provisions of a contract were in substance that certain lands, to the greater part of which Schaeffer already had an equitable title under the agreements of third persons to sell and convey them to him, should be purchased for the mutual interests of the parties; that the legal title in all the lands should be taken in Schaeffer's name, and be conveyed by him to Blair; that Blair should advance the sums required to enable Schaeffer to pay the purchase money of the lands, as well as the necessary expenses of preparing them for sale, and should be repaid his advances with interest, out of the net proceeds of sales, that Schaeffer should stake out the lands for sale, make the necessary im-

provements, sell them, retain a commission of five per cent upon the gross amount of sales, and, until Blair should have been reimbursed for his advances deposit the rest of the proceeds in a bank to Blair's credit, that the expenses of improving and selling the lands, the time within which they must be prepared for sale, the price at which they might be sold and the bank in which the proceeds should be deposited by Schaeffer should be mutually agreed upon between him and Blair, and all contracts of sale should be approved by Blair; and that when Blair should have been reimbursed for all his advances, "then the remainder of the property shall belong, sixty per cent to said Blair and forty per cent to said Schaeffer," and be divided between them accordingly, either by Blair's conveying the title in two-fifths of the land to Schaeffer, or by Schaeffer's selling the land and paying sixty per cent of the proceeds to Blair. It was held, it seems, that this did not constitute Schaeffer an acting partner and where he obtained from Blair more than was needed for the purchase of the land and refused to make a conveyance to him, such misconduct, whether he was or was not a partner, did not operate to forfeit his equitable title in the land. *Schaeffer v. Blair*, 149 U. S. 248, 37 L. Ed. 721.

**21. Mere holding of real property.**—*Thompson v. Bowman*, 6 Wall. 316, 18 L. Ed. 736.

**Trust relation.**—In May, 1835, an agreement was entered into between Price and Seymour, which provided, on the part of Price, that he should devote his time and best judgment to the selection and purchase of land, to an amount not exceeding five thousand dollars, in certain designated states and territories, or in such of them as he might find most advantageous to the interest of Seymour; that the purchases should be made during the then existing year, and that the contracts of purchase should be made, and the conveyances taken in the name of Seymour, and on the part of Seymour, that he should furnish the five thousand dollars; that the lands purchased should be sold within five years afterwards, and that of the profits made by such purchase and sale, one-half should be paid to Price, and be in full for his services and expenses. Under this agreement, lands having been purchased by Price and the title taken in the name of Seymour, held, that Seymour



b. *Joint-Stock Company*.—A joint-stock company formed for the purpose of buying and selling lands is a partnership.<sup>22</sup> The allegation that a company was organized under the laws of New York is not an allegation that the company is a corporation.<sup>23</sup>

c. *Railroad Leases and Agreements*.—A partnership may be formed for the operation of a railroad.<sup>24</sup> And it seems that railroads may be partners.<sup>25</sup>

d. *Admission of New Member Prior to Incorporation*.—An agreement that a person shall become a member of a firm at a future time upon the performance of certain conditions does not make him a partner till the conditions

took the legal title in trust for the purposes specified; that is, to sell the property within the time limited, and, after deducting from the proceeds the outlay, with interest and taxes, to pay over to Price one-half of the residue; and that, to this extent, Seymour was a trustee, and Price the cestui que trust; that the trust continued after the expiration of the five years, unless Price subsequently relinquished his claim; the burden of proof as to such relinquishment resting with the heirs of Seymour. *Seymour v. Freer*, 8 Wall. 202, 19 L. Ed. 306, citing *Berthold v. Goldsmith*, 24 How. 536, 16 L. Ed. 762. See the title **TRUST AND TRUSTEES**.

**Agreement to purchase real estate.**—A refusal to charge the jury that if they believe from the evidence that certain persons purchased the land in question on joint account, in equal shares, for resale at a profit, upon an agreement to contribute equally to the purchase money and the taxes and the interest, such understanding would constitute the parties copartners in such land speculation, and, in the absence of a final settlement and the striking of a balance neither party could be sued at law by the other for reimbursement of advances made by him upon a joint account, is not erroneous. *Clark v. Sidway*, 142 U. S. 682, 35 L. Ed. 1157.

**Special adventure on joint account.**—In the case of *Clark v. Sidway*, 142 U. S. 682, 35 L. Ed. 1157, the joint purchase of land was held not to constitute a copartnership in respect thereto. It was a single special adventure on joint account, involving the payment in equal proportions of designated sums of money. It was a mere community of interest in the property, and the agreement to share the profits and losses in the sale of the land did not create a partnership. The parties were only tenants in common and the action at law would lie.

**22. Buying and selling land.**—*Clagett v. Kilbourne*, 1 Black 346, 17 L. Ed. 213.

**23.** "On looking into the record we find no satisfactory showing as to the citizenship of the plaintiff. The allegation of the amended petition is, that the United States Express Company is a joint-stock company organized under a law of the state of New York, and is a citizen of that state. But the express company cannot be a citizen of New York, within the meaning of the statutes regulating juris-

diction, unless it be a corporation. The allegation that the company was organized under the laws of New York is not an allegation that it is a corporation. In fact, the allegation is that the company is not a corporation, but a joint-stock company—that is, a mere partnership." *Chapman v. Barney*, 129 U. S. 677, 682, 32 L. Ed. 800.

**24. Operation of railroad.**—An agreement provided that the party of the first part should obtain in his own name, but for the joint account of himself and the parties of the second part, a lease of a railroad, and manage the same at a designated salary, for their mutual benefit; and that the parties of the second part should furnish the money necessary to carry out the enterprise, to be reimbursed, with interest, out of its annual profits; and then declared that, after the payment of the capital thus invested and interest, the annual profits should be equally divided between all the parties, and that all losses should be equally borne between them. Held, that the agreement constituted a partnership. *Beauregard v. Case*, 91 U. S. 134, 23 L. Ed. 263.

**25. Arrangement between railroads.**—Certain railroad companies had an arrangement between themselves, whereby the general freight agents of the roads made what was called a joint tariff fixing through rates, which were divided among the several roads constituting a through line. Losses occurring on through shipments, if not located, were prorated as between the companies themselves, in the same ratio as the freight moneys; but if located, were, as between the railroad companies, to be paid by the one on whose road the losses occurred. The joint tariff was published and put into the hands of railroad agents for their guidance in making contracts, and was also distributed to shippers and to the public generally. In all cases when a through rate was contracted for, the several railroads of the connecting line participated therein according to the aforesaid arrangement for prorating through freights with each other. It was held that such an arrangement did not involve joint liability upon the part of the railroad companies, or make them partners either inter sese or as to third persons. *Insurance Co. v. Railroad Co.*, 104 U. S. 146, 26 L. Ed. 679. See, generally, the title **RAILROADS**.



are performed.<sup>26</sup>

**E. Joint Owners of Letters-Patent.**—It is competent for two persons, being joint owners of letters-patent, whether valid or invalid, to enter into a co-partnership for the manufacture and sale of the patented machines.<sup>27</sup>

#### IV. Relations Inter Se.

**A. In General.**—Matters within the scope of the partnership are regulated and controlled by a majority of the partners.<sup>28</sup>

**B. Articles of Partnership.**—Whenever there are written articles of agreement between the partners, their power and authority, inter se, are to be ascertained and regulated by the terms and conditions of the written stipulations.<sup>29</sup>

**26. Admission of new member.**—The members of a partnership agreed to admit a person into the firm on the condition that the company should become incorporated and until so incorporated no change in the name or character of the firm should be made, and that such person should pay to the firm certain amounts of money. The stipulated amounts were paid. It was held that this did not constitute a partnership between the parties. *Drennan v. London Assur. Co.*, 113 U. S. 51, 59, 28 L. Ed. 919, affirmed in *London Assur. Co. v. Drennan*, 116 U. S. 461, 29 L. Ed. 688. See, also, *Paul v. Cullum*, 132 U. S. 539, 551, 33 L. Ed. 430.

**27. Letters—patent.**—*Kinsman v. Parkhurst*, 18 How. 289, 293, 15 L. Ed. 385.

**28. Majority of partners.**—*Latta v. Kilbourn*, 150 U. S. 524, 545, 37 L. Ed. 1169.

**29. Relations inter se.**—*Kimbrow v. Bullett*, 22 How. 256, 16 L. Ed. 313; *Winship v. United States Bank*, 5 Pet. 529, 561, 8 L. Ed. 216.

Where it was stipulated in the articles of copartnership that each partner was to pay his own individual expenses, it was held that this was meant to apply when the parties were at home and not traveling on the business of the concern. It did not extend to extra expenses incurred when abroad on the business of the partnership. *Withers v. Withers*, 8 Pet. 355, 357, 8 L. Ed. 972.

**Buying and selling real estate.**—Where defendant in his answer which was called for under oath denied the allegation of the bill that it was ever agreed that the firm should carry on the business of buying and selling real estate and that at no time was such transaction within the scope of the partnership business, it was held that, while under the well-settled rule of equity pleading and practice, his answer must be overcome by the testimony of at least two witnesses or one witness with corroborating circumstances, the proofs in this case were held not only to have failed to break down the denial but to have affirmatively established that the partnership agreement did not extend to the business of buying and selling real estate either for investment or for speculation of the firm accounts. *Latta v. Kilbourn*, 150 U. S. 524, 541, 37 L. Ed. 1169.

**When partner is also a creditor.**—By

agreement partnership property was to consist of Western North Carolina railroad bonds and stock previously held by one Sibley. Simonton bought one-half and Lancaster, Brown & Co. one-fourth of Sibley's interest. Sibley was to hold the same as collateral for the payment of the purchase price. The whole amount of the bonds and stocks was to be held together and neither party was to dispose of any part of his interest without the consent of his copartners except that Sibley "shall have the privilege of selling the whole amount of both bonds and stock at his discretion at any time to the payment of the said sums due him." The agreement further provided that Sibley might if he thought best proceed to foreclose the mortgage by which the bonds were secured "and whatever the proceeds of said foreclosure may be, or, if the bonds are sold, whatever the net proceeds of the sale may be, after paying the said sums of money and expenses of foreclosure, they shall be considered as due to each party in proportion as the bonds and stocks are not held," and this provision ends with these words: "but may be held by Hiram Sibley as collateral security for the payment of the aforesaid sums respectively. A supplemental agreement also made special provisions for the distribution of any profits arising from the sale, foreclosure or any other disposition of said bonds. Sibley made a contract for the sale of the stock and bonds and received stock of the Southern Railway Security Company in part payment. The balance of the purchase price was not paid and Sibley sold the Western North Carolina Railroad stock for cash with the stipulation that he should retain the Southern Railway Security stock. Held, that the latter stock which afterwards became worthless need not be applied by Sibley to his own indebtedness and might be held a partnership property and that the master was correct in so treating it. In the opinion it is said: "The view that the partnership agreement empowered Sibley to sell the property as managing partner, independently of his right as a creditor, is confirmed by the terms of the power of attorney given him by his copartners on October 3, 1874, by which they recited that they had heretofore left to him the

It is a very common and not an illegal stipulation in partnership articles, that neither partner shall carry on that business for which the partnership is formed, outside of the partnership and for his own account.<sup>30</sup>

**C. Power to Transact Business.**—Independently of any stipulations in the written articles of agreement each partner possesses an equal and general power and authority, in behalf of the firm, to transact any business within the scope and objects of the partnership, and in the course of its trade and business.<sup>31</sup>

**D. Right to Dispose of Partnership Property.**—It is a well-settled rule that one partner may dispose of the personal property of the firm.<sup>32</sup> The authority of each partner to dispose of the partnership funds, strictly and rightfully extends only to the business and transactions of the partnership itself; and any disposition of those funds, by any partner, beyond such purpose, is

management of the adventure,' and authorized and requested him, either to prosecute the proceedings for foreclosure, 'or to take such other action, by sale of bonds or otherwise, as may in his judgment appear for the best interest of all concerned.'" *Simonton v. Sibley*, 122 U. S. 220, 230, 30 L. Ed. 1225.

**30. Carrying on business.**—*Kinsman v. Parkhurst*, 18 How. 289, 293, 15 L. Ed. 385. See, post, "Using Information or Engaging in Business for Personal Advantage," IV, I.

It is competent for two persons being joint owners of letters-patent, whether valid or invalid, who have entered into a copartnership for the manufacture and sale of the patented machines to stipulate that one of them should alone conduct the business. This is a provision for the prosecution of the business in a particular mode, and not for its restraint. *Kinsman v. Parkhurst*, 18 How. 289, 293, 15 L. Ed. 385.

**Master and supercargo.**—Where a master and supercargo was to receive a certain sum per month as wages, and a commission of five per cent, and also one-tenth of all the profits, and it was agreed that these were to be in full of all services and privileges, the master and supercargo had no right to traffic upon his own account, for his own benefit. If the master and supercargo, after the loss of his first vessel, charts another and uses the capital of his partners in prosecuting his trade, informing his owners thereof and expressing his willingness to continue the business upon the same terms as before, to which they did not object, such continuance of the business must be governed by the same rules which regulated the transactions in the first ship. *Mathewson v. Clarke*, 6 How. 122, 12 L. Ed. 370. See the title **MASTERS OF VESSELS**, vol. 8, p. 300.

**31. Transaction of business.**—*Kimbro v. Bullitt*, 22 How. 256, 16 L. Ed. 313; *Latta v. Kilbourn*, 150 U. S. 524, 545, 37 L. Ed. 1169.

**Appointment of clerk.**—Each partner has a right to depute and appoint a clerk to act for both, in matters relative to

their joint interest. *Tillier v. Whitehead*, 1 Dall. 269, 1 L. Ed. 131.

**Compromise by one member of firm of attorneys.**—A and B, attorneys at law and copartners as such, entered into an agreement with the administrator of a decedent's estate whereby they were to bring suit against an insurance company on a policy of insurance on decedent's life and to receive part of the amount recovered for their services, and were to have full power to compromise such suit if they saw proper. A judgment was recovered against the company which A compromised, the claim being doubtful. It appeared from the record in the case that A continued to be a copartner with B so far as the case was concerned. It was held that A had authority to make the compromise in question without the co-operation or consent of B. *Jeffries v. Mutual Life Ins. Co.*, 110 U. S. 305, 310, 28 L. Ed. 156. See, also, the title **ATTORNEY AND CLIENT**, vol. 2, p. 714. See, also, generally, the title **COMPROMISE AND SETTLEMENT**, vol. 3, p. 1002.

**Acceptance of deed.**—"A partnership, as such, could not hold the legal title to real estate, as it is not a person in fact or in law, and the situation in this case is well described in *Percifall v. Pratt*, 36 Arkansas 464, where it was held: 'If the title be made to all the partners by name, they hold the legal title as tenants in common, without survivorship. If to one partner alone, the whole legal title vests in him, which is the case, also, where the title is to a partnership name, which, as in this case, expresses the name of one party only, with the addition of "and company." If the deed be to a name adopted as the firm style, which includes the name of no party, it passes nothing in law. The same occurs where the deed is to one already dead.'" *Riddle v. Whitehill*, 135 U. S. 621, 633, 34 L. Ed. 282.

**Confession of judgment.**—It is well settled by numberless cases, that, even before dissolution, one partner cannot confess judgment. *Hall v. Lanning*, 91 U. S. 160, 170, 23 L. Ed. 271. See post, "Verdict and Judgment," IX, K.

**32. Personal property.**—*Anthony v. Butler*, 13 Pet. 423, 10 L. Ed. 229.



an excess of his authority as a partner, and a misappropriation of those funds, for which the partner is responsible to the partnership; though in the case of bona fide purchasers, without notice, for a valuable consideration, the partnership may be bound by the acts of one partner.<sup>33</sup> Each member of a copartnership in the purchase and sale of land possesses full authority to contract for the sale or other disposition of the entire property.<sup>34</sup> In Missouri each partner may without the concurrence of his copartners mortgage the personal property to secure the payment of a partnership debt.<sup>35</sup> Tenants in common of a ship can only sell their own respective shares, but where the ship belongs to a partnership, one partner may sell the whole ship.<sup>36</sup>

**E. Right to Profits and Disposition of Assets**—1. IN GENERAL.—Each partner receives part of the profits as profits, and takes part of the fund to which the creditors of the partnership have a right to look for the payment of their debts.<sup>37</sup> A person has no right of course to participate in the profits as a partner until he has become such.<sup>38</sup>

2. APPLICATION OF PARTNERSHIP FUND TO INDIVIDUAL DEBTS AND CLAIMS.—Partners have the right, inter sese, to control the disposition of the firm assets, and to appropriate them to the payment of a claim by one partner on the firm.<sup>39</sup> The funds of a partnership cannot be rightfully applied, by one of

**33. Power of disposal confined to partnership business.**—*Rogers v. Batchelor*, 12 Pet. 221, 9 L. Ed. 1063.

**34. Partnership in the purchase and sale of real property.**—*Thompson v. Bowman*, 6 Wall. 316, 317, 18 L. Ed. 736. See post, "Right to Bind Partnership by Deed," V, G.

**35. Power to mortgage.**—"It was also well settled by the decisions of that court, that each partner, by virtue of the relation of partnership, and of the community of right and interest of the partners, had full power and authority to sell, pledge or otherwise dispose of all personal property belonging to the partnership, for any purpose within the scope of the partnership business, and might therefore, without the concurrence of his copartners, mortgage the partnership property by deed of trust, to secure the payment of a partnership debt; *Clark v. Rives*, 33 Missouri 579; *Keck v. Fisher*, 58 Missouri 532; although one partner, without the concurrence of his copartners, could not delegate to a stranger the right of the partnership to administer the partnership effects, and therefore could not make a general assignment of all the property of the partnership for distribution by the assignee among the partnership creditors, retaining no equity of redemption in the partnership. *Hughes v. Ellison*, 5 Missouri 463; *Hook v. Stone*, 34 Missouri 329." *Union Bank v. Kansas City Bank*, 136 U. S. 223, 230, 34 L. Ed. 341.

Under the Missouri decisions a mortgage is an instrument by which a partner has inherent authority to bind the partnership, although the copartners have not joined in it to secure the payment of partnership debts. *Union Bank v. Kansas City Bank*, 136 U. S. 223, 34 L. Ed. 341.

When one partner executed a mortgage to secure the payment of particular debts of an insolvent partnership without the concurrence of his copartners, this did not, under the Missouri law, consti-

tute an assignment for the benefit of creditors nor did the simultaneous appointment of a receiver have such effect. *Union Bank v. Kansas City Bank*, 136 U. S. 223, 34 L. Ed. 341.

**36. Part owners of ships.**—*The William Bagaley*, 5 Wall. 377, 406, 18 L. Ed. 583.

"Part owners of ships are seldom partners in the commercial sense, because no one can become the partner of another without his consent, and because if they acquire title by purchase, they usually buy distinct shares at different times and under different conveyances, and even when they are the builders they usually make separate contributions for the purpose. Generally speaking, they are only tenants in common but the steamer, in this case, belonged to the partnership, and throughout the rebellion to the time of capture was controlled and managed by the partners in the enemy country." *The William Bagaley*, 5 Wall. 377, 405, 18 L. Ed. 583. See, generally, the title SHIPS AND SHIPPING.

**37. Receiving profits as profits.**—*Meehan v. Valentine*, 145 U. S. 611, 623, 36 L. Ed. 835.

**38. Person to be admitted on condition.**

—The members of a partnership agreed to admit a person into the firm on the condition that the company should be incorporated and until so incorporated no change in the name or character of the firm should be made and that such person should pay to the firm a certain amount of money. The stipulated amounts were paid. It was held that as this did not constitute a partnership, such party had no interest in its assets before the company was incorporated. *Drennan v. London Assur. Co.*, 113 U. S. 51, 59, 28 L. Ed. 919, affirmed in *London Assur. Co. v. Drennan*, 116 U. S. 461, 29 L. Ed. 688.

**39. Payment of claim of one partner.**—*McCormick v. Gray*, 13 How. 26, 14 L. Ed. 36.



the partners, to the discharge of his own separate pre-existing debts, without the express or implied assent of the other parties; and it makes no difference, in such a case, that the separate creditor had no knowledge, at the time, of the fact of the fund being partnership property.<sup>40</sup>

3. **AMOUNT OF PROFITS TO WHICH EACH PARTNER IS ENTITLED.**—In the absence of written stipulations or other evidence showing a different intention, partners will be held to share equally both profits and losses.<sup>41</sup> The right to participate in the profits may be lost by refusal to perform the duties of a partner. It may well be considered as a repudiation of the partnership.<sup>42</sup>

**Extra Compensation.**—Where partnerships are equal, and there is no stipulation in the partnership agreement for compensation to a surviving partner for settling up the partnership business, he is entitled to no compensation. As there is an implied obligation on every partner to exercise due diligence and skill, and to devote his services and labors for the promotion of the common benefit of the concern,<sup>43</sup> it is entirely competent for them to determine, as

**Right to control possession.**—Partners as between themselves have a perfect right to control the possession of the partnership funds, and determine that the whole, or any part, shall go into the possession of either partner. Both are ultimately liable for the debts, and whether one or other member of the firm shall have possession of the fund, either under a claim as creditor of the firm, or otherwise, while they act in good faith, is a matter wholly subject to their control. *McCormick v. Gray*, 13 How. 26, 37, 14 L. Ed. 36.

40. **Necessity for assent of copartners.**—*Rogers v. Batchelor*, 12 Pet. 221, 9 L. Ed. 1063.

"One partner cannot apply the partnership funds or securities to the discharge of his own private debt without their consent; and \* \* \* without their consent, their title to the property is not divested, in favor of such separate creditor, whether he knew it to be partnership property or not. In short, his right depends, not upon his knowledge that it was partnership property, but upon the fact, whether the other partners had assented to such disposition of it, or not." *Rogers v. Batchelor*, 12 Pet. 221, 232, 9 L. Ed. 1063.

41. **Equal shares.**—*Paul v. Cullum*, 132 U. S. 539, 550, 33 L. Ed. 430. See, also, *Raphael v. Trask*, 194 U. S. 272, 277, 48 L. Ed. 973; *McMicken v. Webb*, 6 How. 292, 12 L. Ed. 443.

In a suit for a dissolution of a partnership and for an accounting where no fraudulent representations as inducements to the formation of the partnership were alleged to have been made, and whatever objectionable features may have characterized the defendant's conduct and management, a scheme to defraud his copartners is not shown to have existed, it was held that in the absence of satisfactory proof that losses were occasioned by his misconduct or that the want of success which attended the business was traceable to that cause, complainants should not be reinstated at his expense in the

same position as if they had not entered upon an enterprise which turned out to be unfortunate. *Oteri v. Scalzo*, 145 U. S. 578, 592, 36 L. Ed. 824.

A partner who furnished capital, charged in a case strongly indicating injustice, with half profits in favor of another of inventive genius, and whom after valuable discoveries he sought to get rid of, alleging, even with truth, intemperate habits and bad character. *Ambler v. Whipple*, 20 Wall. 546, 22 L. Ed. 403.

**Partner wrongfully excluded.**—Where defendant, who was a member of a partnership undertook, without any just cause, to exclude his partner, from an interest in a valuable contract, in which they were equally concerned, and to take in another person in his stead, and such person knowing that defendant could not rightfully exclude his partner, conspired with defendant to accomplish that purpose, and undertook to appropriate to himself the profits of the contract which of right belonged to such partner, it was held that such partner was entitled to one-half of the profits of the contract. *Pearce v. Ham*, 113 U. S. 585, 593, 28 L. Ed. 1067. See, also, *Karrick v. Hannaman*, 168 U. S. 328, 42 L. Ed. 484.

42. **Refusal to perform duties of partner.**—Where an attorney at law refuses to act as a partner, or to perform the functions of such in the prosecution of a cause which has been intrusted to his firm, and repudiates his obligations, he is not entitled to any part of the fees subsequently earned by his partners in the cause. *Denver v. Roane*, 99 U. S. 355, 25 L. Ed. 476.

43. **Winding up the business.**—*Denver v. Roane*, 99 U. S. 355, 358, 25 L. Ed. 476. See post, "Winding Up the Business," VI, F, 2.

Where law partners had by the agreement provided for the division of the fees in case of the death of either of them, the survivors were held entitled to no allowance for winding up the business, other than their share of the fees as

between themselves, the basis upon which profits shall be divided and losses borne, without regard to their respective contributions, whether of money, labor, or experience, to the common stock. Such matters are entirely within the discretion of parties about to assume the relation of partners.<sup>44</sup>

4. VIOLATION OF PARTNERSHIP AGREEMENT.—See post, "Using Information or Engaging in Business for Personal Advantage," IV, I. See, also, ante, "Amount of Profits to Which Each Partner Is Entitled," IV, E, 3.

**F. Accounting and Settlement**—1. IN GENERAL.—The right to compel an account of profits in equity is one of the most approved criteria of the existence of a partnership.<sup>45</sup> After a partnership contract confessedly against public policy has been carried out, and money contributed by one of the part-

specified in said agreement. *Denver v. Roane*, 99 U. S. 355, 358, 25 L. Ed. 476.

"An objection raised by several other assignments of error (particularly the sixth, seventh, eighth, ninth, eighteenth, and nineteenth) is, in substance, that the court erred in applying to a partnership between lawyers and claim agents the principles of the law of commercial partnerships, in regard to the modes of settlement of the same after the death of a partner, and in regard to the neglect of the business of such a firm by a partner; that by the decree no compensation is allowed to the survivors for carrying on the unfinished business, but that they are required to continue it as well for themselves as for the benefit of the deceased partner's estate. We think these objections to the decree ought not to be sustained." *Denver v. Roane*, 99 U. S. 355, 358, 25 L. Ed. 476. See post, "Winding Up the Business," VI, F, 2.

**44. Determination of division of profits and losses by agreement.**—*Paul v. Culum*, 132 U. S. 539, 550, 33 L. Ed. 430; *Huntley v. Huntley*, 114 U. S. 394, 29 L. Ed. 130.

**Deduction of expenses.**—Where parties associated in trade contract that one partner shall receive a certain share of the profits arising from the sale of goods, deducting "the actual expenses that may appertain to the goods themselves," taxes, clerk hire, and advertising are as clearly chargeable among these expenses as storage, commission or insurance. *Foster v. Goddard*, 1 Black 506, 17 L. Ed. 228.

**Agreement upon dissolution.**—The decree of the circuit court was reversed in *Chouteau v. Barlow*, 110 U. S. 238, 28 L. Ed. 132, on a question of fact, as to whether an agreement of a certain character was made between the copartners in a firm, on its dissolution, as to the interest which the copartners should have in the future in a portion of its assets. See post, "Dissolution," VI.

**45. Right to accounting.**—*Pleasant v. Fant*, 22 Wall. 116, 120, 22 L. Ed. 780. See, also, *Bank v. Carrollton Railroad*, 11 Wall. 624, 629, 20 L. Ed. 82; *Kinsman v. Parkhurst*, 18 How. 289, 15 L. Ed. 385.

"The utmost effect that can be given to the plaintiff's evidence is that he had

reason to expect that he would be included as a party in the project of buying bonds and bidding at the sale of the railroads. But it is clear, from his own evidence, that he was not included in the actual transaction. He furnished no part of the moneys used, and is not shown to have contributed any special or peculiar information important to the syndicate. His bill, therefore, is filed for an account of a partnership or enterprise in which he really did not participate. His remedy, if he is entitled to any, would seem to be an action at law for damages, though it is difficult to see that there was any consideration proceeding from him, either in money contributed or in personal services of any kind, out of which a legal obligation could arise, or which could furnish a measure of damages." *Farley v. Hill*, 150 U. S. 572, 577, 37 L. Ed. 1186.

Where suit was brought by the executor to obtain an accounting as to transactions between a deceased person and the defendant under an alleged law partnership, the bill was dismissed on the ground that the deceased person had regarded the agreement as never having gone into effect or as having been canceled and further that any claim under the agreement was inconsistent with the terms of another agreement subsequently executed. *Davis v. Key*, 123 U. S. 79, 82, 31 L. Ed. 112.

Where there is an agreement between a patentee and an assignee that the latter should manufacture the machines for a certain term even if the patent be invalid, that does not so taint with illegality the sales of the machines by the assignee, as to affect the claim of the assignor to an account of the sales. *Kinsman v. Parkhurst*, 18 How. 289, 15 L. Ed. 385. See, also, *Brooks v. Martin*, 2 Wall. 70, 17 L. Ed. 732.

A party coming into the right of a partner, whether by purchase from such partner (no matter how broad the language of the conveyance may be) or as his personal representative, or under an execution or commission of bankruptcy, comes into nothing more than an interest in the partnership, which cannot be tangible, made available, or be delivered but under an account between the partnership and the partner. *Bank v. Car-*



ners has passed into other forms—the results of the contemplated operation completed—a partner, in whose hands the profits are, cannot refuse to account for and divide them on the ground of the illegal character of the original contract.<sup>46</sup>

rollton Railroad, 11 Wall. 624, 20 L. Ed. 82.

Where it appeared that a business was carried on for two years which, according to a partnership agreement, was to be for a term of five years and that the defendant then took exclusive possession of the business of the partnership and carried on the business profitably and for his own benefit and excluded the plaintiff from any participation in the business or the profits, and the defendant the year before the expiration of the term agreed upon and without the plaintiff's knowledge or consent sold out all the property of the partnership, it was held that whether the partnership should or should not be considered to be dissolved when the defendant ousted the plaintiff and assumed the exclusive possession and control of the property and business, the plaintiff was entitled to an account for his share of the property and the profits. *Karrick v. Hannaman*, 168 U. S. 328, 42 L. Ed. 484.

**Statement of account.**—In stating partnership accounts, where one partner has had entire charge of the business, he is to be debited with the whole capital placed in his hands, as well as with the proceeds of sales realized by him. If part of the capital consisted of stock, which has been used in the business, or disposed of and the proceeds charged against him, he should be credited with such stock as a disbursement, to the amount at which it was originally charged against him. *Gunnell v. Bird*, 10 Wall. 304, 19 L. Ed. 913.

**Decrees reversed.**—A decree of a perpetual injunction on suits instituted on the common-law side of the circuit court of the District of Columbia, reversed, and the bill dismissed; the accounts between the parties having been erroneously adjusted in the circuit court. *Nixdorff v. Smith*, 16 Pet. 132, 10 L. Ed. 913.

The court reverses a decree where the court below affirmed a report of a master finding (on evidence not competent, and in the face of answers by surviving partners responsive to a bill) that the interest of a complainant's intestate in a partnership was one-third, the answers averring that it was but one-eighth. *Moore v. Huntington*, 17 Wall. 417, 21 L. Ed. 642.

**Duty of court to pass upon items.**—According to the ordinary proceedings of a court of chancery, the court should pass upon each item of an account reported by a master, when the amount actually received by a party is in controversy; this is necessary to enable the appellate court to pass its judgment on the items allowed, or disallowed, in the inferior court. But

in a case where the remaining partners had received the sum claimed from them, beyond the debts they had agreed to pay, it mattered not how much more they had received; and such a case does not require a statement of the exact amount; the evidence, and accounts, and exceptions, being all in the record brought into the appellate court, the court can determine whether the sum mentioned is proved to have been collected or not. *Kelsey v. Hobby*, 16 Pet. 269, 10 L. Ed. 961.

**Discovery, account and relief in equity.**—On the dissolution of a partnership, in 1822, it was agreed with the outgoing partners, H. and B., that the debts due to the partnership should be collected by the remaining partners, K. and McL., and the debts due by the partnership should be paid by them, and a fixed sum should be paid to H. and B., when a sufficient sum was collected for that purpose, beyond the amount of the debts due by the firm. In 1829, K. and McL. having gone on, under this agreement, to collect the debts due to, and pay the debts due by, the partnership, H. and B. filed a bill in the circuit court of the South Carolina district, against K. and McL., charging that there was a surplus of the partnership effects, after paying all the debts, sufficient to pay them the sum which, by the agreement made on the dissolution of the partnership, was to be paid to them, and claiming certain Bridge bills, which were to be delivered to them; and praying for an account. The circuit court, after proceeding in the case, the accounts having been frequently before a master, and after evidence had been taken, made a decree in favor of H. and B., for a certain sum of money, etc., and the defendants appealed to the supreme court. It was contended by the appellants, that the circuit court, sitting in chancery, had no jurisdiction beyond that of compelling a discovery of the amount which K. and McL. had received under the agreement; and that if anything was found due to H. and B., they were bound to resort to their action at law, on the covenant, entered into at the dissolution of the partnership, to recover it. This is a clear case for relief, as well as for discovery, in chancery; H. and B. were entitled to an account; and if, upon that account, anything was found to be due to them, they were, upon well-settled chancery principles, entitled to relief also. *Kelsey v. Hobby*, 16 Pet. 269, 10 L. Ed. 961.

**46. Contract against public policy.**—*Brooks v. Martin*, 2 Wall. 70, 17 L. Ed. 732. Compare *McMullen v. Hoffman*, 174 U. S. 639, 654, 43 L. Ed. 1117.

If a contract by one partner to refrain from the manufacture of patented articles



2. BY ARBITRATION.—The submission of complicated accounts to arbitration is lawful.<sup>47</sup>

**G. Lien of Partner.**—"Whilst the partnership lasts, the lien attaches to everything that can be considered partnership property, and is not therefore lost by the substitution of new stock for old. Further, on the death or bankruptcy of a partner, his lien continues in favor of his representatives or assignees, and does not terminate until his share has been ascertained and provided for by the other partners. But after the partnership is dissolved, the lien is confined to what was partnership property at the time of the dissolution, and does not extend to what may have been subsequently acquired by the persons who continue to carry on the business."<sup>48</sup> Where a partnership was incorporated, and, by due conveyances of the interests of all parties interested the entire property and assets of the partnership were conveyed to and vested in the corporation, the debts and liabilities of the firm thereupon became the debts and liabilities of the company. The property ceased to be partnership property and became consolidated in a unity of interest in the corporation. The partners ceased to be partners and became holders of shares in the capital stock of the company; their lien as partners ceased when their character of stockholders began.<sup>49</sup> Such a corporation cannot be considered as having taken the property subject to all partnership equities against it and debts due to members of the partnership have no priority over debts due the creditors of the corporation.<sup>50</sup>

**H. Sale to Copartner.**—Where one partner is present in sole charge of the business, while the other is at a distance, in order to sustain a sale of the absent partner's interest it must be made to appear that the price paid approximates a fair consideration for the thing purchased, and that all the information

could not be enforced, as being against public policy, this would afford no answer to a claim for an account of profits actually realized by prosecuting the business, there being no connection between the illegal stipulation and the profits of the business. *Kinsman v. Parkhurst*, 18 How. 289, 293, 15 L. Ed. 385. Compare *McMullen v. Hoffman*, 174 U. S. 639, 654, 43 L. Ed. 1117.

**47. Arbitration.**—In the settlement of complicated partnership accounts by means of an arbitrator, *Bispham* was charged with one-half of certain custom house bonds, which *Archer*, the other partner, was liable to pay, and which obligations had been incurred on partnership accounts. There was a reservation in the settlement as to certain liabilities, but this one was not included. *Archer's* estate was afterwards exonerated from the payment of these bonds by a decision of the federal supreme court, reported in 9 How. 83. A bill cannot be brought by *Bispham* against *Archer's* executor to refund one-half of the amount of the bonds, upon the ground that *Archer* had never paid it. The reference to an arbitrator was lawful, and his award included many items which were the subject of estimates. It was accepted as perfectly satisfactory, and acquiesced in as such until long after the death of *Archer*. No fraud or mistake is charged in the bill, and if an error of judgment occurred, by which the chance was overrated that the custom house bonds would be enforced against

*Archer*, this does not constitute a ground for the interference of a court of equity. *Bispham v. Price*, 15 How. 162, 14 L. Ed. 644.

Where two partners assigned all their partnership property to a trustee with certain instructions how to dispose of it, and afterwards agreed between themselves to appoint an arbitrator, recognizing in their bonds the directions given to the trustee, the arbitrator had no right to deviate from these directions, and make other disposition of the property. The reason given by the arbitrator, that he preferred creditors before awarding a certain sum to one of the partners is insufficient. Nor had the arbitrator a right to depart, in any particular, from the arrangement of the property which the partners had designated in their deed to the trustee. *McCormick v. Gray*, 13 How. 26, 14 L. Ed. 36.

**Submission by one partner.**—As to submission by one partner, see the title ARBITRATION AND AWARD, vol. 2, p. 469. See, also, *Hall v. Lanning*, 91 U. S. 160, 23 L. Ed. 271.

**48. Lien of partner.**—*Lindley on Partnership*, pp. 700-702; *Hoyt v. Sprague*, 103 U. S. 613, 625, 26 L. Ed. 585. See, also, post, "Rights and Priorities of Creditors," V. H.

**49. *Francklyn v. Sprague***, 121 U. S. 215, 227, 30 L. Ed. 936, approving *Hoyt v. Sprague*, 103 U. S. 613, 26 L. Ed. 585.

**50. *Francklyn v. Sprague***, 121 U. S. 215, 30 L. Ed. 936.

in the possession of the purchaser necessary to enable the seller to form a sound judgment of the value of what he sells should be communicated by the buyer to him.<sup>51</sup>

**I. Using Information or Engaging in Business for Personal Advantage.**—The law exacts good faith and fair dealing between partners, to the exclusion of all arrangements which could possibly affect injuriously the profits of the concern. Neither by open fraud nor concealed deception, nor by any contrivance masking his actual relations to the firm, can a member of it, or an agent of it, be permitted to hold to his own use acquisitions made in disregard of those relations, either as partner or agent.<sup>52</sup> Each partner is the agent of his copartners in all transactions relating to partnership business, and is forbidden

**51. Sale to copartner.**—*Patrick v. Bowman*, 149 U. S. 411, 414, 37 L. Ed. 790. See, generally, the title *MINES AND MINERALS*, vol. 8, p. 364.

A bill was filed in equity by one Bowman and against one Patrick to rescind the sale by Bowman to Patrick, his then partner, and for an account of profits received by Patrick from an interest in certain mines. The facts of the case were substantially as follows: In February, 1822, Bowman then a resident of St. Louis, was temporarily in Leadville on legal business as attorney for Patrick. Bowman visited certain mining property and on February 17, 1882, an agreement was entered into between the owners of the mines and Bowman & Patrick by which the latter undertook in consideration of an undivided one-half of the property to sink a shaft, to obtain patents and commence work within thirty days of the contract. Bowman & Patrick were between themselves to be equal partners in the venture, each paying one-half of the expenses. Patrick, living in Leadville, was to superintend the sinking of the shaft and keep Bowman advised of all that should happen in the partnership venture. In March, 1882, and for some time afterwards Patrick was indebted to Bowman for money advanced by him on account of certain legal business then in his charge. Bowman returned to St. Louis and did not meet Patrick again until June 19th when they had a settlement, at which Bowman exhibited a willingness to sell out his interest to Patrick. A correspondence, both by letter and telegram, began soon after that date, which resulted in a deed by Bowman of his entire interest in the property. The bill filed was dismissed on the ground that the interest of the two partners had been completely settled. *Patrick v. Bowman*, 149 U. S. 411, 37 L. Ed. 790.

The case of *Brooks v. Martin*, 2 Wall. 70, 17 L. Ed. 732, quotes 1 Story's Equity, § 323, to the effect that "if a partner who exclusively superintends the business and accounts of the concern by concealment of the true state of the accounts and business, purchase the share of the other partner for an inadequate price, by means of such concealment, the purchase will be held void." It is further stated in the

opinion: "We lay down, then, as applicable to the case before us, and to all other of like character, that in order to sustain such a sale, it must be made to appear, first, that the price paid approximates reasonably near to a fair and adequate consideration for the thing purchased; and, second, that all the information in possession of the purchaser, which was necessary to enable the seller to form a sound judgment of the value of what he sold, should have been communicated by the former to the latter."

**52. Good faith and fair dealing.**—*Kimberly v. Arms*, 129 U. S. 512, 528, 32 L. Ed. 764.

"One partner cannot, directly or indirectly, use partnership assets for his own benefit; \* \* \* he cannot, in conducting the business of a partnership, take any profits clandestinely for himself; \* \* \* he cannot carry on the business of the partnership for his private advantage; \* \* \* he cannot carry on another business in competition or rivalry with that of the firm, thereby depriving it of the benefit of his time, skill, and fidelity without being accountable to his copartners for any profit that may accrue to him therefrom; \* \* \* he cannot be permitted to secure for himself that which it is his duty to obtain, if at all, for the firm of which he is a member; nor can he avail himself of knowledge or information, which may be properly regarded as the property of the partnership, in the sense that it is available or useful to the firm for any purpose within the scope of the partnership business." *Latta v. Kilbourn*, 150 U. S. 524, 541, 37 L. Ed. 1169.

**Violation of agreement.**—"In *Dean v. McDowell*, 8 Ch. D. 345, one of the stipulations in the articles of copartnership was that 'said C. A. McDowell should diligently and faithfully employ himself in and about the business of the partnership, and carry on and conduct the same to the greatest advantage of the partnership,' and by another article it was stipulated that neither partner should 'either alone or with another person, either directly or indirectly, engage in any trade or business, except upon the account and for the benefit of the partnership.' The business of the firm was to deal as merchants and brokers in selling the produce



to traffic therein for his own advantage, and if he does, will be held accountable

of salt works on commission, and during its existence McDowell clandestinely purchased a share in a firm of salt manufacturers. A bill was filed by the other partner for an account of the profits realized in the new business, and it was held by the master of the rolls that the bill could not be sustained. On appeal this judgment was affirmed. Lord Justice James, after stating the general principles of partnership law, said: 'The business which the defendant has entered into was that of manufacturing salt, which was to be the subject matter of the trade of the first firm. If in that he had in any way deprived the firm of any profits they otherwise would have made—if by his joining in the partnership for the manufacture he had diverted the goods from the firm in which he was a partner to some other firm, I can see that that would be a breach of his duty; but it is not pretended or alleged that any alteration took place in the business of the firm by reason of his having become a shareholder in the other business. It is not pretended that there was any alteration in the commission or anything else. Every thing remained exactly as it was, so that it cannot be suggested that there was a farthing's worth of actual damage done to the original firm by reason of his having become a shareholder in the works which produced the thing in which the firm traded. Under these circumstances it seems to me that we cannot say his profit from the new business was a benefit arising out of his partnership with the plaintiffs. It was not a benefit derived from his connection with the partnership, or a benefit in respect of which he was in a fiduciary relation to the partnership. His relation to the partnership in this respect was the same as an ordinary covenantor to a covenantee in respect of any other covenant which is broken. It was a covenant by a partner with a copartner, a covenant that he would not do something which might result in damage. But it was not a covenant, in my view, which was in any way connected with the fiduciary relations between the parties. That being so, it seems to me that the master of the rolls was right in saying that you cannot extend the cases with regard to a share in the profits to a case in which, as between the parties, there really was nothing but a breach of covenant, which in truth did not result, and could not have resulted, in the slightest loss to the partnership, unless it could have been shown that it led to the covenantor neglecting the business of the partnership, and devoting himself to other business, and diverting his time and attention from the business to which it was his duty to attend.' These views, which were concurred in by the other members of the court, are directly

in point in the present case, which, in principle, cannot be distinguished from the case there under consideration." *Latta v. Kilbourn*, 150 U. S. 524, 548, 37 L. Ed. 1169.

The violation of an undertaking to give to the firm or his associate the opportunity or option to engage in any particular transaction, not within the scope of the firm's business, will not entitle the partners to convert the partner so undertaking into a constructive trustee in respect to the profits realized therefrom. *Latta v. Kilbourn*, 150 U. S. 524, 37 L. Ed. 1169.

If a stipulation between partners could be construed into an agreement that no partner should engage in the buying and selling of real estate on his own account, that would not entitle the other members of the firm to share the profits made by one partner in real estate speculations without having first secured the consent of his copartners to his engaging therein. *Latta v. Kilbourn*, 150 U. S. 524, 546, 37 L. Ed. 1169.

An agreement to furnish information as to bargains in real estate and give copartners the option of taking benefit of such bargains amounts simply to an agreement for future partnership in such properties as might be specially selected for speculation. It is well settled in such cases that no partnership takes place until the contemplated event actually occurs. *Latta v. Kilbourn*, 150 U. S. 524, 37 L. Ed. 1169.

The court in the case of *Latta v. Kilbourn*, 150 U. S. 524, 547, 37 L. Ed. 1169, quotes with approval the case of *Murrell v. Murrell*, 33 La. Ann. 1233, as it was held that a partner who, in violation of the act of partnership, enters into another firm, does not thereby give the right to his original copartner to claim a share in the profits of the new firm. The violation of the agreement may give rise to an action for damages, but inasmuch as the original copartner could not be held, without his consent, for the debts of the new firm, he cannot claim to be made a partner therein.

**Renewal of lease.**—The supreme court cites with approval the case of *Mitchell v. Reed*, 61 N. Y. 123, which held that one member of a partnership could not, during its existence, without the knowledge of his copartners, take a renewal of a lease for his own benefit of premises leased by the firm, upon which it had made valuable improvements and enhanced their rental value, although the term of the renewed lease did not begin until the termination of the partnership. *Kimberly v. Arms*, 129 U. S. 512, 528, 32 L. Ed. 764.

**Assignee of patent.**—The assignee of a patent cannot legally purchase the outstanding claim of a third person, and set



for all profits.<sup>53</sup> But beyond the line of the trade or business in which the firm is engaged, there is no restraint on a partners' right to traffic. As one partner has no authority to bind the firm outside of their ordinary business, he cannot of course be held liable to account, should he make a profitable adventure in a matter not legitimately connected with the business of the firm. The difficulty generally is, to ascertain what acts are within the scope of the particular trade or business.<sup>54</sup>

**J. Payment of Taxes.**—It has been held the duty of one partner who is in possession and use of partnership property to pay the taxes thereon.<sup>55</sup>

### V. Relation to Third Persons.

**A. In General.**—In all mercantile transactions the act of one joint partner in matters relating to their joint trade should be deemed the act of both, al-

it up against the patentee with whom he had an existing agreement, in the nature of a copartnership. *Kinsman v. Parkhurst*, 18 How. 289, 15 L. Ed. 385.

**53. Accountable for profits.**—*Wheeler v. Sage*, 1 Wall. 518, 528, 17 L. Ed. 646.

**54. Trading outside line of partnership business.**—*Wheeler v. Sage*, 1 Wall. 518, 528, 17 L. Ed. 646.

"It is well settled that a partner may traffic outside of the scope of the firm's business for his own benefit and advantage, and without going into the authorities it is sufficient to cite the thoroughly considered case of *Aas v. Benham*, 2 Ch. D. 1891, 244, 255, in which it was sought to make one partner accountable for profits realized from another business, on the ground that he availed himself of information obtained by him in the course of his partnership business, or by reason of his connection of the firm, to secure individual advantage in the new enterprise. It was there laid down by Lord Justice Lindley that if a member of a partnership firm avails himself of information obtained by him in the course of the transaction of the partnership business, or by reason of his connection of the firm, for any purpose within the scope of the partnership business, or for any purpose which would compete with the partnership business, he is liable to account to the firm for any benefit he may have obtained from the use of such information; but if he uses the information for purposes which are wholly without the scope of the partnership business, and not competing with it, the firm is not entitled to an account of such benefits." *Latta v. Kilbourn*, 150 U. S. 524, 549, 37 L. Ed. 1169.

"It was further laid down in that case, in explanation of what was said by Lord Justice Cotton in *Dean v. McDowell*, ubi supra, that 'it is not the source of the information, but the use to which it is applied, which is important in such matters. To hold that a partner can never derive any personal benefits from information which he obtains as a partner would be manifestly absurd;' and it was said by Lord Justice Bowen that the character of information acquired from the partnership transaction, or from connection with

the firm, which the partner might not use for his private advantage, is such information as belongs to the partnership 'in the sense of property which is valuable to the partnership, and in which it has a vested right.'" *Latta v. Kilbourn*, 150 U. S. 524, 550, 37 L. Ed. 1169.

Where a firm, whose business was "a general produce business," owned a mortgage on real estate, which real estate itself the firm was desirous to purchase under the mortgage, and intrusted the subject generally to one of the firm, held, that the legal obligation of the partner intrusted being only to get payment of the mortgage, he might make an arrangement for his own benefit with a third person, without the knowledge of his partners, by which such third persons should buy the mortgaged estate, giving him, the intrusted partner, an interest in it; and if the mortgage debt was fully paid by such partner into the firm account, that there was no breach of partnership or other fiduciary relation in the transaction; or, at least, that no other partner could recover from him a share of profits made by a sale of the real estate; all parties alike having been originally engaged in a scheme to get the real estate by depreciating its value through a process of entering a judgment for a large nominal amount, and by deceiving or "bluffing off" other creditors. *Wheeler v. Sage*, 1 Wall. 518, 17 L. Ed. 646.

**55. Payment of taxes.**—*Chapin v. Streeter*, 124 U. S. 360, 31 L. Ed. 475.

In the case of *Chapin v. Streeter*, 124 U. S. 360, 31 L. Ed. 475, it was held that the duty of one partner, who was in possession of the partnership property and in use of it at the time, to have paid the taxes, and further it was no defense that his copartner stated that if he paid the whole taxes he would not allow it in the settlement of their partnership affairs.

Where plaintiff and defendant were copartners in the business of keeping a hotel, each owning an undivided one-half of the hotel and furniture and the partnership was dissolved and defendant rented of plaintiff his one-half and allowed the property to be sold for taxes and rented the property from the purchaser

though it be the signing of bills of exchange, receipts, etc. But these matters must be confined to such acts and writings as are of a mercantile nature such as are usually and necessarily done in the course of trade, and without which the business of the partnership could not be conveniently carried on.<sup>56</sup> All partners are liable as partners upon contracts made by any of them with third persons within the scope of the partnership business;<sup>57</sup> and even an express stipulation between them that one shall not be so liable, though good between themselves, is ineffectual as against third persons.<sup>58</sup> The signature of one of

and paid rent to him, it was held in an action for rent by his copartner that he was not entitled to credit for the rent paid to the purchaser. *Chapin v. Streeter*, 124 U. S. 360, 31 L. Ed. 475.

**56. Act of one partner.**—*Gerard v. Basse*, 1 Dall. 119, 1 L. Ed. 63. See, also, *Pleasants v. Meng*, 1 Dall. 380, 389, 1 L. Ed. 185.

A. lent to B. & C. a certain sum of money, whether for themselves or for a firm of which all parties were members, was a matter not clear. The money was, however, in fact, put in the firm by B. & C. An agreement was subsequently made, by all the partners, reciting that some had advanced money beyond their shares, and agreeing that each should make a statement of what he had advanced, and that the accounts so rendered and agreed upon should remain capital stock, and that partner's stock in the partnership. On the trial evidence being given, on the one hand, tending to show that in a statement furnished by A. in professed pursuance of the agreement, he had not included this money lent to B. & C., and on the other that at the time of the agreement he had agreed that he would put it in, an instruction was held to be correct which told the jury, that if at the time of the agreement between the partners, A. had assented to treat this money as an advance and to fund it, B. & C. would not remain personally liable on the original loan, if it had in truth been made to them personally; and that the fact that A. did not include the amount in his statement of advances made was not material, provided, as already said, that at the time of the agreement he had in fact agreed to include it. *Gregg v. Moss*, 14 Wall. 564, 20 L. Ed. 740.

**Joint owner of vessel.**—Although no partnership may exist between them, yet where two persons are joint owners of a vessel against which a claim exists for nondelivery of cargo, and one gives a note in the joint name for a balance agreed on as due for such nondelivery—the other party being aware of the making of the note, and of the consideration for which it was given, and making no dissent from the act of his co-owner—such note cannot be repudiated by such other party, he having bought out the share of his co-owner in the vessel and agreed to pay her debts and liabilities. *Newell v. Nixon*, 4 Wall. 572, 18 L. Ed. 305.

**Partnerships in Louisiana.**—According to the law of Louisiana, the partnership in this case being an ordinary one, as distinguished from those which are commercial, each partner is only bound individually for his share of the partnership debts; but to that extent a debt contracted by one partner, even without authority of the others, binds them, if it be proved that the partnership was benefited by the transaction. *Beauregard v. Case*, 91 U. S. 134, 23 L. Ed. 263.

**57. All partners liable.**—*Meehan v. Valentine*, 145 U. S. 611, 623, 36 L. Ed. 835.

**Responsibility for all debts.**—A person who shares in the profits, although his name may not be in the firm, is responsible for all its debts. *Winship v. United States Bank*, 5 Pet. 529, 561, 8 L. Ed. 216.

**58.** "Some of the principles applicable to the question of the liability of a partner to third persons were stated by Chief Justice Marshall in a general way as follows: 'The power of an agent is limited by the authority given him; and if he transcends that authority, the act cannot affect his principal; he acts no longer as an agent. The same principle applies to partners. One binds the others so far only as he is the agent of the others.' 'A man who shares in the profit, although his name may not be in the firm, is responsible for all its debts.' 'Stipulations (restricting the powers of partners) may bind the partners, but ought not to affect those to whom they are unknown, and who trust to the general and well-established commercial law.'" *Meehan v. Valentine*, 145 U. S. 611, 618, 36 L. Ed. 835. See post, "Effect of Agreements between Partners," V. B.

**Fraudulent misrepresentations.**—"If, in the conduct of partnership business, and with reference thereto, one partner makes false or fraudulent misrepresentations of fact to the injury of innocent persons who deal with him as representing the firm, and without notice of any limitations upon his general authority; his partners cannot escape pecuniary responsibility therefor upon the ground that such misrepresentations were made without their knowledge. This is especially so when, as in the case before us, the partners, who were not themselves guilty of wrong, received and appropriated the fruits." *Strang v. Bradner*, 114 U. S. 555, 561, 29 L. Ed. 248.

**Sale of grain.**—A contract of partner-



the partners is a sufficient signing to charge the firm.<sup>59</sup>

**B. Effect of Agreements between Partners.**—Whenever credit is given to the firm, within the scope and objects of the partnership, and in the course of its trade and business, whether the partnership be of a general or limited nature, it will bind all the partners, notwithstanding any secret stipulations or reservations between themselves, which are unknown to those who give the credit.<sup>60</sup>

ship contemplated the buying of grain—both wheat and corn—and its manufacture into flour and meal, and the sale of such grain as might accumulate in excess of that required for manufacturing; and did not contemplate, as between the partners, the buying and selling of grain in large quantities for speculation. The cards and letter heads of the partnership, which were used with the knowledge of all the partners, described it as millers and dealers in grain. It was held that these facts did not necessarily authorize each partner to bind the other by unknown contracts in distant markets for unlimited sales and purchasers of grain for future delivery. *Irwin v. Williar*, 110 U. S. 499, 500, 28 L. Ed. 225; *Dowling v. Exchange Bank*, 145 U. S. 512, 36 L. Ed. 795. See, also, *DEALER*, vol. 5, p. 199; *DEALING IN GRAIN*, vol. 5, p. 199.

**Questions for the jury.**—"What the nature of that business in each case is, what is necessary and proper to its successful prosecution, what is involved in the usual and ordinary course of its management by those engaged in it, at the place and time where it is carried on, are all questions of fact to be decided by the jury, from a consideration of all the circumstances which, singly or in combination, affect its character or determine its peculiarities, and from them all, giving to each its due weight, it is its province to ascertain and say whether the transaction in question is one which those dealing with the firm had reason to believe was authorized by all its members. The difficulty and duty of drawing the inference suitable to each case from all its circumstances cannot be avoided or supplied by affixing or ascribing to the business some general name, and deducing from that, as a matter of law, the rights of the public and the duties of the partners." *Irwin v. Williar*, 110 U. S. 499, 28 L. Ed. 225; *Dowling v. Exchange Bank*, 145 U. S. 512, 36 L. Ed. 795.

**Consent to particular contract.**—It is well settled, that if a bill of exchange be drawn by one partner, in the name of the firm, or if a bill, drawn on the firm, by their usual name and style, be accepted by one of the partners, all the partnership are bound; it results necessarily from the nature of the association, and the objects for which it is constituted, that each partner should possess the power to bind the whole, when acting in the name by which the partnership is known; although the consent of the other partners to the par-

ticular contract should not be obtained, or should be withheld. *LeRoy v. Johnson*, 2 Pet. 186, 187, 7 L. Ed. 391.

**59. Signature to bind firm.**—*Salmon Falls Mfg. Co. v. Goddard*, 14 How. 446, 455, 14 L. Ed. 493.

Where the signature of a firm name to an instrument shows that it was intended to be the act of all the partners, effect must be given to it accordingly, although only one of them is named in the body of the instrument. *George v. Tate*, 102 U. S. 564, 26 L. Ed. 232.

**Binding contract.**—An agreement made and entered into between W., "superintendent of the Keets Mining Co., parties of the first part, and J. B. P., party of the second part;" and by which "the said parties of the first part" agree to deliver at P.'s mill ore from the Keets mine from time to time, and to pay a certain price for each ton crushed and milled, etc., and which is signed and sealed as follows:

"A. W. Whitney, (Seal.)

"Sup. Keets Mining Co.

"John B. Pearson, (Seal.)"

was held to be the contract of the company, and binding on it and its members. *Post v. Pearson*, 108 U. S. 418, 422, 27 L. Ed. 774.

**60. Secret stipulations or reservations.**—*Kimbrow v. Bullitt*, 22 How. 256, 266, 16 L. Ed. 313; *Michigan Bank v. Eldred*, 9 Wall. 544, 19 L. Ed. 763. See, also, *Winship v. United States Bank*, 5 Pet. 529, 8 L. Ed. 216.

"Any restriction which, by agreement among the partners, is attempted to be imposed upon the authority which one partner possesses, as a general agent for the other, is operative only between the partners themselves, and does not limit the authority as to third persons, who acquire rights by its exercise, unless they know that such restrictions have been made." *Kimbrow v. Bullitt*, 22 How. 256, 266, 16 L. Ed. 313. See, also, *Winship v. United States Bank*, 5 Pet. 529, 562, 8 L. Ed. 216.

Where a transaction is one entered into for the common benefit of all the partners, it is of no consequence what the secret understanding of the partners may have been as to the powers of each; the contract being within the scope of the partnership business, each partner is presumed to be the authorized agent of all. *Andrews v. Congar*, 131 U. S., appx. clxxxiii, 26 L. Ed. 90.

Where one partner guaranteed a promissory note, it was said: "There is nothing



**Disproving Existence of Partnership.**—"The effect of private arrangements between the partners as to the relative influence and responsibility of each in deciding questions arising in the course of their business is a very different thing from disproving the existence of the partnership."<sup>61</sup> Even an express stipulation between partners that one of them shall not be liable, though good between the parties, is ineffectual as against third persons.<sup>62</sup>

**C. Acts of Partner beyond Scope of Business.**—Contracts made by one of several partners, in respect to matters not falling within the ordinary business, objects, and scope of the partnership, are not binding on the other partners, and create no liability to third persons, who have knowledge that the partner making the contract is acting in violation of his duties and obligations to the firm of which he is a member.<sup>63</sup> Third persons are not bound to inquire,

in the case to show, or tending to show, that the execution of the guaranty was not in the line of the regular business of the partnership. On the contrary, it does appear that the partners were the owners of a majority of the stock in the corporation that made the note, and that the note and guaranty were given with a view to the protection and improvement in value of that stock. The transaction was one which appears to have been entered into for the common benefit of all the partners. Under such circumstances, it was of no consequence what the secret understanding of the partners may have been as to the powers of each. The contract being within the scope of the partnership business, each partner is presumed to be the authorized agent of all." *Andrews v. Congar*, 131 U. S., appx. clxxxiii, clxxxv, 26 L. Ed. 90.

**Agreement as to debts on steamboat.**—Where a firm with several persons styling themselves, as a firm in this case did, "creditors of the steamboat B.," agreed to release P. (owner of 17-32 parts of the boat, the rest being owned by two other persons) "from all indebtedness due us by the said steamboat so far as the said P. is concerned," and where, on P.'s being about to sell to C. for a price greatly below its value had it been clear of debts, his interest in the steamer, on condition that C. would assume and pay all debts, the firm executed an agreement by which they bound themselves to defend and save the said P., free and harmless of any and all claims and demands that may arise or be brought against said steamboat excepting those above signed. Held, that the expression "defend and save the said P., free and harmless of any and all claims and demands that may arise or be brought against said steamboat," referred to debts existing at the date of the sale, and not to debts that might be contracted after it; and meant to protect the owner from all liability arising from his part ownership of the boat, irrespectively of the fact whether the debts were liens on the boat or not. It was allowable to show that the boat was a very valuable one, and that the money price paid for her was insignificant in comparison with it, in order to infer that the purchaser had assumed the pay-

ment of existing debts against her. *Moran v. Prather*, 23 Wall. 492, 23 L. Ed. 121.

<sup>61</sup> *Porter v. Graves*, 104 U. S. 171, 173, 26 L. Ed. 691.

<sup>62</sup> *Meehan v. Valentine*, 145 U. S. 611, 623, 36 L. Ed. 835.

**Articles of partnership.**—"The articles of copartnership are perhaps never published. They are rarely, if ever seen, except by the partners themselves. The stipulations they may contain are to regulate the conduct and rights of the parties, as between themselves. The trading world, with whom the company is in perpetual intercourse, cannot individually examine these articles, but must trust to the general powers contained in all partnerships. The acting partners are identified with the company, and have power to conduct its usual business, in the usual way. This power is conferred by entering into the partnership, and is perhaps never to be found in the articles. If it is to be restrained, fair-dealing requires that the restriction should be made known. These stipulations may bind the partners; but ought not to affect those to whom they are unknown, and who trust to the general and well-established commercial law. 2 H. Bl. 235; 17 Ves. 412; *Gow on Part. 17*." *Winship v. United States Bank*, 5 Pet. 529, 561, 8 L. Ed. 216.

**Dormant partners.**—The responsibility of dormant partners depends on the general principle of commercial law, not on the particular stipulations of the articles. *Winship v. United States Bank*, 5 Pet. 529, 8 L. Ed. 216.

**Authority of clerk.**—Where it was objected that the right of a clerk authorized by one of the partners to accept bills and notes in the name of the company was limited by the articles of copartnership, it was held that the limitation could not be known and therefore ought not to affect the defendant if he acted under a legal authority. *Tillier v. Whitehead*, 1 Dall. 269, 1 L. Ed. 131.

<sup>63</sup> **Acts of partner beyond scope of business.**—*Kimbro v. Bullitt*, 22 How. 256, 266, 16 L. Ed. 313.

"Every contract in the name of the firm, in order to bind the partnership must not only be within the scope of the business of the partnership but it must be

whether the partner with whom they are contracting is acting on the partnership account, or for his individual advantage; the interest of the partners in the joint stock of the concern, and his consequent authority to use the partnership name, raises a presumption that the contract was made for joint account; which is sufficient to bind the firm, unless the contrary be shown; and that the person with whom the partner deals had notice, or reason to believe, that the former was acting on his separate account.<sup>64</sup> Whatever acts are done by any partner, in regard to partnership property or contracts, beyond the scope and objects of the partnership, must, in general, to bind the partnership, be derived from some further authority express or implied, conferred upon such partner, beyond that resulting from his character as partner.<sup>65</sup> Other matters beyond the scope of a partnership may become the subject of investment and speculation of every partnership on the joint account irrespective of its regular business but such special transaction cannot properly be said to come within the scope of the partnership.<sup>66</sup>

**D. Liability of Person Holding Out as Partner.**—A person may be held liable as a partner where he has held himself out or allowed himself to be held out as such,<sup>67</sup> to third persons who have contracted with the partnership upon

made with a party who has no knowledge or notice that the partner is acting in violation of his obligations and duties to the firm, or for purposes disapproved of by the firm, or in fraud of the firm.' Story Part., 193. This rule as well applies to the indorsement of negotiable instruments as to other contracts." *Smyth v. Strader*, 4 How. 404, 416, 11 L. Ed. 1031.

**64. Inquiry by third persons as to authority.**—*LeRoy v. Johnson*, 2 Pet. 186, 7 L. Ed. 391.

**65. Necessity for further authority.**—*Rogers v. Batchelor*, 12 Pet. 221, 9 L. Ed. 1063.

**Execution of bond.**—It would seem that a bond to bind the members of a partnership must be actually executed by each of them and that in respect to such instrument the act of one partner in executing it would not be the act of the others. *Pleasants v. Meng*, 1 Dall. 380, 389, 1 L. Ed. 185.

**Confession of judgment.**—In the case of *Gerard v. Basse*, 1 Dall. 119, 1 L. Ed. 63, a bond and warrant of attorney to confess judgment signed and sealed by one partner was held to be valid only as against himself and a judgment entered thereon did not bind his partner though such judgment was valid as to him.

An arrangement was made between creditor and debtor houses, that the latter should execute an assignment, and confess judgment, and that the former should give a receipt in full, and agree that the notes of the debtor house should be canceled. The assignment was made, judgment confessed, and the receipt was given. A solvent partner of the debtor house was absent, and neither consented to the assignment nor to the confession of judgment, and upon his motion the judgment was vacated as to him, as being confessed without authority. The judgment was then vacated as to all the partners, and the assigned property taken out of the hands of the trustee by a prior

claim. Whereupon the creditor house brought suit upon the notes which had not been destroyed. It was held that the whole arrangement to secure the debt being in effect annulled, the original indebtedness stood revived, and judgment was properly rendered upon the notes. *Clark v. Bowen*, 22 How. 270, 16 L. Ed. 337.

**Entry of appearance.**—The law does not seem to be entirely clear that a partner may enter an appearance for his copartners without special authority even during the continuance of the firm. *Hall v. Lanning*, 91 U. S. 160, 23 L. Ed. 271.

Where in an admiralty case the rejoinder was signed by a proctor for all the partners authorized by one of the partners, this was held a sufficient appearance for the firm. *Hills v. Ross*, 3 Dall. 331, 1 L. Ed. 623.

**Submission to arbitration.**—As to submission of partnership interests to arbitration by one partner, see the title ARBITRATION AND AWARD, vol. 2, p. 469.

**66. Special transactions.**—*Latta v. Kilbourn*, 150 U. S. 524, 545, 37 L. Ed. 1169.

**Acceptances of agency by law partner.**—A member of a law firm in virtue of his partnership is without authority to accept for his firm an agency for the mere sale of real estate. *Robertson v. Chapman*, 152 U. S. 673, 681, 38 L. Ed. 592.

**67. Holding out as partner.**—*Berthold v. Goldsmith*, 24 How. 536, 542, 16 L. Ed. 762. See, also, *Meehan v. Valentine*, 145 U. S. 611, 36 L. Ed. 835; *Pleasants v. Fant*, 22 Wall. 116, 22 L. Ed. 780; *Thompson v. First Nat. Bank*, 111 U. S. 529, 28 L. Ed. 507; *McGowan v. American, etc., Bank Co.*, 121 U. S. 575, 30 L. Ed. 1027.

"A person not a partner or joint trader may, under some circumstances, be held liable as if he were, in fact, a partner or joint trader. 'Where the parties are not in reality partners,' says Story, 'but are held out to the world as such in transactions affecting third persons,' they will be held to be partners as to such persons.



the faith of such holding out.<sup>68</sup> One who had no knowledge or belief that the defendant was held out as a partner, and did nothing on the faith of such a knowledge or belief, cannot charge him with liability as a partner if he was not a partner in fact.<sup>69</sup> There may be cases in which the holding out has been so public and so long continued as to justify the inference, as matter

Story's Part., § 64. And in *Gow on Partnership* (p. 4) it is laid down as an undeniable proposition, that 'persons appearing ostensibly as joint traders are to be recognized and treated as partners, whatever may be the nature of the agreement under which they act, or whatever motive or inducement may prompt them to such an exhibition.' And so it was adjudged in *Waugh v. Carver*, 2 H. Bl. 235, 246, where it was said by Lord Chief Justice Eyre, that if one will lend his name as a partner he becomes, as against all the world, a partner, 'not upon the ground of the real transaction between them, but upon principles of general policy to prevent the frauds to which creditors would be liable.' " *Sun Ins. Co. v. Kountz Line*, 122 U. S. 583, 593, 30 L. Ed. 1137.

**68. Estoppel by conduct.**—"A person who is not in fact a partner, who has no interest in the business of the partnership and does not share in its profits, and is sought to be charged for its debts because of having held himself out, or permitted himself to be held out, as a partner, cannot be made liable upon contracts of the partnership except with those who have contracted with the partnership upon the faith of such holding out. In such a case, the only ground of charging him as a partner is, that by his conduct in holding himself out as a partner he has induced persons dealing with the partnership to believe him to be a partner, and, by reason of such belief, to give credit to the partnership. As his liability rests solely upon the ground that he cannot be permitted to deny a participation which, though not existing in fact, he has asserted, or permitted to appear to exist, there is no reason why a creditor of the partnership, who has neither known of nor acted upon the assertion or permission, should hold as a partner one who never was in fact, and whom he never understood or supposed to be, a partner, at the time of dealing with and giving credit to the partnership." *Thompson v. First Nat. Bank*, 111 U. S. 529, 536, 28 L. Ed. 507; *Sun Ins. Co. v. Kountz Line*, 122 U. S. 583, 593, 30 L. Ed. 1137.

"Mr. Justice Lindley, in his *Treatise on the Law of Partnership*, sums up the law on this point as follows: 'The doctrine that a person holding himself out as a partner and thereby inducing others to act on the faith of his representations, is liable to them as if he were in fact a partner, is nothing more than an illustration of the general principle of estoppel by conduct.' 'The expression in *Waugh v. Carver*, "if he will lend his name as a partner he becomes as against all the rest

of the world a partner," requires qualification; for the real ground on which liability is incurred by holding oneself out as a partner is, that credit has been thereby obtained. This was put with great clearness by Mr. Justice Parke in *Dickinson v. Valpy*.' 'No person can be fixed with liability on the ground that he has been held out as a partner, unless two things concur, viz: First, the alleged act of holding out must have been done either by him or by his consent, and, secondly, it must have been known to the person seeking to avail himself of it. In the absence of the first of these requisites, whatever may have been done cannot be imputed to the person sought to be made liable; and in the absence of the second, the person seeking to make him liable had not in any way been misled.' *Lindley on Partnership* (1st ed.) 45-47; (4th ed.) 48-50." *Thompson v. First Nat. Bank*, 111 U. S. 529, 540, 28 L. Ed. 507.

**Instructions to jury.**—"The following instruction has been sustained: "If the jury find, from the evidence, that defendants, prior to the making of the contract of June 23, 1881, held themselves out to plaintiff as partners, and that plaintiff dealt with them as such prior to the making of said contract, and entered into said contract believing them to be a firm, and without notice of a corporation, then said defendants are liable on said contract, even though they should find that defendants were not, in fact, a firm, and that there was a corporation called 'The McGowan Pump Company.' " *McGowan v. American, etc., Bark Co.*, 121 U. S. 575, 591, 30 L. Ed. 1027.

This instruction has been likewise sustained: "If the jury find, from the evidence, that the defendants were, prior to June 23, 1881, doing business as partners under the name of 'The McGowan Company' or 'McGowan Pump Co.', and that plaintiff dealt with them before said date as such partners, and had no knowledge of any change in said business, then said contract is the contract of defendants, and defendants cannot avoid or escape liability thereon, even if on that date a corporation existed called 'The McGowan Pump Company,' with which defendants may have been connected, and to which they had turned over their entire partnership business and assets." *McGowan v. American, etc., Bark Co.*, 121 U. S. 575, 591, 30 L. Ed. 1027.

**69. Knowledge of holding out.**—*Thompson v. First Nat. Bank*, 111 U. S. 529, 536, 28 L. Ed. 507.

In the case of *Wilson v. Edmonds*, 130 U. S. 472, 32 L. Ed. 1025, where a person



of fact, that one dealing with the partnership knew it and relied upon it, without direct testimony to that effect.<sup>70</sup> Where persons are sought to be held liable as partners if they are not so, the inquiry must be whether they so conducted themselves with reference to the general public as to induce a person dealing with them and acting with reasonable caution to believe that they were partners.<sup>71</sup>

**E. Liability on Negotiable Instruments.**—Mr. Justice Story said that the doctrine that each partner may bind the firm by bills of exchange, promissory notes and other negotiable instruments is generally limited to partnerships in trade and commerce, and does not apply to other partnerships unless it is the common custom or usage of such business to bind the firm by negotiable instruments, or it is necessary for the due transaction thereof.<sup>72</sup> The liability of a partnership upon negotiable instruments executed by one partner in the name of the firm, exists not only where the firm is a trading or commercial partnership, but where the actual course of business pursued adopts

never represented himself to be a member of a firm and it did not appear that any creditor of the firm was ever informed or supposed that such person was a member or gave credit to the firm or had dealings with the firm on the understanding or belief that he was a partner it was held that he was not a partner. See, also, *Allen v. St. Louis Bank*, 120 U. S. 20, 39, 30 L. Ed. 573; *Rogers v. Batchelor*, 12 Pet. 221, 9 L. Ed. 1063; *Meehan v. Valentine*, 145 U. S. 611, 625, 36 L. Ed. 835.

**70. Inference of knowledge.**—*Thompson v. First Nat. Bank*, 111 U. S. 529, 536, 28 L. Ed. 507; *Sun Ins. Co. v. Kountz Line*, 122 U. S. 583, 593, 30 L. Ed. 1137.

**71. Reasonable caution.**—*Sun Ins. Co. v. Kountz Line*, 122 U. S. 583, 30 L. Ed. 1137.

In this case it was held that the defendants were liable as partners on the ground that they had so conducted themselves with reference to the general public as to induce the shipper acting with reasonable caution to believe that they had formed a combination in the nature of a partnership or were engaged as joint traders under the name of the Kountz Line. *Sun Ins. Co. v. Kountz Line*, 122 U. S. 583, 30 L. Ed. 1137.

**72. Trading partnerships.**—*Dowling v. Exchange Bank*, 145 U. S. 512, 516, 36 L. Ed. 795, quoting Story on Partnership, § 102a.

**Bills of exchange.**—Where bills of exchange were drawn by the principal acting partner of a firm in the name of the firm, all the partners were responsible. *Kimbrow v. Bullitt*, 22 How. 256, 16 L. Ed. 313. See, also, *Strang v. Bradner*, 114 U. S. 555, 561, 29 L. Ed. 248.

**Authority to authorize acceptance of notes.**—One of two partners may give an authority to a clerk; and that clerk may in consequence thereof accept bills and sign or indorse notes in the name of the firm. *Tillier v. Whitehead*, 1 Dall. 269, 1 L. Ed. 131.

**Indorsement of note where transaction has no connection with the business of the firm.**—"The indorsement of the note of

the Black River Lumber Company for \$10,000, by Ketchum in the firm name of Ketchum & Waterman, was made by way of security to the bank for its loan to that company. The transaction had no connection with the business of the firm. It was a guarantee of another's obligation which no member of the firm had any authority to give. It was not shown, moreover, that the indorsement was made with the consent or even knowledge of Waterman. His estate, therefore, cannot be held liable upon the note." *Bank v. Alden*, 129 U. S. 372, 381, 32 L. Ed. 725.

**Partnership for the purpose of sawing lumber.**—In a partnership formed for the purpose of sawing lumber, it was held that the articles of agreement did not create a partnership, each member of which had, under the settled rules of law and as between the firm and those dealing with it, authority to give negotiable paper in its name. The firm was of the class denominated in many adjudged cases as non-trading or non-commercial firms, the members of which could not be held, as matter of law, and by reason of the nature of the partnership business to have authority to execute negotiable instruments in the name of the firm. The issue as to whether the defendants were estopped to dispute the authority of the partner to make the notes in suit was held to be one peculiarly for the jury, under all the facts indicating the nature, necessities and course of business of the firm. *Dowling v. Exchange Bank*, 145 U. S. 512, 36 L. Ed. 795. Compare *Kimbrow v. Bullitt*, 22 How. 256, 268, 16 L. Ed. 313.

**Trading partnership.**—Wherever the business, according to the usual mode of conducting it, imports, in its nature, the necessity of buying and selling, the firm is then properly regarded as a trading partnership, and is invested with all the powers and subject to all the obligations incident to that relation. *Dowling v. Exchange Bank*, 145 U. S. 512, 516, 36 L. Ed. 795; *Winship v. United States Bank*, 5 Pet. 529, 8 L. Ed. 216; *Kimbrow v. Bullitt*, 22 How. 256, 268, 16 L. Ed. 313.

the practice of issuing the mercantile paper of the firm to accommodate its necessities or convenience whenever the occasions occur.<sup>73</sup> Where partnerships are formed for the mere purpose of farming, one partner does not possess the right, without the consent of his associates, to draw or accept bills of exchange, for the reason that such a practice is not usual, nor is it necessary for carrying on the farming business.<sup>74</sup> Where a note is drawn by one partner with sureties, payable to his own firm, the drawer partner is entitled to one-half of it and the obligation of the sureties is diminished pro tanto.<sup>75</sup>

**F. Liability for Tort.**—As a general rule partners are all liable for the tort of one of their number committed in the course of the partnership business.<sup>76</sup> A firm is bound for the frauds committed by one of its partners upon the principle that by forming a partnership the partners declare themselves

**73. Actual course of business pursued.**—*Dowling v. Exchange Bank*, 145 U. S. 512, 517, 36 L. Ed. 795.

**Where articles of partnership are unknown to the public.**—If the particular terms of articles of partnership are unknown to the public, they have a right to deal with the firm, in respect to its business, upon the general principles and presumptions of limited partnerships of a like nature, and any special restrictions in the articles do not affect them. In such partnerships, it is within the general authority of the partners to make and indorse notes, and to obtain advances and credits for the business and benefit of the firm; and if such were the general usage of trade, that authority must be presumed to exist; but not to extend to transactions beyond the scope and objects of the co-partnership. *Winship v. United States Bank*, 5 Pet. 529, 8 L. Ed. 216.

**Acceptance of note.**—Where a bill is drawn upon a firm, and one partner writes "accepted," adding only his own name, it will bind the firm, if they were in partnership at the time of the acceptance. *Pease v. Dwight*, 6 How. 190, 199, 12 L. Ed. 399.

**74. Farming.**—*Kimbro v. Bullitt*, 22 How. 256, 16 L. Ed. 313.

"Farming partnerships, when strictly confined to that purpose, are held to be within the exceptions to the general rule, upon the ground, as assumed by the counsel for the plaintiffs, that their principal object is to make profits out of the soil, by gathering its fruits, and that the partners are in no proper sense engaged in trade." *Kimbro v. Bullitt*, 22 How. 256, 268, 16 L. Ed. 313.

"Another answer, however, may be given to the objection to this part of the instruction, which is entirely conclusive against it. According to the evidence, farming was not the sole business of the partners composing this firm. They were also engaged in running a steam sawmill, for manufacturing purposes; and common observation will warrant the remark that those who engage in that business always want capital to carry it on, and frequently find it necessary to ask for credit. Like those engaged in other branches of manufactures, they buy and sell, and have oc-

casion to remit money and collect it from distant places." *Kimbro v. Bullitt*, 22 How. 256, 268, 16 L. Ed. 313. Compare *Dowling v. Exchange Bank*, 145 U. S. 512, 36 L. Ed. 795.

**75. Liability of sureties.**—*McMicken v. Webb*, 6 How. 292, 12 L. Ed. 443.

**76. Liability for tort.**—"That as a general rule partners are all liable to make indemnity for the tort of one of their number, committed by him in the course of the partnership business, is familiar doctrine. It rests upon the theory that the contract of partnership constitutes all its members agents for each other, and that when a loss must fall upon one of two innocent persons he must bear it who has been the occasion of the loss or has enabled a third person to cause it. In other words, the tortious act of the agent is the act of his principals, if done in the course of his agency, though not directly authorized." *Stockwell v. United States*, 13 Wall. 531, 547, 20 L. Ed. 491.

"Judge Story says, in his valuable work on partnerships, that torts may arise in the course of the business of the partnership, for which all the members of the firm will be liable, although the act may not in fact have been assented to by all the partners. Thus, for example, if one of the partners should commit a fraud in the course of the partnership business, all the partners may be liable therefor, although they may not all have concurred in the act. So, if one of a firm of commission merchants should sell goods consigned to the firm, fraudulently, or should sell goods so consigned in violation of instructions, all the partners would be liable. *Story on Part.*, § 166; *Collier on Part.* (Am. Ed., 1848), §§ 445 and 457; *Nicoll v. Glennie*, 1 Maule and Selw. 568." *Castle v. Bullard*, 23 How. 172, 188, 16 L. Ed. 424.

It appears that in civil transactions a principal or a partnership is affected by the knowledge of the agent or copartner, and that the knowledge of the agent is in law attributed to his principal, as well as that of the partner to all the members of the firm. It seems that a principal, or copartner, is liable for the tort of an agent, or copartner, done without his knowledge or authority, in suits brought by third persons to recover compensation or in-



to the world satisfied with the good faith and integrity of each other and impliedly undertakes to be responsible for what they will respectively do within the scope of the partner's concern.<sup>77</sup>

**G. Right to Bind Partnership by Deed.**—It is a well-settled rule, though a very technical one, that one partner cannot bind his copartners by deed.<sup>78</sup>

**Distinguished from Ordinary Mercantile Transactions.**—The reason is that deeds are matters of a different nature from the usual mercantile transactions and are not necessarily connected with trade but are subject to the rule of law independent of trade and commerce.<sup>79</sup> One partner may, however, bind his copartner by deed, if he is present, and assent to it; the seal of one partner, with the assent of the copartner, will bind the firm.<sup>80</sup> Where a deed is executed on behalf of a firm by one partner, the other partner will be bound if there be either a previous parol authority, or a subsequent parol adoption of the act; and that ratification may be inferred from the presence of the other partner at the execution and delivery, or from his acting under it or taking the benefits of it with knowledge.<sup>81</sup> If an equity results to firm creditors be-

demnity for loss sustained in consequence of the tort. *Stockwell v. United States*, 13 Wall. 531, 545, 20 L. Ed. 491.

On the trial of a civil action brought by the United States under the second section of the act of 1823, to recover against two members of a firm residing at Bangor, in Maine, double the value of certain shingles, the produce of one of the British Provinces, alleged to have been received, concealed, and brought by the defendants, knowing them to have been illegally imported, it is not error in the court to instruct the jury that the knowledge of another member of the firm, who was not sued, was to be deemed the knowledge of the defendants, and that if he knew at the time of the importation and reception of the shingles at Bangor, "that they were Province shingles, liable to duty and seizure, and illegally imported, it was not necessary for the government to prove that the defendants sued personally had actual knowledge of these facts, which were then within the knowledge of their partner;" and that "if with this knowledge on the part of the absent partner, that the shingles were illegally imported and liable to seizure, the firm, in the usual course of the business, received the shingles at Bangor, and they were disposed of by them, and the profits of the business divided among all the partners, the jury were authorized to find that the defendants received the shingles, knowing that the same were illegally imported and liable to seizure." *Stockwell v. United States*, 13 Wall. 531, 20 L. Ed. 491.

**77. Fraud.**—*Smyth v. Strader*, 4 How. 404, 416, 11 L. Ed. 1031.

If the goods were fraudulently sold by one of the firm, and the firm received the profits in the shape of commission, all the partners are responsible for the sale. *Castle v. Bullard*, 23 How. 172, 16 L. Ed. 424.

"Whether this action be regarded as one to recover damages for the deceit practised upon the plaintiffs, or as one to re-

cover the amount of a debt created by fraud upon the part of Strang, we are of opinion that his fraud is to be imputed, for the purposes of the action, to all the members of his firm. The transaction between him and the plaintiffs is to be deemed a partnership transaction, because, in addition to his representation that the notes were for the benefit of his firm, he had, by virtue of his agency for the partnership, and as between the firm and those dealing with it in good faith, authority to negotiate for promissory notes and other securities for its use." *Strang v. Bradner*, 114 U. S. 555, 561, 29 L. Ed. 248.

**78. Power to bind partnership by deed.**—*Anthony v. Butler*, 13 Pet. 423, 10 L. Ed. 229. See, also, *Pleasants v. Meng*, 1 Dall. 380, 389, 1 L. Ed. 185; *Gerard v. Basse*, 1 Dall. 119, 121, 1 L. Ed. 63; *Thompson v. Bowman*, 6 Wall. 316, 18 L. Ed. 736.

**79.** *Gerard v. Basse*, 1 Dall. 119, 1 L. Ed. 63.

**80.** *Anthony v. Butler*, 13 Pet. 423, 10 L. Ed. 229.

**Execution of mortgage.**—Thus where one partner signed and sealed a mortgage with the assent and in the presence of his copartner, the resolution of the partners to give the mortgage and the execution of it bearing the same date, it was held that this must be received as prima facie evidence of the due execution of the deed, though such facts are liable to be rebutted. *Anthony v. Butler*, 13 Pet. 423, 432, 10 L. Ed. 229.

**81. Previous authority or subsequent ratification.**—*McGahan v. Bank*, 156 U. S. 218, 232, 39 L. Ed. 403.

Where one partner, R. M., affixed his name and seal to an instrument whose testament set forth that "R. M. & Sons, by R. M., one of the firm, had thereto set their hands and seals," the instrument may be regarded as the deed of all the partners on proof that prior to the execution the others had authorized R. M. to execute the instrument, and after execu-



cause purchases are made in furtherance of a joint enterprise and the lands are devoted to its use, a mortgage made by a partner of the three-fourths standing in his name to secure a partnership debt, is valid.<sup>82</sup>

**H. Rights and Priorities of Creditors**—1. **IN GENERAL**.—The rule is, that partnership creditors shall, in the first instance, be satisfied from the partnership estate; and separate or private creditors of the individual partners from the separate and private estate of the partners, with whom they have made private and individual contracts; and that the private and individual property of the partners shall not be applied in extinguishment of partnership debts, until the separate and individual creditors of the respective partners shall be paid.<sup>83</sup>

tion, with full knowledge acquiesced in what he had done. *Gibson v. Warden*, 14 Wall. 244, 20 L. Ed. 797.

**Execution of chattle mortgage**.—Where there was proof in the record that the other partners authorized one partner in advance to execute a chattel mortgage and after its execution, with full knowledge, acquiesced in what he had done, it was said in the opinion: "if the law had required the sale, these circumstances would have made the instrument the deed of the firm—as much so as if all the members had been personally present and assented to its execution in that form." *Gibson v. Warden*, 14 Wall. 244, 247, 20 L. Ed. 797.

**82.** *McGahan v. Bank*, 156 U. S. 218, 39 L. Ed. 403.

**83. Priorities**.—*Murrill v. Neill*, 8 How. 414, 12 L. Ed. 1135. See, also, *Peters v. Bain*, 133 U. S. 670, 690, 33 L. Ed. 696; *Tucker v. Oxley*, 5 Cranch 34, 3 L. Ed. 29; *Forsyth v. Woods*, 11 Wall. 484, 20 L. Ed. 207.

It is a general rule, that the joint debts are primarily payable out of the joint effects, and are entitled to a preference over separate debts; and so, in the converse case, the separate debts are primarily payable out of the separate effects, and possess a like preference; and the surplus, only after satisfying such priorities, can be reached by the other class of creditors. *Murrill v. Neill*, 8 How. 414, 428, 12 L. Ed. 1135.

"Whenever, a partnership becoming insolvent, a court of equity takes possession of its property, it recognizes the fact that in equity the partnership creditors have a right to payment out of those funds in preference to individual creditors, as well as superior to any claims of the partners themselves. And the partnership property is, therefore, sometimes said, not inaptly, to be held in trust for the partnership creditors, or, that they have an equitable lien on such property. Yet, all that is meant by such expressions is the existence of an equitable right which will be enforced whenever a court of equity, at the instance of a proper party and in a proper proceeding, has taken possession of the assets. It is never understood that there is a specific lien, or a direct trust." *Hollins v. Brierfield Coal, etc., Co.*, 150 U. S. 371, 385, 37 L. Ed. 1113.

"It is indispensable, however, to such relief, when the creditors are, as in the present case, simple-contract creditors, that the partnership property should be within the control of the court and in the course of administration, brought there by the bankruptcy of the firm, or by an assignment, or by the creation of a trust in some mode. This is because neither the partners nor the joint creditors have any specific lien, nor is there any trust that can be enforced until the property has passed in *custodiam legis*. Other property can be followed only after a judgment at law has been obtained and an execution has proved fruitless." *Case v. Beauregard*, 99 U. S. 119, 125, 25 L. Ed. 370.

A member of a firm assigned and transferred in good faith his interest in the partnership property in payment of a just debt for which he was solely liable. The creditor took possession of it and sold it to A., who, by an act of sale, in which the other member of the firm united, transferred it for a valuable consideration to B. The firm and the members of it were insolvent. C., claiming to be a simple contract creditor of the firm, then filed his bill to subject the property to the payment of his debt. Held, that C. had no specific lien on the property, and there being no trust which a court of equity can enforce, the bill cannot be sustained. *Case v. Beauregard*, 99 U. S. 119, 25 L. Ed. 370.

**Deed of trust**.—A merchant who owed debts upon his own private account, and was also a partner in two commercial houses which owed debts upon partnership account, executed a deed of trust containing the following provisions, viz: It recited a relinquishment of dower by his wife in property previously sold and in the property then conveyed, and also a debt due to the daughter of the grantor, which was still unpaid, and then proceeded to declare that he was indebted to divers other persons residing in different parts of the United States, the names of whom he was then unable to specify particularly, and that the trustee should remit from time to time to Alexander Neill, of the first moneys arising from sales, until he shall have remitted the sum of \$15,000, to be paid by the said Neill to the creditors of the said grantor, whose demands shall then have been ascertained; and if such

It is only through and by means of the equity of the individual partner to have the partnership property applied to the payment of the partnership debts, that the creditors have any lien on, or specific rights to, the property of the firm as distinguished from the property of its members.<sup>84</sup> The subsequent misapplication by one of the partners of funds obtained from a creditor will not affect

demands shall exceed the sum of \$15,000, then to be divided amongst such creditors *pari passu*; and out of further remittances there was to be paid the sum of \$12,000 to his wife as a compensation for her relinquishment of dower, and next the debt due to his daughter, and after that the moneys arising from further sales were to be applied to the payment of all the creditors of the grantor whose demands shall then have been ascertained. In case of a surplus, it was to revert to the grantor. The construction of this deed must be that the grantor intended to provide for his private creditors only out of this fund, leaving the partnership creditors to be paid out of the partnership funds. *Murrill v. Neill*, 8 How. 414, 12 L. Ed. 1135.

Under the above deed, it was the duty of the trustee to divide the first \$15,000 amongst the private creditors of the grantor, and exclude from all participation therein the creditors of the two commercial houses with which the grantor was connected; next to pay the debts due to the wife and daughter; then to pay in full the private creditors, or divide the amount amongst them proportionally. *Murrill v. Neill*, 8 How. 414, 12 L. Ed. 1135.

**Priority of the United States.**—The priority of the United States does not extend so as to take the property of a partner from partnership effects, to pay a separate debt, due by such partner to the United States, when the partnership effects are not sufficient to satisfy the creditors of the partnership. *United States v. Hack*, 8 Pet. 271, 8 L. Ed. 941.

**84. Lien of creditors.**—*McCormick v. Gray*, 13 How. 26, 37, 14 L. Ed. 36. See, also, *Hollins v. Brierfield Coal, etc., Co.*, 150 U. S. 371, 37 L. Ed. 1113.

"No doubt the effects of a partnership belong to it so long as it continues in existence, and not to the individuals who compose it. The right of each partner extends only to a share of what may remain after payment of the debts of the firm and the settlement of its accounts. Growing out of this right, or rather included in it, is the right to have the partnership property applied to the payment of the partnership debts in preference to those of any individual partner. This is an equity the partners have as between themselves, and in certain circumstances it enures to the benefit of the creditors of the firm. The latter are said to have a privilege or preference, sometimes loosely denominated a lien, to have the debts due to them paid out of the assets of a firm

in course of liquidation, to the exclusion of the creditors of its several members. Their equity, however, is a derivative one. It is not held or enforceable in their own right. It is practically a subrogation to the equity of the individual partner, to be made effective only through him. Hence, if he is not in a condition to enforce it, the creditors of the firm cannot be. *Rice v. Barnard et al.*, 20 Vt. 479; *Appeal of the York County Bank*, 32 Pa. St. 446. But so long as the equity of the partner remains in him, so long as he retains an interest in the firm assets, as a partner, a court of equity will allow the creditors of the firm to avail themselves of his equity, and enforce, through it, the application of those assets primarily to payment of the debts due them, whenever the property comes under its administration." *Case v. Beauregard*, 99 U. S. 119, 124, 25 L. Ed. 370.

"The legal right of a partnership creditor to subject the partnership property to the payment of his debt consists simply in the right to reduce his claim to judgment, and to sell the goods of his debtors on execution. His right to appropriate the partnership property specifically to the payment of his debt, in equity, in preference to creditors of an individual partner, is derived through the other partner, whose original right it is to have the partnership assets applied to the payment of partnership obligation. And this equity of the creditor subsists as long as that of the partner, through which it is derived, remains; that is, so long as the partner himself 'retains an interest in the firm assets, as a partner, a court of equity will allow the creditors of the firm to avail themselves of his equity, and enforce through it the application of those assets primarily to payment of the debts due them, whenever the property comes under its administration.' Such was the language of this court in *Case v. Beauregard*, 99 U. S. 119, 25 L. Ed. 370, in which Mr. Justice Strong, delivering its opinion, continued as follows: 'It is indispensable, however, to such relief, when the creditors are, as in the present case, simple-contract creditors, that the partnership property should be within the control of the court, and in the course of administration, brought there by the bankruptcy of the firm, or by an assignment, or by the creation of a trust in some mode. This is because neither the partners nor the joint creditors have any specific lien, nor is there any trust that can be enforced until the property has passed in custodiam legis.' Hence it follows that, 'if before the interposition of the court is asked the



his right to recover from the firm where the creditor is not a party nor privy thereto or of the intention to misapply the funds.<sup>85</sup>

2. APPLICATION OF PARTNERSHIP FUNDS TO INDIVIDUAL DEBTS.—In the case

property has ceased to belong to the partnership, if by a bona fide transfer it has become the several property either of one partner or of a third person, the equities of the partners are extinguished, and consequently the derivative equities of the creditors are at an end.' In that case it was held, in respect to a firm admitted to be insolvent, that transfers made by the individual partners of their interest in the partnership property converted that property into individual property, terminated the equity of any partner to require the application thereof to the payment of the joint debts, and constituted a bar to a bill in equity filed by a partnership creditor to subject it to the payment of his debt, the relief prayed for being grounded on the claim that these transfers were in fraud of his rights as a creditor of the firm. Another case between the same parties came again for consideration before the court, which reaffirmed the decision, and held that in such a case the bill might be properly filed by a creditor, without first reducing his claim to judgment. *Case v. Beauregard*, 101 U. S. 688, 25 L. Ed. 1004." *Fitzpatrick v. Flannagan*, 106 U. S. 648, 654, 27 L. Ed. 211.

"But the instruction was contrary to the ruling in the case of *Fitzpatrick v. Flannagan*, 106 U. S. 648, 654, 27 L. Ed. 611, where this court, speaking by Mr. Justice Matthews, said: 'The legal right of a partnership creditor to subject the partnership property to the payment of his debt consists simply in the right to reduce his claim to judgment, and to sell the goods of his debtors on execution. His right to appropriate the partnership property specifically to the payment of his debt, in equity, in preference to creditors of an individual partner, is derived through the other partner, whose original right it is to have the partnership assets applied to the payment of partnership obligations. And this equity of the creditor subsists as long as that of the partner, through which it is derived, remains; that is, so long as the partner himself, in the language of this court in *Case v. Beauregard*, 99 U. S. 119, 125, 25 L. Ed. 370, 'retains an interest in the firm assets, as a partner, a court of equity will allow the creditors of the firm to avail themselves of his equity, and enforce, through it, the application of those assets primarily to payment of the debts due them, whenever the property comes under its administration.'" *Huiskamp v. Moline Wagon Co.*, 121 U. S. 310, 323, 30 L. Ed. 971.

"If, before the interposition of the court is asked, the property has ceased to belong to the partnership, if by a bona fide transfer it has become the several property either of one partner or of a third person,

the equities of the partners are extinguished, and consequently the derivative equities of the creditors are at an end." *Huiskamp v. Moline Wagon Co.*, 121 U. S. 310, 324, 30 L. Ed. 971. See ante, "Lien of Partner," IV, G.

"If before the interposition of the court is asked the property has ceased to belong to the partnership, if by a bona fide transfer it has become the several property either of one partner or of a third person, the equities of the partners are extinguished, and consequently the derivative equities of the creditors are at an end. It is, therefore, always essential to any preferential right of the creditors that there shall be property owned by the partnership when the claim for preference is sought to be enforced. Thus, in *Ex parte Ruffin* (6 Ves. 119), where from a partnership of two persons one retired, assigning the partnership property to the other, and taking a bond for the value and a covenant of indemnity against debts, it was ruled by Lord Eldon that the joint creditors had no equity attaching upon partnership effects, even remaining in specie. And such has been the rule generally accepted ever since, with the single qualification that the assignment of the retiring partner is not mala fide. *Kimball v. Thompson*, 13 Metc. (Mass.) 283; *Allen v. The Centre Valley Company et al.*, 21 Conn. 130; *Ladd v. Griswold*, 9 Ill. 25; *Smith v. Edwards*, 7 Humph. (Tenn.) 106; *Robb and Others v. Mudge and Another*, 14 Gray (Mass.) 534; *Baker's Appeal*, 21 Pa. St. 76; *Sigler & Richey v. Knox County Bank*, 8 Ohio St. 511; *Wilcox v. Kellogg*, 11 Ohio 394." *Case v. Beauregard*, 99 U. S. 119, 125, 25 L. Ed. 370.

85. Subsequent misapplication. — If promissory notes are offered for discount at a bank, in the usual course of the business of a partnership, by the partner intrusted to conduct the business of the firm, and are discounted by the bank, and such discount was within the firm business, a subsequent misapplication of the money (the indorsees not being parties or privy thereto, or of the intention to misapply the money), will not deprive the holders of their right of action against the dormant partners in such a copartnership. *Winship v. United States Bank*, 5 Pet. 529, 8 L. Ed. 216.

"In considering this objection, then, it must be assumed that the bills were drawn by the firm, and that they were duly accepted and paid by the plaintiffs at maturity, on account of the firm; and if so, it is not perceived how their right to recover the amount can be affected by the fact that one of the drawers applied the money to an unlawful purpose. Where a



of a partner paying his own separate debt out of the partnership funds, it is manifest that it is a violation of his duty, and of the rights of his partners, unless they have assented to it. The act is an illegal conversion of the funds; and the separate creditor can have no better title to the funds, than the partner himself had.<sup>86</sup> If the members of a firm agree among themselves that the firm shall pay an individual partner's debt, it becomes an equitable claim against the firm assets.<sup>87</sup> It is a rule too well settled to be now called in question, that the interest of each partner in the partnership property, is his share in the surplus, after the partnership debts are paid; and that surplus, only, is liable for the separate debts of such partner.<sup>88</sup> The equity of a judgment debtor of one member of a joint stock company formed for the purpose of buying and selling land (which was held to be a partnership) where the title is in trustees who are bound to account to the stockholders the cestui que trusts according to their respective shares after all the debts of the association have been discharged, is the interest in the land after a sufficient portion of it has been disposed of for this purpose.<sup>89</sup> The separate creditor of a member of an association dealing in lands has the same rights, and no others, against his debtor's share in the lands of the association, that the separate creditors have against the partnership goods of an ordinary mercantile firm.<sup>90</sup>

contract grows immediately out of and is connected with the illegal or immoral act, of the party claiming the benefit of it, courts of justice will not lend their aid to enforce it." *Kimbrow v. Bullitt*, 22 How. 256, 269, 16 L. Ed. 313; *Armstrong v. Toler*, 11 Wheat. 258, 6 L. Ed. 468.

"Suppose one of a firm should borrow money of a third person, in the name of the partnership, and apply it to an unlawful purpose, it surely could not defeat the right of the lender to recover on the contract." *Kimbrow v. Bullitt*, 22 How. 256, 269, 16 L. Ed. 313.

**86. Violation of rights of partners.**—*Rogers v. Batchelor*, 12 Pet. 221, 230, 9 L. Ed. 1063.

**Pledge to secure individual indebtedness.**—Where cotton belonging to a firm was pledged by a factor, who was one of the members of the partnership without the authority of his copartners, to secure the payment of his individual indebtedness, and the one to whom the pledge was made only knew him in his capacity of factor and did not understand him to be acting in any other capacity, it was held that the transaction was invalid as against the partnership. *Allen v. St. Louis Bank*, 120 U. S. 20, 39, 30 L. Ed. 573.

**After dissolution.**—Where a firm is dissolved by the death of one of its members, and no bill is filed by his representatives, or by the firm creditors seeking the intervention of a court of equity to wind up the business of the firm, marshal its assets and apply them to the firm debts, the surviving partner may, by paying his individual indebtedness with those assets, make a disposition of them, which is not a fraud in law upon the firm creditors, nor, in the absence of an actual intent to defraud, a just ground for suing out an attachment under the statute of Mississippi. *Fitzpatrick v. Flannagan*, 106 U. S.

648, 27 L. Ed. 211; *McGinty v. Flannagan*, 106 U. S. 661, 27 L. Ed. 215.

**87. Agreement among partners.**—*Finley v. Lynn*, 6 Cranch 238, 3 L. Ed. 211.

In the case of *Huiskamp v. Moline Wagon Co.*, 121 U. S. 310, 30 L. Ed. 971, it was held that even though a partnership was not dissolved one of the partners had the right with the consent of his copartners to appropriate partnership property to the payment of his individual debts, where a creditor had acquired no specific lien thereon.

Where one partner applied partnership property to the payment of his individual indebtedness with the assent of his copartners, it was held that his right to do so was not affected by the fact that a creditor who had acquired no specific lien on the property had no notice of the transfer to the partner so applying the property. *Huiskamp v. Moline Wagon Co.*, 121 U. S. 310, 30 L. Ed. 971.

**88. Surplus only liable for separate debts.**—*United States v. Hack*, 8 Pet. 271, 8 L. Ed. 941. See, also, *McCoombe v. Dunch*, 2 Dall. 73, 1 L. Ed. 294.

Where three persons form a partnership and agree to bear the losses and share the profits of the partnership venture in proportion to their contributions to its capital, and two of the partners furnish all the money and do all the work, they are entitled to be repaid their advances out of its assets before payment of the individual creditors of the partner who paid nothing and did nothing to promote the partnership business. *Hobbs v. McLean*, 117 U. S. 567, 573, 29 L. Ed. 940.

**89. Clagett v. Kilbourne**, 1 Black 346, 17 L. Ed. 213.

**90. Association dealing in lands.**—*Clagett v. Kilbourne*, 1 Black 346, 17 L. Ed. 213.

3. **LIABILITY OF OLD FIRM FOR DEBTS OF NEW.**—A firm is not liable for the debts of a new firm where the new firm borrows money on its own responsibility.<sup>91</sup>

## VI. Dissolution.

**A. By Agreement.**—Partnerships may of course be dissolved by agreement.<sup>92</sup>

**B. By Expiration of Time.**—Partnerships may also be dissolved by expiration of time.<sup>93</sup>

**C. Dissolution by Sale.**—In an ordinary partnership no partner has the right to sell out his interest on notice from the firm without the consent of the copartners and if he does either, the act amounts to a dissolution of the partnership.<sup>94</sup> If persons are copartners in the ownership of land, such lands

**91. Liability of old firm.**—Certain members of a copartnership agreed to pay another member a fixed amount as his capital on his withdrawal from the concern, all parties believing at the time in the firm's solvent condition. The member withdrew and a new partnership was formed between the remaining members. The new firm on its own responsibility borrowed money from the plaintiff, who was acquainted with its members, and paid part of the capital as agreed upon to the retiring member and also some of the debts of the old firm. Soon afterwards the new firm failed, and the plaintiff sought to charge the old firm with the moneys thus loaned, which were used to pay its debts, and the retiring member for the amount due to him. It was held that this could not be done. *Penn Bank v. Furness*, 114 U. S. 376, 379, 29 L. Ed. 168.

**92. Mutual releases and assignments.**—Where an instrument prepared by one partner for signature by his copartner, with whom he has fallen out and quarrelled, contains mutual releases and assignments—each being the consideration of the other—it should, in order to be binding, be signed by both parties. The fact that the partner who did not prepare it has taken without objection from the other an unsigned counterpart after this other partner had signed the first counterpart, and left it in the hands of a third person to be delivered only when the unsigned counterpart was signed and delivered, does not give effect to the release. *Ambler v. Whipple*, 20 Wall. 546, 22 L. Ed. 403.

**Right of use of patent.**—Section 4899 of the Revised Statutes enacts that "every person who purchases of the inventor or discoverer or with his knowledge and consent constructs any newly invented or discovered machine or other patented article prior to the application by the inventor or discoverer for a patent or who sells or uses one so constructed shall have the right to use and vend to others to be used the specific thing so made or purchased without liability therefor." It was held in a case under this section where the machine was constructed by a partnership of which the inventor was a partner and was used with his knowledge and consent before the application for a patent,

that as the implied license conferred by the above section sets the specific machine free from the monopoly of the patent in the hands of any person, after the dissolution of the firm they were entitled to use the machine notwithstanding that it was agreed in the articles of dissolution that nothing therein contained should operate as an assent on the part of the inventor to the right to use the improvements upon the machine or that he has granted any rights whatever to such use other than the other parties then had and nothing in this restriction should be construed to license or impair any rights which the other partners may have to such use. *Wade v. Metcalf*, 129 U. S. 202, 32 L. Ed. 661. See the title **PATENTS**.

**93. Where there is no stipulation as to time.**—It is universally conceded that a contract of partnership, containing no stipulation as to the time during which it shall continue in force, does not endure for the life of the partners, or of either of them, nor for any longer time than their mutual consent, but may be dissolved by either partner at his own will at any time. *Karrick v. Hannaman*, 168 U. S. 328, 333, 42 L. Ed. 484.

**94. Partnership distinguished from joint-stock corporation.**—In an ordinary copartnership the individual members of the firm are presumed to, and in general actually do, contribute to the common enterprise, not only their several shares of partnership capital, but also their individual experience, skill or credit, no member having the right to sell out his interest or to retire from the firm without the consent of the copartners; and if he does either, the act amounts to a dissolution of the partnership. The very reverse is the case of a joint stock corporation, in which each stockholder, whether by purchase or original subscription, has the right, unless restrained by the charter or articles of association, to sell and transfer his shares, and, by transferring them, introduce others in their stead. *Morgan v. Struthers*, 131 U. S. 246, 253, 33 L. Ed. 132. See post, "Mining Partnerships," VIII.

**Assignment by one member.**—"If a member of an ordinary partnership assigns, where the partnership is at will, the assignment dissolves it, and if it is not at



being the only subject matter of the partnership, the partnership will be terminated by a sale of the land.<sup>95</sup>

**D. Misconduct of Partner.**—It seems that misconduct of a partner may be good grounds for dissolving a partnership.<sup>96</sup>

**E. Effect of War.**—War dissolves commercial partnerships existing between the subjects or citizens of the two contending parties prior to the war; for their continued existence would involve community of interest and mutual dealing between enemies.<sup>97</sup>

will, the assignment may be treated by the other members of the concern as a cause for dissolution. The assignee of one partner cannot be made a member of a partnership against the will of the other partners, but the absolute right to have the affairs of the firm at once wound up, when the specified duration of the partnership has not expired, may be subject to modification according to circumstances." *Riddle v. Whitehill*, 135 U. S. 621, 632, 34 L. Ed. 282. See, also, *Hall v. Lanning*, 91 U. S. 160, 169, 23 L. Ed. 271.

**Admission of new member.**—*A., B., & Co.*, a firm engaged in selling live stock on commission, authorized a bank to cash drafts drawn on the firm by *C.*, their agent, who forwarded live stock to them. Some controversy arising, *A., B., & Co.* wrote to the bank as follows: "Jan. 15, 1876. Hereafter we will pay drafts only on actual consignments. We cannot advance money a week in advance of shipment. The stock must be in transit so as to meet dr'ft same day or the day after presented to us. This letter will cancel all previous arrangement of letters of credit in reference to *C.*" The cashier of the bank replied as follows: "Jan. 17, 1876. Your favor of the 15th received. I note what you say. We have never knowingly advanced any money to *C.* on stock to come in. Have always supposed it was in transit. After this we shall require ship'g bill." There was no further communication on this subject between the parties. Two clerks of *A., B., & Co.*, who were aware of this correspondence, became partners without the knowledge of the bank, and the business was thereafter carried on in the same name. *C.* continued to draw on the firm as before, and the bank, without requiring bills of lading, to cash the drafts, all of which were accepted and paid by the firm. The bank acted in good faith. *C.* absconded with the proceeds of two drafts, and the firm brought this action against the bank to recover the amount. Held: 1. That the letters constitute no contract, and the bank is not responsible to the firm for cashing the drafts without bills of lading attached. 2. That if, however, a contract did arise from the cashier's unanswered letter of Jan. 17, 1876, it was with the then existing firm, and ceased on the subsequent change thereof by the admission of new members, without the knowledge or the consent of the bank. *National Bank v. Hall*, 101 U. S. 43, 25 L. Ed. 822.

**95. Sale of land.**—*Thompson v. Bowman*, 6 Wall. 316, 18 L. Ed. 736.

**96. Misconduct of partner.**—Though bad character, drunkenness, and dishonesty on the part of one partner may be good grounds for dissolving a partnership, on the application of the other—this other not having known at the time of forming the partnership, these characteristics of his copartner—yet when before the partnership was formed they were known by the partner not guilty of them to have existed, they do not authorize such partner himself to treat the partnership as ended, and to take to himself all the benefits of the joint labor and joint property. *Ambler v. Whipple*, 20 Wall. 546, 22 L. Ed. 403.

In a case in which both parties, in their pleadings, assumed the partnership to have been dissolved, the federal supreme court, speaking by Mr. Justice Miller, held that drunkenness and dishonesty on the part of one partner and his consequent exclusion from the business did not authorize his copartner, "of his own motion, to treat the partnership as ended and to take himself all the benefits of their joint labors and joint property," or exempt him from responsibility to account to the excluded partner. *Karrick v. Hannaman*, 168 U. S. 328, 336, 42 L. Ed. 484, citing *Ambler v. Whipple*, 20 Wall. 546, 555, 557, 22 L. Ed. 403. See, also, *Marble Co. v. Ripley*, 10 Wall. 339, 358, 19 L. Ed. 955.

And in a later case, the court, speaking by Mr. Justice Woods, said: "However the question may be decided, whether one partner may by his own mere will dissolve a partnership formed for a definite purpose or period, it is clear that upon such a dissolution one partner cannot appropriate to himself all the partnership assets, or turn over the share of his partner to another with whom he proposes to form a new partnership." *Karrick v. Hannaman*, 168 U. S. 328, 337, 42 L. Ed. 484, citing *Pearce v. Ham*, 113 U. S. 585, 593, 28 L. Ed. 1067.

**97. Effect of war.**—*Matthews v. McStea*, 91 U. S. 7, 9, 23 L. Ed. 188. See, generally, the title *WAR*.

"Partnership with a foreigner is dissolved by the same event which makes him an alien enemy, because there is in that case an utter incompatibility created by operation of law between the partners as to their respective rights, duties, and obligations, both public and private, which necessarily dissolves the relation, independent of the will or acts of the parties."



**F. Death of Partner**—1. *IN GENERAL*.—The general rule of law is that every partnership is dissolved by the death of one of the copartners where the articles of copartnership do not otherwise stipulate.<sup>98</sup> It may, however, be continued by contract,<sup>99</sup> or by will.<sup>1</sup>

2. *WINDING UP THE BUSINESS*—a. *In General*.—It is the right of the surviving partner to settle up the concerns of the firm,<sup>2</sup> and for this purpose he is entitled to the possession and control of the joint property,<sup>3</sup> and the sur-

Hanger v. Abbott, 6 Wall. 532, 535, 18 L. Ed. 939; The William Bagaley, 5 Wall. 377, 406, 18 L. Ed. 583.

The effect of war is to dissolve a partnership subsisting between citizens of nations at war; and if the person abounding the hostile country have had his property in partnership with citizens of the enemy country, it is his duty to dispose of, and withdraw his interest in the firm. If he do not, such interest is subject to the rule that personal property left in a hostile country by an owner who abandons such country in order to go to the other belligerent, and so to return to his proper allegiance and soil, becomes, unless an effort is made with promptitude to remove it from such country, impressed with its character, and as such liable to the consequences attaching to enemy's property. The William Bagaley, 5 Wall. 377, 18 L. Ed. 583.

During the late rebellion, a loyal citizen domiciled at the time it broke out in one of the rebellious states, and trading there as a member of a commercial firm, abandoned it and removed to a loyal state. He never in any way aided or abetted the rebellion, but there was no evidence that he ever attempted or desired to withdraw his property from the rebellious region. In a year, more or less, after the rebellion broke out, the rebel authorities professed by one of their decrees to confiscate his interest in the firm; and the partners resident in the rebellious states—he having no connection with or knowledge of their action—loaded a ship which he alleged belonged to his firm when he left it, and which, in attempting, under papers, flag, officers, and crew of the Confederate States to run the blockade established by the United States, two years before, of the Southern coast, was captured by a Federal cruiser. Held, that so much time having elapsed after the proclamation and before the confiscation and the capture, without effort on the part of the loyal owner to get it away from the rebellious region, his share in vessel and cargo was rightly condemned with the shares of the partners in rebellion; that the alleged confiscation was no excuse for his not having previously made an effort to withdraw or dispose of his interest in the firm and that neither his loyal domicile during the rebellion, nor, under the circumstances, the confiscation, nor his want of connection with or knowledge of the enterprise, nor all combined, defeated the right of the captors. The William Bagaley, 5 Wall. 377, 18 L. Ed. 588.

**Civil war.**—Civil war equally with foreign war renders commercial intercourse unlawful between the contending parties, and dissolves commercial partnership. Matthews v. McStea, 91 U. S. 7, 10, 23 L. Ed. 188.

**Date of dissolution.**—A partnership between a resident of New York and other parties, residents of Louisiana, was not dissolved by the late Civil War as early as April 23, 1861; and all the members of the firm are bound by its acceptance of a bill of exchange bearing date and accepted on that day, and payable one year thereafter. Matthews v. McStea, 91 U. S. 7, 23 L. Ed. 188.

**98. Death.**—Burwell v. Mandeville, 2 How. 560, 11 L. Ed. 378.

**99. Continuance by contract.**—There is no doubt, that the liability of a deceased copartner, as well as his interest in the profits of a concern, may, by contract, be extended beyond his death; but without such a stipulation, even in the case of a copartnership for a term of years, it is clear that death dissolves the concern. Scholefield v. Eichelberger, 7 Pet. 586, 8 L. Ed. 793.

**1. Continuance by will.**—A partner, too, may by his will provide that the partnership shall continue notwithstanding his death. Burwell v. Mandeville, 2 How. 560, 11 L. Ed. 378.

**2. Right of surviving partner.**—Wickliffe v. Eve, 17 How. 468, 15 L. Ed. 163; Emerson v. Senter, 118 U. S. 1, 8, 30 L. Ed. 49.

It is a legal right of the surviving partners to close out the concern, collect and dispose of its choses in action, and its property, pay what it owes, and then pay over to the persons entitled their just share of what is left. Moore v. Huntington, 17 Wall. 417, 423, 21 L. Ed. 642. See also, Wallace v. Fitzsimmons, 1 Dall. 248, 1 L. Ed. 122. Price v. Ralston, 2 Dall. 60, 66, 1 L. Ed. 289.

**3. Possession and control of property.**—“In case of dissolution by death, surviving partners are invested with the exclusive right of possession and management of the whole partnership property and business, for the purpose of paying the partnership debts and disposing of the effects of the concern for the benefit of themselves and the estate of the deceased.” Riddle v. Whitehill, 135 U. S. 621, 637, 34 L. Ed. 282; Emerson v. Senter, 118 U. S. 1, 30 L. Ed. 49.

“When the partnership is dissolved by the death of one partner, the surviving partner is entitled to the possession and

living partner may be compelled to wind up the business.<sup>4</sup>

b. *Collection of Assets*.—The surviving partner is entitled to collect the assets.<sup>5</sup>

c. *Disposition of Assets*.—It is the duty of the surviving partner to dispose of the partnership property, and settle the partnership debts.<sup>6</sup> An assignment for the benefit of creditors by a surviving partner with preferences to some has

control of the joint property for the purpose of closing up its business. *Wickliffe v. Eve*, 17 How. 468, 15 L. Ed. 163; *Shanks v. Klein*, 104 U. S. 18, 26 L. Ed. 635; *Emerson v. Senter*, 118 U. S. 1, 8, 30 L. Ed. 49. See, also, *Price v. Ralston*, 2 Dall. 60, 66, 1 L. Ed. 289.

**Application to individual debt.**—The surviving partner has a right to hold partnership property in his possession until the debts of the firm are paid, and if the firm is indebted to him, he has a right to hold it until he is paid. *Clay v. Freeman*, 118 U. S. 97, 106, 30 L. Ed. 104.

The proposition that the partnership property can be taken out of the surviving partners' hands, and distributed among the several partners and their representatives without a settlement and payment of the partnership debts, including any balance due the surviving partner himself, is a proposition that equity will not for a moment entertain. *Clay v. Freeman*, 118 U. S. 97, 106, 30 L. Ed. 104.

**Limitations.**—The surviving partner who is in possession of partnership property has a right to hold it until the debts of the firm are paid and if the firm is indebted to him, he has a right to hold it until he is paid. Being in possession of the assets, he is not affected by the statute of limitations. If the statute runs against anybody, it runs against the representatives of the deceased partner in relation to their right to call him to account. *Clay v. Freeman*, 118 U. S. 97, 30 L. Ed. 104.

**4. Suit to compel winding up of business.**—Where the surviving partner is not using due diligence in settling the partnership business or is acting in bad faith, the interference of a court of equity may be invoked. *Emerson v. Senter*, 118 U. S. 1, 8, 30 L. Ed. 49.

"It is true that, in many cases—where, for instance, the surviving partner is not exercising due diligence in settling the partnership business, or in acting in bad faith—the personal representative of the deceased partner may invoke the interference of a court of equity, and compel such a disposition of the partnership effects as will be just and proper; this, because, as between the partners, and therefore, as between the surviving partner and the personal representatives of the deceased partner, the joint assets constitute a fund to be appropriated primarily to the discharge of partnership liabilities; though not necessarily, and under all circumstances, upon terms of equality as to all the joint creditors." *Emerson v. Senter*,

118 U. S. 1, 8, 30 L. Ed. 49.

**Bill in equity.**—In case of dissolution of a partnership by the death of one of the partners, without any previous agreement as to the mode of liquidation, the joint creditor may, at his election, institute proceedings, by filing a bill in equity against the personal representatives of the deceased partner, and the survivors, to wind up the partnership business, to marshal the assets, and appropriate the partnership property to the payment of the joint debts. *Story on Partnership*, §§ 347, 362. *Fitzpatrick v. Flannagan*, 106 U. S. 648, 656, 27 L. Ed. 211.

**Lien of partnership debts.**—The surviving partner may, at any time be compelled by the representatives of the deceased partner to dispose of the partnership property and settle the partnership debt; and although his neglect or delay in winding up the concern may expose him to the animadversion of the court, and to the vigorous exercise of its power to compel him to do his duty, it will not relieve the partnership assets in his hands from the lien of the partnership debts. *Clay v. Freeman*, 118 U. S. 97, 106, 30 L. Ed. 104.

**5. Payment of partnership debt to executor.**—A payment to an executor or administrator, can be no satisfaction to a surviving partner, who has the sole right of suing for, and of receiving the moneys due to the company. *Wallace v. Fitzsimmons*, 1 Dall. 248, 250, 1 L. Ed. 122.

**6. Disposition of assets.**—*Clay v. Freeman*, 118 U. S. 97, 106, 30 L. Ed. 104. See, also, *Emerson v. Senter*, 118 U. S. 1, 8, 30 L. Ed. 49.

**Purchase by trustee at his own sale.**—In the case of *Hammond v. Hopkins*, 143 U. S. 224, 36 L. Ed. 134, two partners owned real estate in common, some of which was used in the partnership business. One died making the other by his will a trustee for the testator's children, with the power of sale of all the real estate, and directing that the business be continued. After carrying on the business for some time the trustee sold the real estate by auction, and bought portions of it in through a third person, and accounted for half of the net proceeds. The transaction was open and known to all the cestuis que trustent, and was objected to by none of them. It was held that there was nothing in this to indicate fraud; that the purchase was not absolutely void but voidable, and might be confirmed by the parties interested, either directly or by long acquiescence, or by the absence of an election to avoid the con-



been held valid.<sup>7</sup> As to application of funds by surviving partner to his individual indebtedness, see ante, "Application of Partnership Funds to Individual Debts and Claims," IV, E, 2.

3. CONTINUANCE OF BUSINESS—*a. In General.*—Although by the general rule of law every partnership is dissolved by death it is competent for the partners to provide by contract,<sup>8</sup> or by will for the continuance of the business.<sup>9</sup> In making such provision a testator may bind his whole estate or only that part of it already embarked in the partnership.<sup>10</sup> But it will require the most clear

veyance within a reasonable time after the facts came to their knowledge. *McIntire v. Pryor*, 173 U. S. 38, 57, 43 L. Ed. 606.

**Sale to surviving partner.**—The executors of a deceased member of a partnership sold and transferred, by written contract, all the interest of such deceased member in or to the assets of the late firm to the surviving member. Part of the consideration was in land, which by the terms of the contract, the surviving member was to repurchase within five years if the executors so elected. Within the stipulated time the executors did so elect and properly notified the surviving member. Held, that the executors were entitled to recover the stipulated price and were bound to reconvey the land. *Brown v. Slee*, 103 U. S. 828, 837, 26 L. Ed. 618.

7. **Preferences.**—"But, while the surviving partner is under a legal obligation to account to the personal representative of a deceased partner, the latter has no such lien upon joint assets as would prevent the former from disposing of them for the purpose of closing up the partnership affairs. He has a standing in court only through the equitable right which his intestate had, as between himself and the surviving partner, to have the joint property applied in good faith for the liquidation of the joint liabilities. As with the concurrence of all of the partners the joint property could have been sold or assigned, for the benefit of preferred creditors of the firm, the surviving partner—there being no statute forbidding it—could make the same disposition of it. The right to do so grows out of his duty, from his relations to the property, to administer the affairs of the firm so as to close up its business without unreasonable delay; and his authority to make such a preference—the local law not forbidding it—cannot, upon principle, be less than that which an individual debtor has in the case of his own creditors. It necessarily results that the giving of preference to certain partnership creditors was not an unauthorized exertion of power by Moores, the surviving partner." *Emerson v. Senter*, 118 U. S. 1, 9, 30 L. Ed. 49.

8. **By contract.**—*Burwell v. Mandeville*, 2 How. 560, 11 L. Ed. 378.

9. **By will.**—*Burwell v. Mandeville*, 2 How. 560, 11 L. Ed. 378.

10. **Agreement or will.**—It is competent for the partners to provide by agreement for the continuance of the partnership after the death of one of them but then

it takes place in virtue of such agreement only, as the act of the parties, and not by mere operation of law. A partner, too, may by his will provide that the partnership shall continue notwithstanding his death; and if it is consented to by the surviving partner, it becomes obligatory, just as it would if the testator, being a sole trader, had provided for the continuance of his trade by his executor, after his death. *Burwell v. Mandeville*, 2 How. 560, 576, 11 L. Ed. 378; *Smith v. Ayer*, 101 U. S. 320, 329, 25 L. Ed. 955.

**Liability of estate of testator.**—Although by the general rule of law, every partnership is dissolved by the death of one of the partners, where the articles of copartnership do not stipulate otherwise, yet either one may, by his will, provide for the continuance of the partnership after his death; and in making this provision, he may bind his whole estate or only that portion of it already embarked in the partnership. *Burwell v. Mandeville*, 2 How. 560, 11 L. Ed. 378.

"A testator, too, directing the continuance of a partnership, may, if he so choose, bind his general assets for all the debts of the partnership contracted after his death. But he may also limit his responsibility, either to the funds already embarked in the trade, or to any specific amount to be invested therein for that purpose; and then the creditors can resort to that fund or amount only, and not to the general assets of the testator's estate, although the partner or executor, or other person carrying on the trade may be personally responsible for all the debts contracted." *Burwell v. Mandeville*, 2 How. 560, 576, 11 L. Ed. 378; *Smith v. Ayer*, 101 U. S. 320, 330, 25 L. Ed. 955; *Jones v. Walker*, 103 U. S. 444, 26 L. Ed. 404.

A testator who was a member of a partnership concern provided in his will that his capital and interest in said concern should be continued therein, and should be chargeable for its debts and liabilities, but that his other property should not be so chargeable. It was held that such other property was not bound for the debts of the partnership incurred subsequently to his death. *Jones v. Walker*, 103 U. S. 444, 446, 26 L. Ed. 404.

"In the recent case of *Smith v. Ayer*, 101 U. S. 320, 25 L. Ed. 955, the legal principle lying at the foundation of the first of these grounds of relief was fully discussed and determined. It was there held



and unambiguous language, demonstrating in the most positive manner that the testator intended to make his general assets liable for all debts contracted in the continued trade after his death, to justify the court in arriving at such a conclusion.<sup>11</sup> A codicil to a will which stated that "it is my will that my interest in the copartnership subsisting between Daniel Cawood and myself, under the firm of Daniel Cawood and Company, shall be continued therein until the expiration of the term limited by the articles between us; the business to be conducted by the said Daniel Cawood, and the profit or loss to be distributed in the manner the said articles provide," does not justify the conclusion that the testator intended to make his general assets liable for all debts contracted in the continued trade after his death.<sup>12</sup>

b. *Liability of Person Continuing the Business.*—A person who continues the business is of course liable for the profits,<sup>13</sup> and in some instances may be

that a testator might authorize the continuance of a partnership, in which he was engaged at the time of his death, without subjecting any more of his property to the vicissitudes of the business than what was then embarked in it, and that, unless he had expressly placed the whole, or some other part of his estate, under the operation of the partnership, it would not be presumed that he had so intended. See, also, *Burwell v. Mandeville*, 2 How. 560, 11 L. Ed. 378; *Ex parte Garland*, 10 Ves. Jr. 109. In the case before us the testator declares, in express terms, that his capital and interest in said concern shall be continued therein, and shall be chargeable for its debts and liabilities; but his other property shall not be so chargeable. We see no reason in the present case for departing from the principal adopted in *Smith v. Ayres* after much consideration. If dividends of profits out of the partnership business were honestly and fairly made, and when paid did not diminish the capital, nor withdraw what was necessary to pay the indebtedness of the concern, we see no reason why the persons receiving them should now be called on to refund them." *Jones v. Walker*, 103 U. S. 444, 445, 26 L. Ed. 404.

The will of a testator provided that his capital and interest in a partnership concern of which he was a member should be continued therein; and that the profits of the firm arising from his share should be paid to certain specified persons. The dividends of profits were honestly declared and paid without diminishing the capital and before any of the debts of the firm were in existence. The concern afterwards became insolvent. Held, that the persons receiving such profits could not be called on to refund them. *Jones v. Walker*, 103 U. S. 444, 446, 26 L. Ed. 404.

11. *Language to make general assets liable.*—*Burwell v. Mandeville*, 2 How. 560, 11 L. Ed. 378.

12. *Burwell v. Mandeville*, 2 How. 560, 11 L. Ed. 378.

*Duty of third persons.*—Where partners provide by agreement or will for the continuance of the business after death of one of them the agreement or authority must be clearly made out; and third persons,

having notice of the death, are bound to inquire how far the agreement or authority to continue it extends, and what funds it binds, and if they trust the surviving party beyond the reach of such agreement, or authority, or fund, it is their own fault, and they have no right to complain that the law does not afford them any satisfactory redress. *Burwell v. Mandeville*, 2 How. 560, 576, 11 L. Ed. 378; *Smith v. Ayer*, 101 U. S. 320, 25 L. Ed. 955.

Parties who deal with an executor, exercising his power of disposition of the personal assets of the estate in his hands, to raise money, not for the estate or the settlement of its affairs, but for the business of a commercial firm, are bound to look into his authority, and are held to a knowledge of all the limitations which the will, as well as the law, puts thereon. Such assets are held by him in trust to pay the debts of the testator and then to discharge legacies. Where, therefore, they are acquired from him by third parties, with knowledge of his trust and of his disregard of its obligations, they can be followed and recovered. *Smith v. Ayer*, 101 U. S. 320, 25 L. Ed. 955. See the title EXECUTORS AND ADMINISTRATORS, vol. 6, p. 119.

13. *Liability for profits.*—If the surviving partner of a firm which has been dissolved by the death of one of its members in good faith, with the acquiescence of the personal representatives of the deceased partner, uses the firm property, to continue the business on his own account and in his own name, he does it without other liability than to be held accountable to the estate of his deceased partner for a share of the profits; or upon a bill filed for that purpose, by the personal representatives of the deceased partner or a partnership creditor, to wind up the firm business and apply its assets to the payment of its debts. Any intermediate disposition of the property, made in good faith, even although it may have been specifically a part of the partnership assets, and even if it has been applied to the payment of his individual obligations, will be valid and effectual; and, without circumstances showing an actual intention to

liable though no profits or even a loss is made.<sup>14</sup>

4. **LIABILITY OF SURVIVING PARTNER.**—Surviving partners are bound to use reasonable diligence and care in closing out the business, and in taking care of the decedent's interest. If they use such care and diligence they are only liable for what was realized in their hands when it was done. If they do not they are liable for what might have been realized by the use of such care and diligence.<sup>15</sup> A surviving partner is not liable in an action at law for the separate debt of a deceased partner, though he have partnership funds in his hands.<sup>16</sup>

defraud, cannot be treated as a fraud in law upon partnership creditors. *Fitzpatrick v. Flannagan*, 106 U. S. 648, 657, 27 L. Ed. 211.

**Rental value of slaves.**—Where a surviving partner conducted a plantation belonging to his deceased partner and by the Civil War the slaves thereon became free, it was held that he was not chargeable by reason of his not selling the slaves for their value but only for their rental value prior to emancipation. The surviving partner was also held for the rental value of the plantation. *Clay v. Field*, 138 U. S. 464, 34 L. Ed. 1044.

**Attachment.**—A defendant, as surviving partner of a firm dissolved by the death of one of its members, with the assent of the personal representatives of his deceased copartner, had been left in possession of the firm property, for the purpose of continuing the business. In good faith he borrowed money upon the individual credit given him, by reason of his possession and control of property and applied it to the purpose of paying the debts due from the firm and repaid such a loan, without any actual fraudulent intent. It was held that this was not a fraud in law upon the creditors of the partnership, justifying a seizure, on attachment under the laws of Mississippi of all his property. *Fitzpatrick v. Flannagan*, 106 U. S. 648, 654, 27 L. Ed. 211.

14. **Liability for interest.**—If surviving partners go on with the business under the credit, and risking the effects of the firm, and profits result, they will be bound to account for those profits as belonging to the firm, and they are liable to be charged with interest on the funds they use, though no profits, or even a loss, is made. *Riddle v. Whitehill*, 135 U. S. 621, 637, 34 L. Ed. 282.

**Liability to beneficiaries of deceased partner.**—Where executors depart from the ordinary mode prescribed by law by consenting to the continuance of a business and thus expose the property to the hazards of trade, they run the risk of making themselves answerable for any loss that may occur to the beneficiaries of the deceased partner. *Hoyt v. Sprague*, 103 U. S. 613, 629, 26 L. Ed. 585.

**Mingling goods.**—The following instruction was held erroneous: It was the duty of the "surviving partner of the firm to sell and convert into money the goods and property belonging to said firm, and to

collect the debts due the firm, and first apply the same to the payment of the debts due by the firm, and not to mingle the same with his own goods, so that they could not be identified, he being by law created a trustee for this purpose; but if he mingled them with other goods, so that they could not be identified, he thereby rendered his own goods liable for the debts of the firm, or (as?) those originally owned by the firm; and if he applied the proceeds of the sale of such goods, either originally owned by the firm or those afterwards purchased and mixed up with them, so that they could not be identified, to the payment of his private debts, such disposition operated as a fraud upon the rights of the creditors of the firm of which he was surviving partner, and as to him rendered the sale void." *McGinty v. Flannagan*, 106 U. S. 661, 27 L. Ed. 215.

15. **Reasonable diligence.**—*Moore v. Huntington*, 17 Wall. 417, 423, 21 L. Ed. 642.

On a bill by the representatives of a deceased partner against surviving partners for an account, these last should not be charged with the sum which the partnership assets at the exact date of the deceased partner's death were worth, but only with such sum as by the use of reasonable care and diligence they could get for them in closing the partnership business. *Moore v. Huntington*, 17 Wall. 417, 21 L. Ed. 642.

**Value of real estate.**—Surviving partners should not be charged with the value of real estate of the partnership, the title to which is left by the decree charging them in the heirs of the deceased partner. *Moore v. Huntington*, 17 Wall. 417, 21 L. Ed. 642.

Surviving partners are not required to become purchasers of decedent's interest at a valuation. *Moore v. Huntington*, 17 Wall. 417, 423, 21 L. Ed. 642.

**Purchase by surviving partner.**—In the case of *Hammond v. Hopkins*, 143 U. S. 224, 36 L. Ed. 134, where a surviving partner was appointed trustee and purchased partnership realty through a third person but the transaction was open and known to the cestui que trust, it was held that there was no evidence of fraud. See, also, *McIntire v. Pryor*, 173 U. S. 38, 57, 43 L. Ed. 606.

16. **Separate debts of deceased partner.**—*Vienne v. McCarty*, 1 Dall. 154, 1 L. Ed. 79.



5. **RIGHTS OF HEIRS AND PERSONAL REPRESENTATIVES OF DECEASED PARTNERS.**—It is the duty of the surviving partner to pay over to the representatives of the deceased partners what may be due to them after a final settlement of the joint debts.<sup>17</sup> As it is the right of the surviving partner to settle up the concerns of the firm, the administrator of a deceased partner has no right to interpose and claim a debt due to the partnership.<sup>18</sup> In Louisiana the title to the interest of a deceased partner descends to his heirs.<sup>19</sup>

**G. Bankruptcy and Insolvency.**—As to dissolution of partnership by bankruptcy and insolvency, see, also, the titles *BANKRUPTCY*, vol. 2, p. 952; *INSOLVENCY*, vol. 7, p. 5.<sup>20</sup> The rule that the purchaser from the trustee or assignee

**17. Amount due after final settlement.**—*Emerson v. Senter*, 118 U. S. 1, 8, 30 L. Ed. 49.

**Bill for account and discovery.**—A bill in equity may be maintained by the personal representatives of a deceased partner against the survivors to compel an account, so far as an account is possible, and for a discovery of the partnership property which came to their hands. *Denver v. Roane*, 99 U. S. 355, 357, 25 L. Ed. 476.

**Allowing interest of decedent to be used in business.**—"Where the representative of a deceased partner allows the interest of his decedent to be used in the business by the surviving partner, and thereby loses his lien upon the partnership property, he does not thereby become a creditor of the new firm, and cannot come into concourse with the creditors thereof; but the property of the firm is first subject to the claims of such creditors, and after they are satisfied the representative's right to have an account against the surviving partner remains as before." *Hoyt v. Sprague*, 103 U. S. 613, 628, 26 L. Ed. 585.

**Lien.**—"At the death of William Sprague, Sen., in 1856, there is no doubt that each party in interest was entitled to call for a liquidation and settlement of the partnership affairs and a division of the surplus property, and had a lien on the entire property and effects for that purpose. In the real estate and corporal chattels they were tenants in common with the surviving partners, and over the entire property including the credits and other assets they had the lien referred to, which they had a right to enforce at once if the surviving partners refused to make a settlement. These partners had the right of possession, and, in the choses in action, the right of property, to enable them to settle up the concern. But these rights of survivorship were subordinate to the lien of those beneficially interested, who thereby had a right to enforce the due appropriation of the partnership effects." *Hoyt v. Sprague*, 103 U. S. 613, 624, 26 L. Ed. 585.

"But whatever may have been the responsibility which Mary Sprague, as administratrix and guardian, assumed, it cannot be doubted that she had the power to keep the property in the business, for it was subject to her disposal. And as it was kept in the business by her consent

and allowance, she ceased to have a lien upon the property as against subsequent creditors of the concern. And, as she in her representative capacity ceased to have such a lien, it is difficult to see how the minors themselves, when they arrived at full age, could have any such lien, whatever remedy they may have had against Mary Sprague. If the ultimate beneficiaries of a deceased partner's estate could thus revive a lien which has become extinguished as against creditors, there would be little safety in dealing with commercial partnerships, in which any partner has ever died." *Hoyt v. Sprague*, 103 U. S. 613, 628, 26 L. Ed. 585.

**18. Right to claim debt.**—*Wickliffe v. Eve*, 17 How. 468, 15 L. Ed. 163.

**19. Partnerships in Louisiana.**—Under the law of Louisiana upon the death of a member of a partnership the title to his interest in the partnership effects descends to his heir and does not rest in the survivor. Where, however, the surviving partners surrendered all the partnership assets for the benefit of creditors, which was accepted by the court which appointed a syndic to administer the property, it was held that this proceeding could not be collaterally attacked by attaching creditors. *Tua v. Carriere*, 117 U. S. 201, 29 L. Ed. 855.

**Liability on note.**—In a case arising in Louisiana, where a note was given by a partnership and one of the partners died, and his widow accepted succession without benefit of inventory, it was held that she was not liable in solido. *Henderson v. Wadsworth*, 115 U. S. 264, 29 L. Ed. 377. See the title *BILLS, NOTES AND CHECKS*, vol. 3, p. 339.

Payments by the surviving partners were held inadmissible in this case to show an interruption of prescription. *Henderson v. Wadsworth*, 115 U. S. 264, 29 L. Ed. 377.

**20. Assignment of firm's effects by one partner.**—An assignment in bankruptcy by one partner, in the name of the co-partnership, of the partnership effects and credits, has been held valid. *Harrison v. Sterry*, 5 Cranch 289, 3 L. Ed. 104. See the title *BANKRUPTCY*, vol. 2, p. 952.

As to whether petition by one partner is involuntary as to copartners, see the title *BANKRUPTCY*, vol. 2, p. 843.



in bankruptcy does not acquire by purchase any greater rights than those possessed by such trustee or assignee,<sup>21</sup> applies to a purchase by a member of a bankrupt partnership.<sup>22</sup>

**H. Assignment for the Benefit of Creditors.**—A partnership may make an assignment for the benefit of creditors.<sup>23</sup>

**I. Effect of Dissolution.**—A dissolution of partnership puts an end to the authority of one partner to bind the other; it operates as a revocation of all power to create new contracts, and the right of partners as such can extend no further than to settle the partnership concerns already existing, and distribute the remaining funds; and this right may be restrained by the delegation of this authority to one partner.<sup>24</sup>

**Agreement Ratified by Copartner.**—Where it was alleged that an agreement was executed by one partner after the dissolution without the consent and knowledge of his copartner but it was found by the jury that this agreement had been ratified, it was held valid.<sup>25</sup>

**J. Necessity for and Effect of Notice of Dissolution.**—The rule appears to be that if one of the partners contracts with a third person, in the name of the firm, after the dissolution, but that fact is not made public, or known by such third person, the law considers the contract as being made with the firm, and on their credit.<sup>26</sup> Persons dealing with the firm after dissolution, if they

**21. Purchaser from trustee.**—See the title *BANKRUPTCY*, vol. 2, p. 915.

**22. Purchase by member of bankrupt partnership.**—Where the assignee of a bankrupt firm sold a debt due the firm to one of its members and authorized him to prosecute a suit which had been begun, it was held that such member as purchaser of the debt had no greater right than the assignee to contest the validity of an assignment of the debt made by the firm previous to the commencement of the bankruptcy proceedings. *Crawford v. Hasley*, 124 U. S. 642, 31 L. Ed. 275.

**23. Assignment for benefit of creditors.**—*Emerson v. Senter*, 118 U. S. 1, 3, 30 L. Ed. 49. See the title *ASSIGNMENTS FOR THE BENEFIT OF CREDITORS*, vol. 2, p. 603.

**Preferences.**—As to prohibition of preference by limited partnerships, see the title *ASSIGNMENTS FOR BENEFIT OF CREDITORS*, vol. 2, p. 616.

**Continuance of business.**—Where a person who is the representative of a deceased partner and also the guardian of the beneficiaries of such partner's estate allows the interest of his decedent to be used in the business by the surviving partners, and thereby loses his lien upon the partnership property, neither he nor the beneficiaries of the decedent's estate can come into concurrence with the creditors thereof, when the surviving partners assign all the partnership property in trust for the benefit of creditors, but the property of the firm thereafter acquired is first subected to the claims of such creditors. *Hoyt v. Sprague*, 103 U. S. 613, 628, 26 L. Ed. 585.

Upon dissolution by an assignment, the solvent partners are in equity entitled to hold the effects and property in the way that surviving partners do, and if they continue the business it is at their own

peril, in the absence of special provision. *Riddle v. Whitehill*, 135 U. S. 621, 637, 34 L. Ed. 282.

**Omissions for schedule.**—Where it was contended that an assignment for the benefit of creditors made by a surviving partner was void because of the fraudulent omissions from the schedule of certain property which constitutes a part of the partnership assets and was appropriated by the surviving partner to his own use, it was held that this fraud upon the part of such surviving partner did not effect the rights of the assignee and of the beneficiary of the trust who are ignorant of the fraud of the grantor. *Emerson v. Senter*, 118 U. S. 1, 30 L. Ed. 49. See the title *ASSIGNMENTS FOR BENEFIT OF CREDITORS*, vol. 2, p. 610.

**24. Effect of dissolution.**—*Bell v. Morrison*, 1 Pet. 351, 7 L. Ed. 174.

**25. Kelly v. Crawford**, 5 Wall. 785, 790, 18 L. Ed. 562.

**Creation of cause of action.**—After a dissolution of a partnership, no partner can create a cause of action against the other partners, except by a new authority communicated to him for that purpose. *Bell v. Morrison*, 1 Pet. 351, 7 L. Ed. 174. See, also, *Hall v. Lanning*, 91 U. S. 160, 23 L. Ed. 271.

**Bill of exchange.**—Where a bill of exchange was drawn by A., after the dissolution of his partnership with B., and the proceeds of the bill went to pay, and did pay, the partnership debts of A. & B., which A., on the dissolution of the firm, had assumed to pay; the holder of the bill, after its dishonor, can have no claim on B., in consequence of the particular appropriation of the proceeds of the bill. *LeRoy v. Johnson*, 2 Pet. 186, 187, 7 L. Ed. 391.

**26. Contracts after dissolution.**—*LeRoy v. Johnson*, 2 Pet. 186, 7 L. Ed. 391.

in fact have received information thereof, cannot recover against a retired partner. And if they have no actual notice the question is still one of diligence on the part of the withdrawing partner. If he does all that the law requires, he is exempt, even though the notice does not reach such persons.<sup>27</sup> It is not necessary that there be either actual notice or publication in a newspaper.<sup>28</sup> A retiring partner, after due notice of dissolution, cannot charge his firm for the payment of a negotiable promissory note, even in the hands of an innocent holder, by giving it a date within the period of the existence of the partnership, upon the principle that after the power of the agent of a private person has been revoked, he cannot bind his principal by simply dating back what he does.<sup>29</sup>

**K. Rights upon Dissolution**—1. **IN GENERAL**.—Where the partnership expires in accordance with its terms, or is dissolved by agreement, each partner as a general rule has an equal right to the possession of the partnership property, and if they cannot agree as to the disposition and division of it, a court of equity will appoint a receiver to collect and apply the effects. Each partner has a right to have the partnership assets applied in liquidation of the partnership debts, and to have the surplus assets divided, and each may insist on a sale, and that nothing shall be done except with a view to wind up the concern.<sup>30</sup> After

**27. Recovery against retired partner.**—*Lovejoy v. Spafford*, 93 U. S. 430, 441, 23 L. Ed. 851.

**Where public notice is given.**—If, a public notice is given by one partner of the dissolution of a partnership; and creditors, unreasonably neglecting it, place funds in the hands of the other partner, they must take the consequence of their own imprudence. *Crawford v. Willing*, 4 Dall. 286, 290, 1 L. Ed. 836.

**28. Necessity for actual notice or publication.**—It is not an absolute, inflexible rule, that there must be a publication in a newspaper to protect a retiring partner. Any means of fairly publishing the fact of such dissolution as widely as possible, in order to put the public on its guard—as, by advertisement, public notice in the manner usual in the community, the withdrawal of the exterior indications of the partnership—are proper to be considered on the question of notice. *Lovejoy v. Spafford*, 93 U. S. 430, 23 L. Ed. 851.

**Disavowal of continuance—Admissibility of evidence.**—A., having had no previous dealings with a firm, but having heard of its existence, and who composed it, sold goods to one of the partners, and received in payment therefor a draft by him drawn upon the firm, and accepted in its name. At the time of the transaction the firm was, in fact, dissolved; but A. had no notice thereof. Held, that, in order to protect a retired partner against such acceptance of the draft at the suit of A., evidence, tending to show a public and notorious disavowal of the continuance of the partnership, is admissible. *Lovejoy v. Spafford*, 93 U. S. 430, 23 L. Ed. 851.

"When \* \* \* the defendant proved that actual notice had been given to all those who had dealt with the firm; that all subsequent business was carried on in the name of the remaining partner only, thus making a marked change in the presenta-

tion of the firm; when the claimants received and obtained the draft at a distance of several hundred miles from the place where the firm did business, and there was no evidence that the firm had ever before transacted any business in that place,—we think the evidence offered should not have been excluded. When the defendant offered to prove that it was generally known along the Mississippi River that the dissolution had taken place, and offered evidence showing to whom, to what extent, and in what manner, notice had been given; that all the lumber dealers in Davenport were notified and knew of the dissolution; that at Eau Claire, on the occasion of the transaction in question, and before the drafts were made, notice was there given to all, or nearly all, of the lumber dealers in that place that the firm had been dissolved,—we think the evidence was competent to go before the jury." *Lovejoy v. Spafford*, 93 U. S. 430, 441, 23 L. Ed. 851.

"He refused to admit evidence which would have sustained the fifth request to charge, that, if the notice was so generally communicated to the business men of Eau Claire as to be likely to come to the claimant's knowledge, the jury are at liberty to find such knowledge. In this we think he erred." *Lovejoy v. Spafford*, 93 U. S. 430, 442, 23 L. Ed. 851.

**29. Antedating promissory note.**—*Coler v. Cleburne*, 131 U. S. 162, 173, 174, 33 L. Ed. 146; *Anthony v. County of Jasper*, 101 U. S. 693, 698, 25 L. Ed. 1005.

**30. Rights upon dissolution.**—*Riddle v. Whitehill*, 135 U. S. 621, 637, 34 L. Ed. 282; *Emerson v. Senter*, 118 U. S. 1, 30 L. Ed. 49.

**Right to assets.**—"And however the question may be decided, whether one partner may by his own mere will dissolve a partnership formed for a definite purpose or period, it is clear that upon such



dissolution, one partner cannot bind his copartners by new contracts or securities, or impose upon them a fresh liability.<sup>31</sup> Partners may agree that the joint property shall belong to one of them.<sup>32</sup>

2. **CONVERSION OF REALTY INTO PERSONALTY.**—Real property owned by a partnership and purchased with partnership funds is, for the purpose of settling the debts of the partnership and distributing its effects, treated in equity as personal property.<sup>33</sup>

## VII. Limited Partnerships.

In a case arising under the laws of Texas relating to limited partnerships, it was held that the only effect of failure to publish the terms of the partnership as required by the statute of that state was that the partnership should be deemed general.<sup>34</sup> Failure to comply with the provisions of the New York statute in reference to the formation of limited partnerships will likewise render a special partner liable as a general partner to creditors but will not change his special partnership into a general one. All his relations to his copartners and their obligations growing out of their relation to him as a special partner, remain unimpaired.<sup>35</sup> Where the attaching creditors with other creditors described persons in the release executed by them at about the time of the formation of the limited partnership, as constituting a limited partnership in which a certain person was the general and another person the special partner and thus recognized and dealt with such persons as a limited partnership, they are estopped from insisting that there was no such partnership.<sup>36</sup> An assignment by the general partner in a limited partnership consisting of a general and special partner is not void because it does not include the individual property of the special partner.<sup>37</sup>

**Preferences by Limited Partnerships.**—As to prohibition of preferences

a dissolution one partner cannot appropriate to himself all the partnership assets, or turn over the share of his partner to another with whom he proposes to form a new partnership." *Pearce v. Ham*, 113 U. S. 585, 593, 28 L. Ed. 1067.

31. **New contracts and liabilities.**—*Hall v. Lanning*, 91 U. S. 160, 170, 23 L. Ed. 271. See, also, *Bell v. Morrison*, 1 Pet. 351, 7 L. Ed. 174.

**Entry of appearance.**—After the dissolution of a partnership, one partner has no implied authority to cause the appearance of another partner to be entered to a suit brought against the firm. *Hall v. Lanning*, 91 U. S. 160, 23 L. Ed. 271.

32. **Agreement between partners.**—"It is competent," says Mr. Justice Story, *Partnership*, § 358, 'for the partners, in cases of voluntary dissolution, to agree that the joint property of the partnership shall belong to one of them; and if this agreement be bona fide and for a valuable consideration, it will transfer the whole property to such partner, wholly free from the claims of the joint creditors. The like result will arise from any stipulation to the same effect, in the original articles of copartnership, in cases of a dissolution by death or by any other personal incapacity.'" *Fitzpatrick v. Flannagan*, 106 U. S. 648, 656, 27 L. Ed. 211.

33. **Conversion into personalty.**—*Allen v. Withrow*, 110 U. S. 119, 130, 28 L. Ed. 90; *Seymour v. Freer*, 8 Wall. 202, 19 L. Ed. 306. See, also, *Clagett v. Kilbourne*, 1 Black 346, 17 L. Ed. 213.

Real estate bought and held by a partnership for partnership purposes may be appropriated to the satisfaction of the partnership debts, and for that purpose, and to that extent, it is to be treated as personal property of the partnership, and like other personal property pass under the control of the surviving partner. This control extends to the right to sell it, or so much of it as may be necessary to pay the partnership debts, or to satisfy the just claims of the surviving partner. And the purchasers of such real estate acquire an equitable title which courts of chancery will enforce by requiring the holder of the legal title to convey such title to them. *Shanks v. Klein*, 104 U. S. 18, 22, 26 L. Ed. 635.

"Real estate purchased with partnership funds for partnership uses, though the title be taken in the name of one partner, is in equity treated as personal property, so far as is necessary to pay the debts of the partnership and to adjust the equities of the partners; but the principle of equitable conversion has no further application." *Riddle v. Whitehill*, 135 U. S. 621, 635, 34 L. Ed. 282.

34. **Laws of Texas.**—*Tracy v. Tuffly*, 134 U. S. 206, 33 L. Ed. 879.

35. *Abendroth v. Van Dolsen*, 131 U. S. 66, 73, 33 L. Ed. 57.

36. **Estoppel.**—*Tracy v. Tuffly*, 134 U. S. 206, 227, 33 L. Ed. 879.

37. **Assignment by general partner.**—*Tracy v. Tuffly*, 134 U. S. 206, 33 L. Ed. 879.



by limited partnerships, see the title *ASSIGNMENTS FOR THE BENEFIT OF CREDITORS*, vol. 2, p. 617. An adjudication of the bankruptcy of a firm, and of the members in whose name the firm was doing business, in a bankrupt proceeding affecting them alone, to which a special partner was not a party, does not estop a copartnership creditor from setting up the liability of such special partner imposed upon him by the statute for noncompliance with its provisions.<sup>38</sup> Where the members of a firm purchased the interest of one of the members, it was held that their assignee in bankruptcy could not recover from the seller.<sup>39</sup> An agreement between owners of vessels to form a line for carrying passengers and freight between New York and San Francisco, is but a contract for a limited partnership, and the remedy for a breach of it is in the common-law courts.<sup>40</sup>

### VIII. Mining Partnerships.

Mining partnerships are governed by many of the rules relating to ordinary partnerships, but also by some rules peculiar to themselves, one of which is that one person may convey his interest in the mine and business without dissolving the partnership.<sup>41</sup> In a suit to compel an account for the proceeds of a mining claim, a finding by the court that there was no such cotenancy between the parties in the mine in controversy as to entitle the plaintiff to an accounting is a mere legal inference, and not a sufficient finding of fact upon which to base a decree.<sup>42</sup> A partnership for the purchase and sale of minerals and mining land and not for the development and working mines, is not a mining partnership in the proper sense of that term. Hence it is subject to the rules gov-

**38. Liability of special partner.**—*Abendroth v. Van Dolsen*, 131 U. S. 66, 71, 33 L. Ed. 57. See, also, the title *BANKRUPTCY*, vol. 2, p. 867.

**39. Purchase of interest by copartners.**—“There can be no pretense that Condict owed the bankrupts anything. They bought his interest in the limited partnership of which he was once a member and paid him for it. If the creditors of that partnership have any just claims against him on account of what has been done, they must proceed as they may be advised to enforce their rights, but the assignee of the bankrupts is in no respect their representative for that purpose. He can reduce to his possession whatever is owing to the bankrupts and also what they have disposed of in fraud of the bankrupt law; but Condict was not their debtor when the bankruptcy occurred, and there is no allegation that what they did in respect to his interest in the limited partnership was forbidden by the bankrupt law.” *Wight v. Condict*, 154 U. S. 666, 26 L. Ed. 562.

**40. Vandewater v. Mills**, 19 How. 82, 15 L. Ed. 554. See, generally, the title *ADMIRALTY*, vol. 1, p. 119.

**41. Rules governing mining partnership.**—*Kahn v. Smelting Co.*, 102 U. S. 641, 645, 26 L. Ed. 266.

“Associations for working mines are generally composed of a greater number of persons than ordinary trading partnerships; and it was early seen that the continuous working of a mine, which is essential to its successful development, would be impossible, or at least attended with great difficulties, if an association was to be dissolved by the death or bankruptcy

of one of its members, or the assignment of his interest. A different rule from that which governs the relations of members of a trading partnership to each other was, therefore, recognized as applicable to the relations to each other of members of a mining association. The delectus personæ, which is essential to constitute an ordinary partnership, has no place in these mining associations.” *Kahn v. Smelting Co.*, 102 U. S. 641, 645, 26 L. Ed. 266.

“Mining partnerships as distinct associations, with different rights and liabilities attaching to their members from those attaching to members of ordinary trading partnerships, exist in all mining communities; indeed, without them successful mining would be attended with difficulties and embarrassments, much greater than at present.” *Kahn v. Smelting Co.*, 102 U. S. 641, 645, 26 L. Ed. 266.

“There are other consequences resulting from this peculiarity of a mining partnership, particularly as to the power of individual members to bind the association, upon which there is no occasion now to express any opinion.” *Kahn v. Smelting Co.*, 102 U. S. 641, 646, 26 L. Ed. 266.

**Sale by one partner.**—There is no relation of trust or confidence between mining partners which is violated by the sale and assignment by one partner to a stranger, or to one of the associates, of his share in the property and business of the association. And it makes no difference whether the other associates are consulted or not. *Bissell v. Foss*, 114 U. S. 252, 261, 29 L. Ed. 126.

**42. Legal inference.**—*Kahn v. Smelting Co.*, 102 U. S. 641, 26 L. Ed. 266.

erning ordinary trading or commercial partnerships. It can no more be called a mining partnership than a partnership for the purchase of the products of a farm and the land upon which those products are raised can be called a partnership to farm the lands.<sup>43</sup>

### IX. Pleading and Practice.

**A. Parties.**—In suits by or in reference to partnerships or partnership property, all proper and necessary parties should be joined.<sup>44</sup> A private party suing to abate a public nuisance, if he has partners in the particular business affected

**43. Partnership for purchase and sale of minerals distinguished from mining partnership.**—*Kimberly v. Arms*, 129 U. S. 512, 530, 32 L. Ed. 764.

"The case of *Bissell v. Foss*, 114 U. S. 252, 29 L. Ed. 126, does not seem to us to have any bearing on the subject under consideration. There the question was whether a member of a mining partnership, that is, a partnership formed for the development and working of a mine, could acquire the share of an associate without the knowledge of the other associates and hold them on his own account; and the court held that it was lawful for him to do so. Mining partnerships or associations, whilst governed by many rules relating to ordinary partnerships, have some rules peculiar to themselves. One of such rules is that a member may convey his interest or shares to another person without dissolving the partnership, and thus bring into it a new member without the consent of his associates; and may purchase interests in the same or in other mines for his own benefit without being required to account to the partnership for the property. *Kahn v. Smelting Co.*, 102 U. S. 641, 26 L. Ed. 266." *Kimberly v. Arms*, 129 U. S. 512, 529, 32 L. Ed. 764.

**Purchase by one partner.**—Where one partner in a mining partnership bought a share in the common property and business, it did not enure to the benefit of all, subject to the payment by each of his associates of his share of the purchase money, in the absence of an agreement to that effect, and they were not entitled to a share in the purchase. *Bissell v. Foss*, 114 U. S. 252, 29 L. Ed. 126.

**44. One partner alone.**—"One partner cannot recover his share of a debt due to the partnership in an action at law, prosecuted in his own name alone against the debtor." *Vinal v. West Virginia, etc., Land Co.*, 110 U. S. 215, 28 L. Ed. 124.

**Partner interested in contract.**—If the contract was made and the work done by the libellant, his right to recover, in his own name, cannot be defeated by showing that he had a partner interested in the contract. *The Ship Potomac*, 2 Black 581, 17 L. Ed. 263; *Law v. Cross*, 1 Black 533, 17 L. Ed. 185.

**Heirs at law.**—Where the wife of a decedent, who was also the administratrix of the estate, did not join one of the heirs at law in a suit, it was held that this was not necessary, as the suit could be main-

tained in her representative character without joining the heirs at law. *Moore v. Huntington*, 17 Wall. 417, 422, 21 L. Ed. 642.

Where a person sues in chancery as administrator of a deceased partner, to have an account of partnership concerns, alleging in his bill that he is the sole heir of the deceased partner, the fact that he is not so does not make the bill abate for want of necessary parties; since a decree in his favor as administrator would not interfere with the rights of others who might claim a distribution after the complainant received the money decreed to him. *Moore v. Huntington*, 17 Wall. 417, 21 L. Ed. 642.

In the case of *Seymour v. Freer*, 8 Wall. 202, 19 L. Ed. 306, it was held that the principle of equitable conversion being applied to the case, and the land which was to be converted into money, being regarded and treated in equity as money, the personal representative of Price was the proper person to maintain the suit, and it was not necessary that his heirs at law should be parties. *Seymour v. Freer*, 8 Wall. 202, 19 L. Ed. 306.

**Widow and children of deceased partner.**—Where a bill was filed in the supreme court of the District of Columbia by a surviving partner against the administratrix of a deceased partner, alleging that there had never been a settlement of the affairs of the partnership and that upon such settlement there would be a balance due to the plaintiff, and further alleging that there was real estate which had been purchased in the name of the firm and which was standing in the name of the deceased partner, there is no impropriety in making the widow and children of the deceased partner parties defendant to such bill. *White v. Joyce*, 158 U. S. 128, 142, 39 L. Ed. 921.

**Title of cause.**—The bare title of a cause at the head of one or two orders of court—these being the only parts of a record in a concurrent proceeding sent here—in which orders the defendant is stated to be G. M. "et al." is not sufficient to show that a partner of G. M., to wit, one J. B.—not anywhere named in any portion of the record sent, was a defendant and party to the proceeding. *Williams v. Bankhead*, 19 Wall. 563, 22 L. Ed. 184.

**Suit involving title to lots.**—Where the surviving partner of an insolvent firm as-



by the nuisance, need not join them as plaintiffs any more than he need join other persons who have suffered similar injuries.<sup>45</sup> Objections for the want of parties should be made at the proper time.<sup>46</sup>

**B. Jurisdiction.**—1. **EQUITY.**—The creditor of a partnership may, at his option, proceed at law against the surviving partner or go, in the first instance, into equity against the representatives of the deceased partner. It is not necessary for him to exhaust his remedy at law against the surviving partner before proceeding in equity against the estate of the deceased.<sup>47</sup> Undoubtedly equity has jurisdiction, where a person has been induced, by fraudulent representations, to enter into a partnership, to rescind the contract at his instance, and put an end to it ab initio.<sup>48</sup> Where by the articles of copartnership the debt of one member of the firm to another firm was assumed by the firm adopting such articles as payable out of the partnership fund, it was held that this did not constitute a demand against the partnership at law but that a suit in equity might be sustained on this claim.<sup>49</sup> It is equity alone which can restrain a joint creditor from receiving his full dividend out of the separate effects of one of the partners until the joint effects are exhausted.<sup>50</sup> The purchaser of one partner's

signed certain lots of ground belonging to the firm for the benefit of its creditors, the heirs of the deceased partner cannot be made parties to a suit involving the title to the lots, on the ground of any relation of trust or confidence subsisting between them and the assignee. *Rothwell v. Dewees*, 2 Black 613, 17 L. Ed. 309.

**Action upon a covenant.**—In an action upon a covenant—contained in an agreement between the covenantor and "S. and such other parties as he may associate with him under the name of S. & Company," signed and sealed by the covenantor, and signed "S. & Co." by the hand of S., acting in behalf and by authority of the partnership—to pay to "the said S. & Company, parties of the second part," for work to be done by them, all those who are partners at the time of the signing of the agreement may join. *Seymour v. Western R. Co.*, 106 U. S. 320, 27 L. Ed. 103.

**45. Abatement of nuisance.**—*Mississippi, etc., R. Co. v. Ward*, 2 Black 485, 17 L. Ed. 311. See, generally, the title NUISANCES, vol. 8, p. 933.

**46. Peremptory exceptions.**—A peremptory exception filed by defendant after the case was at issue, and on the day that it was set for trial before a jury, praying that the suit should be dismissed, because a partner with plaintiff in the transaction which is the foundation of this suit, was not made a plaintiff in the case, comes too late to be granted. It was properly overruled. *Burbank v. Bigelow*, 154 U. S., appx., 558, 19 L. Ed. 51, following *Breedlove v. Nicolet*, 7 Pet. 413, 8 L. Ed. 731.

**When objection for misjoinder must be made.**—Where an action was brought against a partnership carried on in the name of B. S. Bibb & Company and the complainant alleged that B. S. Bibb & Company and Thomas H. Hopkins were copartners of the firm but that the proof showed that Hopkins was not a partner but only a clerk and that the business done in the name of B. S. Bibb & Company was

that of B. S. Bibb alone, no objection was made to the misjoinder, it was held that a judgment was properly rendered against the defendant Bibb alone after the verdict had been given finding that Hopkins was not a partner. In the opinion it is said: "At common law the objection for misjoinder should be made by answer or plea in a way so as to give the plaintiff a better writ; but at common law where two or more parties are sued as partners, and there is no denial of the partnership, and no plea alleging a misjoinder, it is doubtful whether after verdict such an objection could be taken. But however that may be, under the modern codes, including that of Alabama, no such objection can be made after verdict. In this case the plaintiff in error did business under the name of B. S. Bibb & Company, and he should not be heard, when sued as a partner of that firm, to say that he alone composed the firm, and was, therefore, not liable because joined with another defendant who was not a member." *Bibb v. Allen*, 149 U. S. 481, 504, 37 L. Ed. 819.

**47. Option of creditor.**—*Nelson v. Hill*, 5 How. 127, 12 L. Ed. 81. See, also, *Case v. Beauregard*, 101 U. S. 688, 25 L. Ed. 1004.

"In general the surviving partner is liable at law only; and no decree can be made against him, although he may be a proper party to the suit in equity, as being interested to contest the plaintiff's demand, unless some other equity intervenes, and so it was held in *Wilkinson v. Henderson*, 1 Myl. & K. 582, 589." *Burwell v. Mandeville*, 2 How. 560, 575, 11 L. Ed. 378.

**48. Rescission of contract of partnership.**—*Oteri v. Scalzo*, 145 U. S. 578, 588, 36 L. Ed. 824. See the title RESCISSION, CANCELLATION AND REFORMATION.

**49. Debt of one member.**—*Finley v. Lynn*, 6 Cranch 238, 249, 3 L. Ed. 211.

**50. Restraining joint creditor.**—*Tucker v. Oxley*, 5 Cranch 34, 3 L. Ed. 29.



share or interest in the lands of an association cannot maintain ejectment for it; his remedy is in equity, where he may call for an account, and thus entitle himself to all that the judgment debtor could have claimed after payment of the partnership liabilities.<sup>51</sup>

2. **ADMIRALTY.**—Where certain parties joined together to carry on an adventure in trade for their mutual benefit—one contributing a vessel, and the other his skill, labor, experience, etc.—and there was to be a communion of profits on a fixed ratio, it was a contract over which a court of admiralty had no jurisdiction.<sup>52</sup>

**C. Declarations and Bills.**—Statutes which dispense with the necessity of proof of partnership, where it is alleged in the declaration, are common.<sup>53</sup> Declarations must of course contain all necessary averments.<sup>54</sup> In Mississippi it is lawful to declare against any one or more of the partners, as their liabilities are joint and several by statute.<sup>55</sup> Bills in equity must not be multifarious.<sup>56</sup>

**D. Plea.**—A plea which sets up as a cause of action against the plaintiffs that they induced the defendant to dissolve partnership between him and another person and to enter plaintiff's employ with intent to wrongfully destroy the business of the defendant, is defective where there is no allegation as to how long the partnership was to continue, as no action would lie for terminating or inducing the termination of the partnership at will. Whether treated as a set-off or recoupment or simply as an independent cause of action, such a plea

**51. Purchase of partner's share of real estate.**—*Clagett v. Kilbourne*, 1 Black 346, 17 L. Ed. 213.

**52. Admiralty.**—*Ward v. Thompson*, 22 How. 330, 16 L. Ed. 249. See the title **ADMIRALTY**, vol. 1, p. 119.

**53. Statute of Illinois.**—The statute of Illinois, which in trials of actions by or against partners on contracts, dispenses, in the first instance, with the necessity of proof of the partnership, applies to a case where the declaration beginning thus: "A., B., and C., trading as A. & Co., complain of D., E., and F., trading as D. & Co.," then goes on referring, throughout, to the parties respectively, as "the said plaintiffs" and "the said defendants." The designation of the parties, as partners, in the opening of the declaration, is not a simple designatio personarum, and superfluous; but amounts to an averment that they contracted as partners. *Cooper & Co. v. Coates & Co.*, 21 Wall. 105, 22 L. Ed. 481.

**54. Citizenship.**—An averment in the declaration, that the plaintiffs were a firm of natural persons, associated for the purpose of carrying on the banking business in Omaha, Nebraska Territory (a place which, at the time of the suit brought, was remote from the great centres of trade and commerce), and had been for a period of eighteen months engaged in that business, at that place, is equivalent to saying that they had their domicile there, and is a sufficient averment of citizenship. *Express Co. v. Kountze Bros.*, 8 Wall. 342, 19 L. Ed. 457.

**Declaration against one partner only.**—The declaration in an action against one partner only, never gives notice of a claim being on a partnership transaction; the

proceeding is always as if the party sued was the sole contracting party; and if the declaration were to show a partnership contract, the judgment against the single partner could not be sustained. *Barry v. Foyles*, 1 Pet. 311, 7 L. Ed. 157.

**Indorsement of note.**—It is, in general, not necessary, in deriving title to a bill or note, through the indorsement of a partnership firm, or from the surviving partner, through the act of the law, to state particularly the names of the persons composing the firm. *Childress v. Emory*, 8 Wheat. 642, 5 L. Ed. 705.

**55. Mississippi statute.**—By a statute of Mississippi, all promises, contracts and liabilities of copartners, are to be deemed and adjudged joint and several; and in all suits on contracts in writing, made by two or more persons, it is lawful to declare against any one or more of them. This is such a severance of the contract as puts it in the power of the plaintiff to hold any portion of them jointly, and the others severally, bound by the contract; and there is no obligation on the part of the plaintiff to put the defendants in such condition, by his pleadings, as to compel each to contribute his portion for the benefit of the others. *Minor v. Mechanics' Bank*, 1 Pet. 46, 7 L. Ed. 47, cited. *Amis v. Smith*, 16 Pet. 303, 10 L. Ed. 973.

**56. Multifariousness.**—Where there were two mercantile firms and some of the members common to both, a creditor's bill was not multifarious when filed against the personal representative of two of the deceased partners of the two firms and also against the surviving partner of one of the firms. *Nelson v. Hill*, 5 How. 127, 12 L. Ed. 81.

does not set up evidence sufficient to constitute a valid set-off or recoupment of a cause of action.<sup>57</sup> If a declaration be upon a joint note, and the defendant plead that the note is the separate note of one of the defendants, and was given to and accepted by the plaintiff, in full satisfaction of the debt, this plea is bad, upon special demurrer, because it amounts to the general issue.<sup>58</sup>

**E. Demurrer.**—The objection of multifariousness to a bill for dissolution of a partnership, and for partition of the partnership land, should be taken by demurrer.<sup>59</sup> Conclusions of law as to the execution of a bond by a partnership are not admitted by demurrer.<sup>60</sup>

**F. Defenses.**—Equitable defenses cannot, under the jurisprudence of the federal courts, be set up in a court of law.<sup>61</sup> By operation of law, a partnership debt is not extinguished or compensated by the indebtedness of the creditor to one of the partners; although such partner may, by way of defense or by exception, as it is termed in the practice of Louisiana, offset or oppose the compensation of his demand to that of the creditor.<sup>62</sup> A debt due by a partnership to a partnership creditor cannot be set off against a debt due by such creditor to one of the partners.<sup>63</sup> It is not necessary that there be a settlement of partnership accounts in order that there may be a recovery upon a promise by one partner that the firm would accept a draft.<sup>64</sup>

**57. Defective plea.**—*McGuire v. Gerstley*, 204 U. S. 489, 51 L. Ed. 581.

**58. Plea amounting to general issue.**—*Van Ness v. Forrest*, 8 Cranch 30, 3 L. Ed. 478.

**59. Multifariousness.**—Where a bill prayed for a dissolution of the partnership between the parties and the sale of certain lands by them held as tenants in common, which, it was alleged, were not susceptible of division without prejudice to them, there was no demurrer to the bill and it was held that if there was anything in the allegations which concern the partnership, which introduces another matter, the objection should have been taken by demurrer for multifariousness. *Briges v. Sperry*, 95 U. S. 401, 24 L. Ed. 390.

**60. Conclusions of law.**—"Neither of the other partners signed the bond but the complainants allege that the firm directed the claimant to give the bond for and in the name and style of their said partnership as obligors; to which it may be answered that if the firm gave such directions the claimant did not follow them, as the bonds set forth in the record as an exhibit to the bill of complaint shows that it is the individual bond of the alleged senior partner. Nor do the complaints pretend that the other partners ever signed the instrument, but they contend that the demurrer admits every thing which they have alleged. Matters of fact well pleaded are admitted by a demurrer, but it is equally well settled that mere conclusions of law are not admitted by such a proceeding." *United States v. Ames*, 99 U. S. 35, 45, 25 L. Ed. 295.

**61. Equitable defense.**—A plea avers as follows: That the note sued on "was and is wholly without consideration and is null and void and that said note is based upon and grew out of transactions relating to the business of the partnership;

that such partners are interested in the same and are necessarily parties to a suit relating to said note and that the amount due on the said note, if any, cannot be ascertained until a final settlement of the said partnership can be had." This plea has no legal defense of want of consideration, for the plea admits by implication that there may be something on the note but the equitable defense that the amount due on the note, if anything, is dependent on the amount coming from the assets of the partnership which cannot be ascertained without a settlement of the partnership affairs in a suit which all the partners are necessary parties. Such equitable defense cannot, under the jurisprudence of the courts of the United States, be set up in a court of law. *Burnes v. Scott*, 117 U. S. 582, 586, 587, 29 L. Ed. 991.

The rule, if any, to which the facts set up in the above plea entitles the defendant, is an injunction to stay the suit at law upon the note until a settlement of the partnership and an ascertainment of the amount, if anything, coming out of the assets of the partnership. *Burnes v. Scott*, 117 U. S. 582, 584, 587, 29 L. Ed. 991.

**62. Practice in Louisiana.**—*Beauregard v. Case*, 91 U. S. 134, 23 L. Ed. 263.

**63. Set-off—Debt due to one of the partners.**—*Cramond v. United States Bank*, 4 Dall. 291, 1 L. Ed. 838.

**64. Necessity for settlement of accounts.**—An action was brought upon a promise made by one partner that his firm would accept a certain draft drawn on them and which was dishonored by the drawees. It was objected that the partnership accounts remained unsettled and therefore the plaintiff ought not to recover. In the opinion it is said: "Surely, this alone is not sufficient to deprive the plaintiff of his right of action. It is perfectly consistent with this state of facts, that the plaintiff should be a creditor of the firm



**G. Evidence**—1. **PRESUMPTION AND BURDEN OF PROOF.**—A promise to give the defendant a part of the profits does not necessarily raise a presumption of partnership.<sup>65</sup> A partner is not presumed to have knowledge of a letter not written in the name of the firm.<sup>66</sup> Ordinarily, the presumption is that all parties have access to the partnership books.<sup>67</sup> Where the fact sought to be proved by the production of books and papers, is the existence of a deed from one of the partners of a firm to the firm itself, secondary proof that an entry existed on the books of a transfer of real estate to the firm; that an account was open, in them, with the property; that the money of the firm was applied to the consideration of the purchase; that the person who erected new buildings on the property were paid by the notes and checks of the firm, which buildings were afterwards rented in the name, and partly furnished through the funds of the partnership, and that the taxes were paid in the same way, this is not sufficient for the presumption of a deed by a jury, as a matter of direction from the court.<sup>68</sup> Where a promissory note, payable to a firm, was signed by one of the partners in the firm together with two other persons, and suit was brought upon it against these two other persons in the name of the payee partner, upon the ground that the note was intended for his individual benefit, and that the insertion of the name of the firm as payees was an error, it was clearly his duty to prove such error upon the trial.<sup>69</sup> The necessity for proof may be dispensed

to an extent far beyond the amount of \$4,000. There is evidence in the record from which the jury might fairly presume that such was the case. But the circumstance that the accounts of the partnership were unsettled is put, as, of itself, sufficient to defeat the plaintiff's recovery; which it cannot be admitted to be, if, in any possible case consistently with that fact, he might have sustained any loss by taking the bill upon the faith of the defendant's promise." *Townslay v. Sumrall*, 2 Pet. 170, 184, 7 L. Ed. 386.

**65. Presumption of partnership.**—The admission of the defendant and the deposition of K. to the effect that the defendant had procured for K. a loan of money to be used in a purchase of cotton, and that K. had voluntarily promised to give the defendant a part of the profits, if any were made, for his assistance in procuring the loan, when no sum or proportion of profits was named, does not raise such a presumption of partnership. *Pleasants v. Fant*, 22 Wall. 116, 22 L. Ed. 780.

**66. Presumption of assent.**—If one partner write a letter in his own name, to his creditor, referring to the concerns of the partnership, and his own private debts to those to whom the letter is addressed, the letter not being written in the name of the firm; it cannot be presumed that the other partner had a knowledge of the contents of the letter, and sanctioned them; unless some proof to this effect was given, the other partner ought not to be bound by the contents of the letter. *Rogers v. Batchelor*, 12 Pet. 221, 9 L. Ed. 1063. See, generally, the title **PRESUMPTIONS AND BURDEN OF PROOF**.

**67. Access to partnership books.**—*Winship v. United States Bank*, 5 Pet. 529, 8 L. Ed. 216.

"That, ordinarily, the presumption was

that all the parties had access to the partnership books, and might know the contents thereof. But this was a mere presumption from the ordinary course of business, and might be rebutted by any circumstances whatsoever, which either positively or presumptively repelled any inference of access; such, for instance, as the distance of place in the course of business of the particular partnership, or any other circumstances raising a presumption of nonaccess. And he left the jury to draw their own conclusion as to the knowledge of the Binneys, of the entries in the partnership books, from the whole evidence in the case." *Winship v. United States Bank*, 5 Pet. 529, 556, 8 L. Ed. 216.

**68. Presumption of deed.**—*Hanson v. Eustace*, 2 How. 653, 11 L. Ed. 416.

Nor are the jury at liberty, in such a case, to consider a refusal to furnish books and papers, as one of the reasons upon which to presume a deed; and an instruction from the court which permits them to do so, is erroneous. *Hanson v. Eustace*, 2 How. 653, 11 L. Ed. 416.

**69. Proof of error.**—*McMicken v. Webb*, 6 How. 292, 12 L. Ed. 443.

**Fulfillment of duties.**—The payee partner in the above case having brought into the evidence the terms upon which the partnership was dissolved, by which it appeared to be his duty to collect the assets, pay the debts, and settle the concerns of the partnership, it was competent for the jury to judge whether the note was given provisionally and designed to abide the settlement of the affairs of the firm, and if so, then it became necessary for the payee partner to prove the fulfillment of these duties before any right of action upon the note accrued to him. *McMicken v. Webb*, 6 How. 292, 12 L. Ed. 443.



with by consent,<sup>70</sup> or by statute.<sup>71</sup>

2. **DECLARATIONS AND ADMISSIONS**—a. *In General*.—Where the question before the jury was, whether or not one of the defendants was a partner in a commercial firm, it was proper for the court to exclude the declarations made by the defendant in the absence of the plaintiffs.<sup>72</sup> It was also proper not to confine the attention of the jury to declarations made at one particular time in the presence of one of the plaintiffs, but to allow all similar declarations to be given in evidence, so that the jury could judge of the entire question of the existence of the partnership.<sup>73</sup>

b. *Partners*.—As to declarations and admissions when made by partners, see the title **DECLARATIONS AND ADMISSIONS**, vol. 5, p. 226.<sup>74</sup> Parties cannot give private conversation or correspondence with each other to rebut evidence of partnership with a third person.<sup>75</sup> The existence of a partnership may be admitted by the pleadings.<sup>76</sup>

c. *Third Persons*.—The assignee claimed that a partnership formerly existing between the bankrupt and other parties had been dissolved prior to a certain transaction; and that, consequently, that transaction was had with the

70. **Consent to dissolution**.—Where a bill was filed for dissolution and a receiver, mainly on the ground that defendants had violated the terms of the partnership and were improperly managing the business committed to their charge, the consent of the defendants to a dissolution made it unnecessary for the plaintiffs to prove the special grounds set out in their bill and the fact that there was no formal decree was immaterial. *Burns v. Rosenstein*, 135 U. S. 449, 34 L. Ed. 193.

71. **Necessity for proof of partnership**.—By the rules of common law it is certainly necessary that parties who sue as coplaintiffs, alleging themselves to be partners, shall make proof of that allegation. The same is true of persons who are alleged to be copartners, and sued as such as defendants. By the statutes of Illinois the rule of law is changed in this respect unless a plea in abatement is interposed, or verified pleas are filed denying the execution of a writing set up. *Cooper & Co. v. Coates & Co.*, 21 Wall. 105, 110, 22 L. Ed. 481.

"A statute of Illinois provides that in actions on contracts, express or implied, against two or more defendants as partners, joint obligors, or payors, proof of their joint liability or partnership shall not be required to entitle the plaintiff to judgment, unless such proof shall be rendered necessary by a plea in abatement, or a plea in bar, denying the partnership or joint liability, verified by affidavit. The joint contract and liability of the defendants, therefore, stood admitted by the pleadings, and this is a sufficient answer to several objections taken to the admissibility of statements and the proof of acts of the defendant, Jacob Forsyth." *Forsyth v. Doolittle*, 120 U. S. 73, 30 L. Ed. 586.

72. **Declarations in absence of plaintiffs**.—*Teller v. Patten*, 20 How. 125, 15 L. Ed. 831.

73. **In presence of one of the plaintiffs**.—*Teller v. Patten*, 20 How. 125, 15 L. Ed. 831.

74. **Statement of co-owners**.—"The only question open for our consideration arises upon the exception to the exclusion by the commissioner of the testimony given in another suit by one of the part owners of the schooner as to the extent and value of its repairs. The exclusion, we think, was correct. The statements of the part owner, expressing his judgment as to the matters upon which he was examined, could, at most, bind only himself. They were not evidence against his co-owners, who were merely tenants in common with him, not partners. *Story on Partnership*, § 453." *The New Orleans*, 106 U. S. 13, 16, 27 L. Ed. 96.

75. **Private conversations or correspondence**.—*Freeborn v. Smith*, 2 Wall. 160, 17 L. Ed. 922.

76. **Admission in answer**.—In an action brought to recover the purchase price of a sawmill, the declaration alleged that it had been sold to defendants, who were at the time partners in the business of sawing and manufacturing lumber and timber, and of procuring, owning, and operating a sawmill for that purpose. Though all the defendants were sued, only one appeared or was served. His answer was as follows: "And defendant admits that he and the other defendants \* \* \* were interested together in the business of sawing and manufacturing lumber at the time mentioned in the complaint, and contemplated and intended to procure by lease or purchase, or erect, a sawmill in the neighborhood of Homerville, aforesaid." The judge charged the jury that the existence of the partnership was conceded. It was held, that this answer was a concession or admission of the alleged partnership; and when it was further proved without contradiction that the mill, at the time of sale, was in the possession and use of the defendants, the instruction of the court was justified. *Porter v. Graves*, 104 U. S. 171, 172, 26 L. Ed. 691.

**Time of interest in partnership**.—The language of the complainant in his bill,

bankrupt individually, and not with the firm. The defendants, insisting to the contrary, offered the declarations of such other parties touching the points in controversy. Held, that such declarations were not evidence.<sup>77</sup>

3. **ADMISSIBILITY.**—A partnership may be proved by parol as well as by written evidence.<sup>78</sup> The right of a partner to sign the firm name to a contract of indemnity in favor of third persons must be strictly proved; but it need not necessarily be proved by a written authority to him.<sup>79</sup> A latent ambiguity in a receipt for settlement of partnership accounts may be explained by parol.<sup>80</sup> On an issue between a partnership and third parties as to the day when the partnership was formed, the mere articles of partnership are not evidence in favor of the partnership. It must be shown by extrinsic evidence, that they were made on the day when they purport to have been made.<sup>81</sup> Evidence that by the articles of partnership one partner had no right to indorse negotiable paper, is inadmissible to defeat a bona fide holder of such paper indorsed with the firm name by a member of the firm, and taken by such bona fide holder for value, and without notice of the articles.<sup>82</sup> Where, to a suit against a partnership for debt, the defense is that a former partner has unwarrantably signed the firm name after dissolution of the partnership, the paper signed may be read in evidence by itself, it being so read, however, "subject to the proof to be given hereafter."<sup>83</sup> Where the suit was brought upon a partnership transaction, against one of the partners and the declaration stated a contract with the partner who was sued, and gave no notice that it was made by him with another person, evidence of a joint assumpsit may be given, to support such a declaration; the want of notice has never been considered as justifying an exception to such evidence at the trial.<sup>84</sup> Parol testimony has been admitted to refute the contention that the notes of a corporation were accepted for a partnership liability by a misunderstanding.<sup>85</sup>

4. **SUFFICIENCY OF EVIDENCE.**—The evidence of partnership must be sufficient to submit to a jury.<sup>86</sup>

"that he became interested in a ship and cargo at and from Gibraltar," is decisive of the question of time when his interest commenced, and shows that he had no interest until she arrived at Gibraltar. *Mathewson v. Clarke*, 6 How. 122, 12 L. Ed. 370.

77. **Third persons.**—*Nudd v. Burrows*, 91 U. S. 426, 23 L. Ed. 286.

78. **Proof of partnership.**—*Moran v. Prather*, 23 Wall. 492, 23 L. Ed. 121.

79. **Right to sign name to contract of indemnity.**—*Moran v. Prather*, 23 Wall. 492, 23 L. Ed. 121.

80. **Latent ambiguity.**—The words "received on settlement to this date" are ambiguous and may refer to a settlement for the year or a settlement for the whole period of partnership. This ambiguity, being latent, may be removed by the evidence in the case. *Clay v. Field*, 138 U. S. 464, 480, 34 L. Ed. 1044.

81. **Date of formation of partnership.**—*Philpot v. Gruninger*, 14 Wall. 570, 20 L. Ed. 743.

82. **Articles of partnership as evidence to defeat holder of negotiable paper.**—*Michigan Bank v. Eldred*, 9 Wall. 544, 19 L. Ed. 763.

83. **Signature of firm name after dissolution.**—*Kelly v. Crawford*, 5 Wall. 785, 18 L. Ed. 562.

84. **Want of notice.**—*Barry v. Foyles*, 1 Pet. 311, 7 L. Ed. 157.

#### 85. Notes given for partnership liability.

—A purchase was made by a partnership from the plaintiff, the contract providing that a cash payment of a portion of the purchase money was to be made and the partnership was to give its notes for the rest. While the goods were being delivered a corporation was organized from the partnership and the notes for the remainder of the purchase money were made by the corporation and accepted by the plaintiff. The plaintiff then brought an action to hold the members of the partnership on the notes individually, and the court held that parol testimony that the plaintiff knew that the members of the partnership proposed to organize a corporation with limited liability, that the purchase was to be made in the interest of such corporation, and that its obligations were to be given for the deferred payments, was admissible, as it made against the contention of the plaintiff that its acceptance of the notes of the limited liability company was through a misunderstanding and mistake. *Case Mfg. Co. v. Soxman*, 138 U. S. 431, 436, 437, 34 L. Ed. 1019.

86. **Promise to give defendant a part of the profits.**—The admission of the defendant and the depositions of K to the effect that the defendant had procured for K a loan of money to be used in the purchase of cotton, and that K had voluntarily promised to give the defendant a



5. **VARIANCE.**—Where there is a variance evidence is inadmissible.<sup>87</sup>

**H. Witnesses.**—Where the testimony of two partners was admitted in regard to transactions with and statements by deceased partners in a suit against his assignee in bankruptcy, it was held that these witnesses were not incompetent under § 858 of the Revised Statutes, which provides that in an action by or against executors, administrators or guardians neither party shall be allowed to testify against the other as to any transactions with or statements by the testator, intestate or ward.<sup>88</sup> It seems that the rule as to disqualification as to interest applied to partners.<sup>89</sup>

**I. Instructions.**—An instruction in an action to hold a person as a partner, which ignored the effect of a legal instrument which constituted such per-

part of the profits, if any were made, for his assistance in procuring the loan, when no sum or proportion of profits was made, is not sufficient evidence to require the court to submit the question of partnership to a jury and in the absence of other evidence an instruction to find for the defendant was right. *Pleasants v. Fant*, 22 Wall. 116, 22 L. Ed. 780.

**Evidence for jury.**—*Smyth v. Strader*, 4 How. 404, 11 L. Ed. 1031.

**87. Variance.**—The interest of a copartnership cannot be given in evidence, on an averment of individual interest, nor an averment of the interest of a company be supported, by a special contract relating to the interest of an individual. *Graves v. Boston Marine Ins. Co.*, 2 Cranch 419, 2 L. Ed. 324.

The declaration contained two counts: The first, setting out the cause of action, stated "for that whereas, the said defendants and copartners, trading under the firm of Josiah Turner & Co., in the lifetime of said William, on the 1st day of March, 1821, were indebted to the plaintiffs; and being so indebted, etc." the second count was an insimul computasent, and began, "and also whereas, the said defendants, afterwards, to wit, on the day and year aforesaid, accounted with the said plaintiffs of and concerning divers other sums of money due and owing from the said defendants," etc. The defendants, to maintain the issue on their part, gave in evidence to the jury, that William Turner, the person mentioned in the declaration, died on the 6th of January, 1819, that he was formerly a partner with Josiah and Philip Turner, the defendants, under the firm of Josiah, Turner & Co.; but that the partnership was dissolved in October, 1817, and that the defendants formed a copartnership in 1820. The defendants prayed the court to instruct the jury, that there was a variance between the contract declared on, and that given in evidence—William Turner being dead. The only allegation in the second count in the declaration, from which it is argued, that the contract declared upon was one including William Turner with Joseph and Philip, is, "that the said defendants accounted with the plaintiffs;" but this does not warrant the conclusion drawn from it; the defendants were Josiah and Philip

Turner; William Turner was not a defendant; and the terms, "the said defendants," could not include him. There was no variance between the contract declared upon in the second count, and the contract proved upon the trial, with respect to the parties thereto. *Schimmelpennick v. Turner*, 6 Pet. 1, 8 L. Ed. 297.

The principle is, that a contract made by copartners is several as well as joint, and the assumpsit is made by all and by each; it is obligatory on all, and on each of the partners. If, therefore, the defendant fails to avail himself of the variance in abatement, when the form of his plea obliges him to give the plaintiff a proper action, the policy of the law does not permit him to avail himself of it, at the time of trial. *Barry v. Foyles*, 1 Pet. 311, 7 L. Ed. 157.

**88. Transactions with deceased persons.**—*Hobbs v. McLean*, 117 U. S. 567, 575, 29 L. Ed. 940. See, generally, the title WITNESSES.

**89.** In an action originally commenced against A. and B., as partners, upon an alleged engagement by the firm, and where A., who was not found or served with process, was offered as a witness in favor of B., having been released by B., the court said: "It is to be premised, that the only ground upon which the objection can be rested is the supposed interest of the witness in the event of the cause; since the suit having regularly abated as to him, by the return that he was 'no inhabitant,' he was no more a party to it than he would have been had his name been altogether omitted in the declaration. As to the objection upon the score of interest, it is sufficient to remark that it was manifestly hostile to the party in whose favor he testified and who offered it in evidence; since the plaintiff's recovery against the defendant, and satisfaction from him, would be a bar to their action against the witness; and the release of A. protected him against any action which A. might bring against him for contribution or otherwise." *LeRoy v. Johnson*, 2 Pet. 186, 187, 7 L. Ed. 391.

The partner offered as a witness in this case was a party upon the record, and thus also, disqualified. *Smyth v. Strader*, 4 How. 404, 11 L. Ed. 1031. See the title WITNESSES.



son a creditor and not a partner, was held erroneous, as it overrules the legal effect of the instrument.<sup>90</sup>

**J. Limitation and Laches.**—When the statute of limitations has once run against a debt, the cause of action against the partnership is gone.<sup>91</sup> Between partners the statute of limitations does not begin to run before dissolution, some exclusion of one of the partners,<sup>92</sup> or the statement of an account.<sup>93</sup> When the right of action accrues, so as to set the statute of limitations in motion, depends upon circumstances, and cannot be held as matter of law to arise at the date of the dissolution, or to be carried back by relation to that date.<sup>94</sup> The right

**90. Effect of legal instrument.**—*Davis v. Patrick*, 122 U. S. 128, 30 L. Ed. 1090. See ante, "Loan of Money with Participation in the Profits," III, B, 2.

**91. Cause of action distinguished.**—*Bell v. Morrison*, 1 Pet. 351, 7 L. Ed. 174.

**92. Dissolution or exclusion of partner.**—"We are not prepared to decide that there is a definite rule of law that statutes of limitation commence to run immediately upon the dissolution of a partnership, irrespective of the circumstances of the particular case. Mr. Justice Lindley, in his excellent work on Partnership, says: 'So long, indeed, as a partnership is subsisting, and each partner is exercising his rights and enjoying his own property, the statute of limitations has, it is conceived, no application at all; but as soon as the partnership is dissolved, or there is any exclusion of one partner by the others, the case is very different, and the statute begins to run.' American Ed. 1888, 510. The learned author in his last edition cites *Knox v. Gye*, supra, and *Noyes v. Crawley*, 10 Ch. Div. 31, in which Vice Chancellor Malins quotes the above language with commendation, and dissents from *Miller v. Miller*, L. R. 8 Eq. 499." *Riddle v. Whitehill*, 132 U. S. 621, 636, 34 L. Ed. 582.

**Limitations in the District of Columbia.**—*Baker v. Cummings*, 169 U. S. 189, 42 L. Ed. 711. See, also, *Baker v. Cummings*, 181 U. S. 117, 45 L. Ed. 776.

**Recovery of partnership funds.**—Where suit was brought to recover on a contract with the government by one partner who was adjudicated bankrupt and died pending suit and his assignee in bankruptcy was substituted as a party in place of his administratrix and the money paid to the assignee it was held that the right of action by the surviving partners did not accrue until the recovery of the money which was the sole asset of the partnership and hence limitations did not apply. *Hobbs v. McLean*, 117 U. S. 567, 29 L. Ed. 940.

**Lien of partner.**—C. I. F. and D. I. F., two brothers, entered into a partnership for the purpose of running a plantation. C. I. F. put in a larger share and received partnership notes. D. I. F. conducted the plantation and lived on it until his death, which took place in 1859, and from that time until the commencement of the Civil War it was conducted by his administrator. C. I. F. died in 1867 leaving his daughter P., the complainant, his sole heir at law. A few months before his death C. I. F.

was appointed administrator de bonis non of his brother but nothing came into his hands and he filed no account. B. J. C. was appointed administrator of both the deceased partners and assumed management of the plantation. In 1868 B. J. C. under a decree of the probate court sold the one half interest of the late D. I. F. to P. A receipt for the amount of the purchase was given her, less the costs, which was credited on the notes by the administrator, and she received a deed for the property purchased and went into and remained in possession. The widow of D. I. F. filed a petition for dower in the share of D. I. F. which was set off to her in 1873 and later filed a bill for damages in dower which was still pending. In 1880 D. I. F., Jr., commenced an action of ejectment for an undivided half of said plantation as heir of his father, which case was still pending at the time of the filing of the bill in this case by P. and her husband, in which it was claimed that no part of the partnership notes given to C. I. F. had ever been paid and the bill prayed for an account and that the said debt be paid out of the partnership including the plantation. The sale of D. I. F.'s interest to P. was held to be void. It was held that the plantation was partnership property, that P. was a proper party and that limitations could not be set up against P. In the opinion it is said: "It results from these views that the lien for partnership debts takes precedence, not only of the interest of David I. Field, junior, as heir-at-law of D. I. Field, but of Lucy C. Freeman's right of dower. As, however, dower was actually assigned to her nearly three years before the filing of the present bill, such assignment should not now be disturbed; but no further exaction for detention of dower should be enforced." *Clay v. Freeman*, 118 U. S. 97, 109, 30 L. Ed. 104.

**93. Stated accounts.**—The statute of limitations was held a bar to a claim where the account was submitted to arbitration, the exception as to merchants' accounts, if it applies at all to accounts of partners, inter sese, not including their stated accounts. *Bispham v. Price*, 15 How. 162, 14 L. Ed. 644.

**94. Where limitation arises dependent on circumstances.**—*Riddle v. Whitehill*, 135 U. S. 621, 637, 34 L. Ed. 282.

**Where firm is being wound up without antagonism.**—"Where \* \* \* partnership affairs are being wound up in due course,

to an account may be lost by laches.<sup>95</sup>

**K. Verdict and Judgment**—1. **NECESSITY FOR SERVICE OF PROCESS.**—In order that a judgment may be valid there must be due service of process.<sup>96</sup> It appears to be settled law, that a member of a partnership firm, residing in one state, cannot be rendered personally liable in a suit brought in another state against him and his copartners, although the latter be duly served with process,

without antagonism between the parties, or cause for judicial interference; where assets are being realized upon and liabilities extinguished, and no settlement has been made, the cause of action has not accrued, and the statute has not begun to run." *Riddle v. Whitehill*, 135 U. S. 621, 637, 34 L. Ed. 282; *Emerson v. Senter*, 118 U. S. 1, 30 L. Ed. 49.

Being in possession of the partnership assets, a surviving partner is not affected by the statute of limitations in reference to a debt due himself. If the statute runs against anybody it runs against the representatives of the deceased partner in relation to their right to call him to account. *Clay v. Freeman*, 118 U. S. 97, 106, 30 L. Ed. 104.

**95. Laches.**—"Counsel in conclusion earnestly contends that whatever rights appellees may have had were lost by laches; and the desire is intimated that we should reconsider *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828, so far as it was therein stated that even though a complainant were guilty of such delay in seeking relief upon infringement as to preclude him from obtaining an account of gains and profits, yet, if he were otherwise so entitled, an injunction against future infringement might properly be awarded. We see no reason to modify this general proposition, and we do not find in the facts as disclosed by the record before us anything to justify us in treating this case as an exception." *Menendez v. Holt*, 128 U. S. 514, 523, 32 L. Ed. 526.

**96. No judgment can be rendered without service of process.**—But the circuit court rightly held that it had no jurisdiction to enter judgment against the defendants, because there had been no lawful service of the summons upon them. It appears by the record, and is not denied by the petitioner, that the defendants were a partnership. In the absence of local statute, no valid judgment can be rendered against the members of a partnership without service upon them. In *re Grossmayer*, 177 U. S. 48, 50, 44 L. Ed. 665; *D'Arcy v. Ketchum*, 11 How. 165, 13 L. Ed. 648.

**Judgment in Texas.**—The Revised Statutes of Texas of 1895 contain the following provisions: "Art. 1223. In any suit against a foreign private or public corporation, joint stock company or association, or acting corporation or association, citation or other process may be served on the president, vice-president, secretary or treasurer, or general manager, or upon any local agent within this state, of such

corporation, joint stock company or association, or acting corporation or association." "Art. 1224. In suits against partners, the citation may be served upon one of the firm, and such service shall be sufficient to authorize a judgment against the firm and against the partner actually served." "It is argued, in behalf of the petitioner, that the defendants in this case were an 'association,' within the meaning of article 1223 of these statutes, and therefore service on their local agent within the state was sufficient. But upon reading that article in connection with article 1224, which immediately follows it, it is manifest that the words in the former section, 'corporation, joint stock company or association, or acting corporation or association,' were not intended to include partnerships; and that the mode of service in actions against partnerships was regulated by the latter section, which requires service in such actions to be made upon one of the firm. As no such service had been made in the case before us, the circuit court had no jurisdiction to entertain the action, or to render judgment against the defendants." In *re Grossmayer*, 177 U. S. 48, 50, 44 L. Ed. 665.

"It is contended upon the part of the plaintiffs in error that the Pacific Company was doing business in the state of Texas, because of a partnership arrangement with the Gulf Company, or because the latter company was the agent of the Pacific Company, or, as it is sometimes said, the representative of the Pacific Company in the state of Texas. As to the question of partnership, we do not think this record presents a question of that sort. The suit is not for a partnership liability. It is an action upon a single cause of action for the tort of the Pacific Company. Service is not had by serving one partner. The real contention is that the service reaches the Pacific Company because of the agency or representative character of the Gulf Company." *Peterson v. Chicago, etc., R. Co.*, 205 U. S. 364, 390, 51 L. Ed. 841.

Where a partner was absent from the state and not served with process, a judgment rendered in Texas against the partnership and against the absent partner individually was valid to bind the firm assets but not to bind his individual property and could not be proceeded on by execution against his individual property. *Sugg v. Thornton*, 132 U. S. 524, 531, 33 L. Ed. 447.

**Infants.**—Where in suits brought in a state court to settle an alleged copartner-



and although the law of the state where the suit is brought authorizes judgment to be rendered against him.<sup>97</sup> A judgment against one partner or his administrator (the other partners being out of the jurisdiction) binds the partnership property, and if partnership property be attached in such a case and not released, the marshal is bound to sell it and apply the proceeds to the satisfaction of the judgment.<sup>98</sup>

2. **GENERAL VERDICT.**—Where the declaration alleges a partnership, and the jury find a general verdict, they must be presumed to have found that fact.<sup>99</sup>

3. **PRIORITY.**—A judgment for a partnership debt recovered against one of the partners is payable out of the proceeds of partnership property in preference to the individual debts of the partner sued.<sup>1</sup>

4. **CORRECTNESS AND CONCLUSIVENESS.**—The verdict of a jury properly rendered is conclusive of issues of fact.<sup>2</sup> Where the petition prayed for a judgment against all the defendants in solido for the whole amount of the partnership debt, but the facts alleged by the pleadings and disclosed by the proofs showed that the partnership was not a commercial but an ordinary one within the law of Louisiana, it was held, that a verdict against each defendant for his proportionate share of such debt and the judgment rendered thereon were not vitiated by such a departure from the issues.<sup>3</sup> The commercial partnership, the makers of the note upon which the suit was instituted, was composed of three persons, one of whom was a resident citizen of Alabama, and out of the jurisdiction of the court, when the suit was brought, and the remaining two, the defendants, were resident citizens of Louisiana. Held, that although the suit being against two of the three obligors might not be sustained at common law, yet as the courts of Louisiana do not proceed according to the rules of the common law, their code being founded on the civil law, this suit was properly brought.<sup>4</sup>

ship between the plaintiffs and a deceased partner, the supreme court of the state decided that there had been no sufficient service on an infant defendant who had succeeded to an undivided interest in the property of the deceased partner, and consequently that the lower court had had no authority to appoint a guardian ad litem for such infant, and therefore reversed a decree directing a sale of the property of the deceased, such adjudication is the law of the case, and is binding upon the circuit court of the United States in an action brought by a grantee of the heirs of the deceased against a purchaser at sale under such decree. *Galpin v. Page*, 18 Wall. 350, 21 L. Ed. 959.

97. *Hall v. Lanning*, 91 U. S. 160, 169, 23 L. Ed. 271.

**Effect of judgment in another state.**—If a judgment is rendered in one state against two partners jointly after serving notice upon one of them only under a statute of the state providing that such service shall be sufficient to authorize a judgment against both, yet the judgment is of no force or effect in a court of another state, or in a court of the United States, against the partner who is not served with process. *Goldey v. Morning News*, 156 U. S. 518, 521, 39 L. Ed. 517, citing *D'Arcy v. Ketchum*, 11 How. 165, 13 L. Ed. 648; *Hall v. Lanning*, 91 U. S. 160, 23 L. Ed. 271.

A member of a partnership, residing in one state, not served with process and not

appearing, is not personally bound by a judgment recovered in another state against all the partners after a dissolution of the firm, although the other members were served, or did appear and cause an appearance to be entered for all, and although the law of the state where the suit was brought authorized such judgment. *Hall v. Lanning*, 91 U. S. 160, 23 L. Ed. 271.

Where a judgment was given in New York against two partners, one of whom resided in Louisiana and was never served with process, and an action was brought against him in Louisiana upon this judgment, a peremptory exception, in the nature of a demurrer, that "the judgment sued upon is not one upon which suit can be brought against the defendant in this court," was well founded. *D'Arcy v. Ketchum*, 11 How. 165, 13 L. Ed. 648.

98. *Inbusch v. Farwell*, 1 Black 566, 17 L. Ed. 188.

99. *Matheson v. Grant*, 2 How. 263, 11 L. Ed. 261.

1. **Priority.**—*Inbusch v. Farwell*, 1 Black 566, 17 L. Ed. 188.

2. **Trading firm.**—In the case of *Kimbro v. Bullitt*, 22 How. 256, 16 L. Ed. 313, the jury found that this was a trading firm, and their verdict is conclusive.

3. **Law of Louisiana.**—*Beauregard v. Case*, 91 U. S. 134, 23 L. Ed. 263.

4. *Breedlove v. Nicolet*, 7 Pet. 413, 8 L. Ed. 731.



**L. Execution, Attachment and Garnishment.**—Partnership goods are attachable for the debts thereof.<sup>5</sup> If a judgment at law be recovered against a copartnership, the separate property of each partner is alike liable to execution with the property of the partnership; and equity will not interfere, unless there are cogent special circumstances.<sup>6</sup> The creditor may levy his execution on his debtor's share of the joint property, but he sells only the debtor's interest in it, after payment of all the partnership debts.<sup>7</sup> The firm credits are not liable to attachment for the separate debts of one partner.<sup>8</sup> Payment to an executor of a deceased partner will not have the effect to release a garnishee from a partnership debt. Nor will such payment of one-half the amount due release the debt *pro tanto*.<sup>9</sup> A suit was brought by plaintiff as surviving partner to recover a debt due to the partnership. An attachment was issued by an administratrix for a debt due by the plaintiff in his separate capacity to a deceased person. The court ordered one-half to be paid to the plaintiff and one-half to the administratrix of the deceased creditor.<sup>10</sup>

**M. Appeal and Error.**—A decree which decides that complainants are entitled to a share in the profits and that defendant accounts therefor and referring the case to an auditor to state an account, is not a final decree from which an appeal should be taken.<sup>11</sup> An appeal has been dismissed because taken in the name of William A. Freeborn & Co., the court holding that no difference existed between writs of error and appeals as to the manner in which the names of the parties should be set forth.<sup>12</sup> As to description of judgment against partnership in writ of error, see the title *APPEAL AND ERROR*, vol. 2, p. 141.

**N. Actions between Partners**—1. **AT LAW.**—A partner of a firm cannot, at law, sue it, for that would be to sue himself. But a bona fide assignee may maintain an action.<sup>13</sup> In an action of account-render between partners, it is enough to charge the defendants generally with the receipt of money to their

**5. Recovery on bonds.**—Partnership goods were attached on *mesne* process against three partners, for a partnership debt; property released on bond conditioned to pay the judgment which may be recovered against the defendants; suit discontinued against two defendants for want of jurisdiction, and prosecuted to judgment against the administrator of the other. Held, that the plaintiff may recover from the sureties in the bond the amount of the judgment. Sureties in such a bond are sureties of the partnership, and if compelled to pay the money, they have an action for reimbursement against all who were partners at the date of the bond. *Inbusch v. Farwell*, 1 Black 566, 17 L. Ed. 188.

**6. Liability of separate property.**—*Lewis v. United States*, 92 U. S. 618, 623, 23 L. Ed. 513.

**7. Sale of debtor's interest.**—*Clagett v. Kilbourne*, 1 Black 346, 17 L. Ed. 213.

The purchaser under the execution takes the estate which the judgment debtor would have been entitled to after a final settlement of the partnership accounts. The remedy of the purchaser is, to go into equity and call for an account and thus entitle himself to the interest of the judgment debtor after the settlement of the partnership liability. The fact that the property in this case consisted of real estate would not change the principles of law governing the ultimate rights and in-

terest concerned, its real property being treated in equity as personalty. *Clagett v. Kilbourne*, 1 Black 346, 17 L. Ed. 213.

**8. Attachment of firm credits.**—*McCoombe v. Dunch*, 2 Dall. 73, 1 L. Ed. 294.

**Investigation of partnership accounts.**—In an attachment case the court said they could not "in this manner, attempt to investigate the partnership accounts." *Wallace v. Fitzsimmons*, 1 Dall. 248, 250, 1 L. Ed. 122.

**9. Payment to executor of deceased partner.**—*Wallace v. Fitzsimmons*, 1 Dall. 248, 1 L. Ed. 122.

**10.** *McCarty v. Emlen*, 2 Dall. 277, 1 L. Ed. 380.

**11. Appeal and error.**—*Latta v. Kilbourn*, 150 U. S. 524, 37 L. Ed. 1169. See the title *APPEAL AND ERROR*, vol. 1, p. 952.

**12.** *The Proctor*, 11 Wall. 82, 20 L. Ed. 47. But see the statutes allowing amendments.

**13. Right of partner to firm.**—*Smyth v. Strader*, 4 How. 404, 415, 11 L. Ed. 1031; Compare *Van Ness v. Forrest*, 8 Cranch 30, 34, 3 L. Ed. 478. And see the title *BILLS, NOTES AND CHECKS*, vol. 3, p. 356.

**Action of account almost obsolete.**—Except in an action of account, which is almost obsolete, it is a general rule that between partners, whether they are so in

joint benefit.<sup>14</sup> No action of assumpsit will lie between partners to recover partnership assets unless the partners have settled their accounts and struck a balance.<sup>15</sup> A partner who assumes to dissolve the partnership, before the end of the term agreed on in the partnership articles, is liable, in an action at law against him by his copartner for the breach of the agreement, to respond in damages for the value of the profits which the plaintiff would otherwise have received.<sup>16</sup>

2. *IN EQUITY*—a. *In General*.—In actions between partners, equity is the usual tribunal.<sup>17</sup> A court of equity, doubtless, will not assist the partner breaking his contract to procure a dissolution of the partnership, because, upon familiar principles, a partner who has not fully and fairly performed the partnership agreement on his part has no standing in a court of equity to enforce any rights under the agreement.<sup>18</sup>

b. *Injunction and Specific Performance*.—Equity will enjoin one partner from violating the rights of his copartner in partnership matters, although no

general or for a particular transaction only, no account can be taken at law. *Ivinson v. Hulton*, 98 U. S. 79, 25 L. Ed. 66.

14. *Account-render*.—*James v. Browne*, 1 Dall. 339, 1 L. Ed. 165.

In an action of account-render brought by one partner against another, issue having been joined on a plea of *ne unques receiver*, where the plaintiff proves a receipt to the joint benefit of the partners, by the hand of one of the persons mentioned in the declaration, he is entitled to a general verdict. *James v. Browne*, 1 Dall. 339, 1 L. Ed. 165.

In an action of account-render between partners, if these facts are proved—that a partnership existed; that the defendant was the acting partner; and that he received any part of the sum, from any of the persons mentioned in the declaration—he shall uniformly be obliged to render an account of his transactions. In the opinion, it is said: “Nor does the verdict of the jury affect the principles of the settlement; for, suppose, I engage in trade with another man, and pay into his hands £1000, as my share of the stock; if, afterwards, I bring an action of account-render against him, and the jury find the receipt of this money; such finding does not surely fix the sum for which he shall be responsible to me, but the auditors will, nevertheless, on the one hand, allow me a proportion of any profits which have been accumulated; or, on the other hand, charge me with a proportion of any losses or expenses that may have happened in our joint negotiations.” *James v. Browne*, 1 Dall. 339, 1 L. Ed. 165.

15. *Action of assumpsit*.—*Ozeas v. Johnson*, 4 Dall. 434, 1 L. Ed. 897.

16. *Breach of agreement*.—*Karrick v. Hannaman*, 168 U. S. 328, 337, 42 L. Ed. 484.

17. *Usual resort to equity*.—“Owing to the ability of courts of equity not only to investigate complicated accounts, but also to compel the specific performance of agreements, and to reform or rescind the same, in case of fraud or mistake, and to

restrain breaches of duty for the future, it is to them rather than courts of law that partners usually have recourse for the settlement of controversies among themselves. 2 Lindley, *Partnership* (3d Ed.), 933.” *Ivinson v. Hulton*, 98 U. S. 79, 80, 25 L. Ed. 66.

*In the District of Columbia*.—A bill filed in the supreme court of the District of Columbia by a surviving partner against the administratrix of a deceased partner alleging that there had never been a settlement of the affairs of the partnership and that, upon such settlement, there would be a balance due to the complainant, is altogether a proper one. *White v. Joyce*, 158 U. S. 128, 39 L. Ed. 921.

Where another bill was filed by the above partner, more than eleven years after the death of the deceased partner and five years after the settling of the accounts between the partners and ordering sale of the real estate, which he styled a supplemental bill, and after stating that the trustees after effort made, failed to sell the partnership real estate, alleged that the deceased partner had died seized and possessed of certain real estate and asked that a decree should be granted ordering the sale of such real estate, it was held that this could not properly be regarded as a supplemental bill, but was essentially a new proceeding under the Maryland act of March 10th, 1875, in which it was competent for the heirs to plead the statute of limitations. It was the duty of the court to give the minor heirs the benefit of the statute. A different conclusion was reached in reference to the widow and adult son. The delay of six years from the filing of their answer from the bringing of the bill of review, was not satisfactorily explained, and upon well-settled principles, a court of equity must leave them in the position in which they placed themselves. *White v. Joyce*, 158 U. S. 128, 39 L. Ed. 921.

18. *Partner breaking his contract*.—*Karrick v. Hannaman*, 168 U. S. 328, 335, 42 L. Ed. 484; *Marble Co. v. Ripley*, 10 Wall. 339, 358, 19 L. Ed. 955.



dissolution of the partnership be contemplated.<sup>19</sup> While doubtless a court of equity will not assist the partner breaking his contract to procure a dissolution, generally speaking, neither will it interfere at the suit of the other partner to prevent the dissolution, because, while it may compel the execution of articles of partnership so as to put the parties in the same position as if the articles had been executed as agreed, it will seldom, if ever, specially compel subsequent performance of the contract by either party, the contract of partnership being of an essentially personal character.<sup>20</sup>

c. *Discovery and Account*—(1) *In General*.—Partners are entitled to an accounting in equity.<sup>21</sup> So far as accounts between the parties are closed by the articles of dissolution, no reason can be assigned for opening them. But if rights, growing out of those articles, require a settlement, the plaintiff is entitled to an account.<sup>22</sup> A bill for a settlement of partnership accounts will not lie unless all the partners are made parties defendant.<sup>23</sup>

(2) *Rights of Assignees and New Members*.—Although a new member can-

**19. Injunction.**—*Marble Co. v. Ripley*, 10 Wall. 339, 19 L. Ed. 955.

**20. Injunction a specific performance.**—*Karrick v. Hannaman*, 168 U. S. 328, 335, 42 L. Ed. 484.

Especially where, by the partnership agreement, as in the case at bar, the defendant is to supply all or most of the capital, and the plaintiff is to furnish his personal services, the agreement cannot be specifically enforced against the plaintiff, and will not be enforced against the defendant. *Karrick v. Hannaman*, 168 U. S. 328, 336, 42 L. Ed. 484.

**21. Accounting in equity.**—A. and B., having arranged the terms on which the partnership between them should be dissolved, stipulated that their clerk should examine their books, ascertain the amount which each had put into the firm and each had drawn out, and report the same as the basis of their agreed settlement, and that if any error was made, it should be corrected when discovered. The clerk made the examination, and reported that the sum of \$47,039.54 was due from B. to A. Thereupon, supposing the report to be correct, each made, executed, and delivered to the other all the papers necessary to perfect and complete the terms and conditions of the dissolution of the partnership. On the same day, the clerk discovered that he had made an error of \$4,036.12 against A. B. having refused to correct it, A. filed his bill praying for an account, the correction, amendment, and cancellation of the papers so executed by them, and for a decree for the payment of the \$4,036.12 due him. The bill was dismissed, on the ground that A.'s remedy was at law. Held, that the decree was erroneous. *Ivinson v. Hutton*, 98 U. S. 79, 25 L. Ed. 66.

A., B., and C., who were partners as attorneys and counsellors at law, agreed that the general partnership between them should terminate March 18, 1869; that thereafter no new business should be received by the firm, and that any coming to it through the mails should be equitably divided. It was also stipulated that

the business then in hand should be closed up as rapidly as possible by them "as partners, under their original terms of association and in the firm name." They agreed, August 13, 1869, that in case of the death of either of them, his heirs or personal representatives should receive one-third of the fees in cases nearly finished, and twenty-five per cent in other partnership cases. A. having died, his executor filed his bill against B. and C. for a discovery, and to recover A.'s share in the fees received by them out of the partnership business which remained unfinished when the firm was dissolved. Held: 1. That a court of chancery had jurisdiction to entertain the bill, and power to decree the relief asked so far as the fees had been collected. *Denver v. Roane*, 99 U. S. 355, 25 L. Ed. 476.

**Bill for settlement.**—Where a complainant's right is only an equity to share in the surplus, if any, of the firm property after settlement of the partnership accounts, the proper bill is a bill for such a settlement. *Bank v. Carrollton Railroad*, 11 Wall. 624, 20 L. Ed. 82.

**Accounts for profits.**—In a court of equity, a partner who, after a dissolution of the partnership, carries on the business with the partnership property, is liable, at the election of the other partner or his representative, to account for the profits thereof, subject to proper allowances. *Karrick v. Hannaman*, 168 U. S. 328, 337, 42 L. Ed. 484.

**22. Finley v. Lynn**, 6 Cranch 238, 249, 3 L. Ed. 211.

**23. Parties.**—*Bank v. Carrollton Railroad*, 11 Wall. 624, 20 L. Ed. 82.

A bill for a settlement of partnership accounts which, without charging fraudulent confederacy, shows that it is filed not against all the original partners, but against one of them (yet remaining in the administration of the firm concerns), and persons who have succeeded to the rights (not to the obligations), of one or more of the others, presents not only a want of indispensable parties but a misjoinder of the defendants—a misjoinder



not be admitted into a partnership without the consent of all parties, yet a person who has obtained a share in the concern can, after the partnership has expired, maintain a suit in chancery for his share of the profits.<sup>24</sup> An assignee of an assignee of a copartner in a joint purchase and sale of lands, may sustain a bill in equity against the other copartners and the agent of the concern, to compel a discovery of the quantity purchased and sold, and for an account and distribution of the proceeds.<sup>25</sup>

d. *Dissolution and Sale*.—In the absence of demurrer or any objection to the jurisdiction a decree in California, founded on a bill for dissolution and sale of real estate held by the parties as tenants, awarding partition, has been held proper.<sup>26</sup>

3. **ADMIRALTY**.—A court of admiralty takes cognizance of certain questions between part owners, as to the possession and employment of the ship, but will not assume jurisdiction in matters of account between them. A contract of partnership in the earnings of a ship comes within the same category. If the party desires an account, his remedy is in a court of chancery. If his complaint be for a breach of some independent covenant, he should seek his remedy in a court of common law.<sup>27</sup>

**PART OWNERS**.—See the title **JOINT TENANTS AND TENANTS IN COMMON**, vol. 7, p. 533.

**PART PAYMENT**.—See the titles **CONTRACTS**, vol. 4, p. 566; **PAYMENT**.

**PART PERFORMANCE**.—See the title **FRAUDS, STATUTE OF**, vol. 6, p. 459.

**PARTY AGGRIEVED**.—See the title **APPEAL AND ERROR**, vol. 2, p. 53.

**PARTY RATE TICKETS**.—See the title **INTERSTATE AND FOREIGN COMMERCE**, vol. 7, p. 484.

apparent upon the face of the bill. It must be dismissed. *Bank v. Carrollton Railroad*, 11 Wall. 624, 20 L. Ed. 82.

Although in general a bill in chancery will not be dismissed for want of proper parties, the rule resting as it does upon the supposition that the fault may be remedied, and the necessary parties supplied, does not apply when this is impossible, and whenever a decree cannot be made without prejudice to one not a party. In such a case the bill must be dismissed. Hence in a case where if all the partners were made parties to the bill, the court in which the bill was filed would, from the character of its jurisdiction (which was confined to persons resident within particular districts, which one of the partners here was not), be without any jurisdiction of the controversy, the bill must be dismissed. *Bank v. Carrollton Railroad*, 11 Wall. 624, 20 L. Ed. 82.

24. **New member**.—*Mathewson v. Clarke*,

6 How. 122, 12 L. Ed. 370.

25. **Assignees**.—*Pendleton v. Wambersie*, 4 Cranch 73, 2 L. Ed. 554.

26. **Sufficiency of bill**.—Where a bill prayed for a dissolution of the partnership between the parties, and a sale of certain lands by them held as tenants in common, which, it was alleged, were not susceptible of division without prejudice to them and there was no demurrer to the bill, nor did the answer raise any objection to the jurisdiction, it was held that, as the allegations of the bill touching the lands conform to the provision of the code of California, and are sustained by the proofs, the decree below awarding partition was proper. *Briges v. Sperry*, 95 U. S. 401, 24 L. Ed. 390.

27. **Admiralty**.—*Ward v. Thompson*, 22 How. 330, 333, 16 L. Ed. 249. See, also, *The Steamboat Orleans v. Phœbus*, 11 Pet. 175, 9 L. Ed. 677. See the title **ADMIRALTY**, vol. 1, p. 146.

## PARTY WALLS.

### CROSS REFERENCES.

See the titles **ADJOINING LANDOWNERS**, vol. 1, p. 117; **BOUNDARIES**, vol. 3, p. 461; **CONTRIBUTION AND EXONERATION**, vol. 4, p. 595; **EASEMENTS**, vol. 5, p. 690; **FENCES**, vol. 6, p. 272; **TRESPASS**.

As to determination of titles to party walls, see the title **EJECTMENT**, vol. 5, p. 699.

**Apportionment of Cost of Wall—A Personal Charge.**—The moiety of the cost of a party wall, under an early act of Pennsylvania, was a personal charge against the builder of the second house, and not such a lien upon the house itself, as would render it liable to the reimbursement of the first builder, into whose hands it might come.<sup>1</sup>

**Acts of Trespass.**—Where an act of assembly of Pennsylvania provided that any person whose lot joined upon the house of another might lawfully use and break into the wall, if he first paid a moiety of the cost of building it, though no action would lie to recover this moiety until the second house was actually begun, yet, if it was begun, and a breach made in the wall, before the payment, the builder was considered as a trespasser, notwithstanding half of the wall was raised upon his ground; and in an action of trespass against him, he could not justify under this act.<sup>2</sup>

**PASS.**—See the title **CARRIERS**, vol. 3, p. 567.

**PASSAGE MONEY.**—See **FREIGHT**, vol. 6, p. 533.

**PASS BOOK.**—See the title **BANKS AND BANKING**, vol. 3, p. 29.

**PASSENGER.**—See note 3.

**PASSPORT.**—A "passport" is a document, which, from its nature and object, is addressed to foreign powers; purporting only to be a request, that the bearer of it may pass safely and freely; and is to be considered rather in the character of a political document, by which the bearer is recognized, in foreign countries, as an American citizen; and which, by usage and the law of nations,

1. **Personal charge.**—*Ingles v. Bringhurst*, 1 Dall. 341, 346, 1 L. Ed. 167.

**Lien given by statute.**—The act of Pennsylvania gave a perpetual lien to the first builder of a party wall, for so much of his neighbor's land as one-half of the breadth of the wall should cover. It was enacted, at the same time, that the second builder, having the use of one-half of the wall, should reimburse one-half of the expense of building it. *Ingles v. Bringhurst*, 1 Dall. 341, 345, 1 L. Ed. 167.

2. **Trespass.**—*Ingles v. Bringhurst*, 1 Dall. 341, 345, 1 L. Ed. 167.

3. **Passenger.**—"In *Les Bones Costumes de la Mar* (Black Book, 3 Twiss' Ed. 50, App. Pt. III), it is said 'the term **passenger** includes all those who ought to pay freight for their persons apart from their merchandise,' and 'every man is called a **passenger** who pays freight for his own person, and for goods which are not merchandise.'" *The Main v. Williams*, 152 U. S. 122, 129, 38 L. Ed. 381.

**Barge carrying passengers.**—A canal

boat laden with coal for transportation, having on board the master with his family, is not a "barge carrying **passengers**," within the meaning of § 4492 of the Revised Statutes, which requires that such a barge, while in tow of a steamer, shall be provided with "fire buckets, axes, life preservers, and yawls." *Transportation Line v. Cooper*, 99 U. S. 78, 25 L. Ed. 382.

**Common carrier.**—As to who is a **passenger** within the meaning of the law of common carriers, see the title **CARRIERS**, vol. 3, p. 566, et seq.

**Passenger from foreign port.**—A native inhabitant of Porto Rico and an inhabitant subsequent to the cession of the island, was not a **passenger** from a foreign port, but a **passenger** "from territory or other places" subject to the jurisdiction of the United States, within the meaning of the immigration laws. *Gonzales v. Williams*, 192 U. S. 1, 12, 16, 43 L. Ed. 317.

is received as evidence of the fact.<sup>4</sup>

**PATENT.**—"A patent was the description once applied to commissions for office; and the records of this court at first speak of the commissions of the judges as patents."<sup>1</sup>

**PATENT AND LATENT AMBIGUITY.**—"Ambiguitas patens," says Lord Bacon, "is that which appears to be ambiguous upon the deed or instrument: latens is that which seemeth certain and without ambiguity, for anything that appeareth upon the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity."<sup>2</sup>

**4. Passport.**—*Urtetiqui v. D'Arcy*, 9 Pet. 692, 699, 9 L. Ed. 276.

"There is no law of the United States, in any manner regulating the issuing of **passports**, or directing upon what evidence it may be done, or declaring their legal effect. It is understood, as matter of practice, that some evidence of citizenship is required, by the secretary of state, before issuing a **passport**. This, however, is entirely discretionary with him. No inquiry is instituted by him to ascertain the fact of citizenship, or any proceedings had that will in any manner bear the character of a judicial inquiry. It is a document, which, from its nature and object, is addressed to foreign powers; purporting only to be a request that the bearer of it may pass safely and freely; and is to be considered rather in the character of a political document, by which the bearer is recognized, in foreign countries, as an American citizen; and which, by usage and the law of nations, is received as evidence of the fact. But this is a very different light, from that in which it is to be viewed in a court of justice, where the inquiry is as to the fact of citizenship. It is a mere *ex parte* certificate; and if founded upon

any evidence produced to the secretary of state, establishing the fact of citizenship, that evidence, if of a character admissible in a court of justice, ought to be produced upon the trial, as higher and better evidence of the fact." *Urtetiqui v. D'Arcy*, 9 Pet. 692, 699, 9 L. Ed. 276.

**Citizenship.**—As to **passport** incompetent to establish citizenship, see the title **ALIENS**, vol. 1, p. 244.

**1. Patent.**—*Wilson v. Rousseau*, 4 How. 646, 698, 11 L. Ed. 1141.

The act of March 3, 1885, limits appeals from the territories and District of Columbia to cases where the value of the matter in dispute exceeds five thousand dollars, except where the validity of a **patent** or copyright is involved. The **patent** referred to in the exception is a **patent** for an invention or discovery, not a **patent** for land. *Street v. Terry*, 119 U. S. 385, 386, 30 L. Ed. 439.

**2. Deery v. Cray**, 10 Wall. 263, 270, 19 L. Ed. 887. See the title **PAROL EVIDENCE**, ante, p. 12.

**Deeds.**—As to admissibility of deeds where the uncertainty of description is a **patent ambiguity**, see the title **DOCUMENTARY EVIDENCE**, vol. 5, p. 450.



# PATENTS.

BY J. N. CLAYBROOK.

## I. Definitions and Distinctions, 148.

- A. Definitions, 148.
- B. Distinctions, 148.
  - 1. Distinguished from Copyright, 148.
  - 2. Distinguished from Land Patents, 149.

## II. Property in Inventions or Patent Rights, 149.

- A. Unpatented Invention as Property, 149.
- B. Patent Rights as Property, 150.
  - 1. General Rules, 150.
  - 2. Appropriation by Government, 150.

## III. Patent Laws, 151.

- A. Power of Congress, 151.
- B. Object of Patent Laws, 151.
- C. Construction of Patent Laws, 151.

## IV. Persons Entitled to Patents, 152.

- A. First Inventor, 152.
  - 1. Necessity for Patent to Be Obtained by First Inventor, 152.
  - 2. Who Is First Inventor, 152.
  - 3. Effect of Laches or Delay by First Inventor, 153.
- B. As between Employer and Employee, 153.
  - 1. General Rules, 153.
  - 2. Government Employees, 153.
  - 3. Patent Perfected at Employer's Expense, 154.
  - 4. Employee Engaged to Perfect Patent, 154.
  - 5. Patent Perfected after Termination of Employment, 155.
  - 6. License to Employer, 155.
    - a. Express License, 155.
    - b. Implied License, 155.
- C. As between Partners, 155.
- D. Aliens, 156.

## V. Patentability, 156.

- A. What May Be Patented, 156.
  - 1. In General, 156.
  - 2. Machines, 156.
    - a. Definitions, 156.
    - b. Patentability, 156.
  - 3. Products or Manufactures, 156.
  - 4. Compositions of Matter, 156.
  - 5. Arts and Processes, 157.
    - a. What Constitutes, 157.
      - (1) What Constitutes an Art, 157.
      - (2) What Constitute a Process, 157.
    - b. Patentability, 158.
      - (1) In General, 158.
      - (2) Process Consisting of Function of Machine, 158.
      - (3) Process Carried into Effect by Machinery, 159.
        - (a) General Rule, 159.
        - (b) Where Machinery Is Old, 159.

- (4) New Process for Making Old Substance, 159.
- (5) Process of Applying New Principle or Law of Nature 160.
- (6) Combinations, 160.
- 6. Principles or Ideas, 160.
- 7. Function of Machine, 161.
- 8. Designs, 161.
- B. Invention, 162.
  - 1. Necessity of Invention, 162.
  - 2. What Constitutes, 162.
    - a. Definitions, 162.
    - b. Perfection of Conception and Representation in Physical Form, 163.
    - c. Mechanical Skill, 163.
    - d. Carrying Forward Old Ideas, 165.
    - e. Change in Form, 166.
    - f. Change in Arrangement or Location of Elements, 167.
    - g. Change in Proportions or Degree, 168.
    - h. Improvement of Existing Devices, 168.
    - i. Applying Old Devices to New Uses, 169.
      - (1) Analogous or Double Use, 169.
      - (2) When Application to New Use Requires Invention, 171.
      - (3) Changing Device to Adapt It to New Use, 172.
    - j. Substitution of One Material for Another, 172.
      - (1) General Rule, 172.
      - (2) Material Performing New Function or Accomplishing New Result, 174.
    - k. Substitution of Equivalents, 174.
    - l. Omission of Minor or Immaterial Features, 175.
    - m. Combination of Old Elements, 175.
    - n. Effect of Simplicity or Obviousness of Device, 178.
  - 3. Evidence of Invention, 178.
    - a. Judicial Notice, 178.
    - b. General Use as Evidence of Invention, 178.
- C. Novelty and Anticipation, 179.
  - 1. Novelty, 179.
    - a. Necessity for Novelty, 179.
    - b. What Constitutes, 179.
      - (1) Definitions, 179.
      - (2) Machines, 179.
      - (3) Manufactures, 180.
      - (4) Processes, 180.
      - (5) Composition of Matter, 180.
      - (6) Designs, 180.
      - (7) Combinations, 181.
  - 2. Anticipation, 181.
    - a. Effect of Anticipation, 181.
    - b. Ways in Which Patent May Be Anticipated, 181.
      - (1) Prior Patent, 181.
        - (a) Prior Domestic Patent, 181.
        - (b) Prior Foreign Patent, 182.
        - (c) Subsequent Patent Must Be Included within Former Specification, 182.
      - (2) Prior Description in Printed Publication, 183.
        - (a) General Rule, 183.
        - (b) Time of Publication, 183.
        - (c) Requisites of Description, 183.
      - (3) Public Use or Sale, 184.

- (a) Public Use or Sale in This Country, 184.
      - aa. General Rule, 184.
      - bb. Duration of Use, 184.
      - cc. Nature and Extent of Use, 184.
    - (b) In Foreign Country, 184.
  - (4) Prior Invention Patented Subsequently, 185.
    - (a) Prior Domestic Invention, 185.
    - (b) Prior Foreign Invention, 185.
  - c. What Constitutes Anticipation, 185.
    - (1) Definition, 185.
    - (2) Identity, 185.
    - (3) Prior Accidental Production, 186.
    - (4) Prior Unsuccessful Devices, 186.
    - (5) Lost or Forgotten Arts or Devices, 186.
    - (6) Failure to Disclose Essentials, 186.
    - (7) Superiority in Later Devices, 186.
    - (8) Necessity for Completion and Perfection of Former Devices, 187.
    - (9) Modification or Change in Prior Devices, 187.
    - (10) Particular Kinds of Inventions, 187.
      - (a) Machines, 187.
      - (b) Manufactures, 188.
      - (c) Processes, 188.
      - (d) Combinations, 189.
    - d. Necessity for Knowledge of Anticipation, 190.
    - e. Estoppel to Show Anticipation, 190.
  - 3. Evidence, 190.
    - a. Judicial Notice, 190.
    - b. Presumptions and Burden of Proof, 190.
    - c. Admissibility, 190.
      - (1) Prior Patents, 190.
      - (2) Prior Printed Publications, 190.
      - (3) Prior Use, 191.
      - (4) Priority between Several Inventions, 191.
      - (5) Expert Evidence, 191.
    - d. Weight and Sufficiency, 191.
      - (1) General Rule, 191.
      - (2) Oral Testimony, 191.
      - (3) Admissions, 192.
      - (4) General Use as Evidence of Novelty, 191.
      - (5) Evidence of Interested Parties, 192.
      - (6) Decision of Patent Office, 192.
      - (7) Failure to Claim as Evidence, 193.
  - 4. Province of Court and Jury, 193.
- D. Utility, 193.
  - 1. Necessity for Utility, 193.
  - 2. What Constitutes, 193.
  - 3. Evidence of Utility, 194.
    - a. Presumptions and Burden of Proof, 194.
    - b. General Use as Evidence, 194.
    - c. Infringement as Evidence, 194.
  - 4. Province of Court and Jury, 194.
- E. Public Use or Sale before Obtaining Patent, 195
  - 1. General Rule, 195.
  - 2. What Constitutes, 195.
    - a. Nature and Extent of Use, 195.
    - b. Visibility of Use, 195.



- c. Use for Purposes of Profit, 195.
- d. Use for Purposes of Experiment, 196.
  - (1) In General, 196.
  - (2) Good Faith of Experiments, 196.
  - (3) Place of Making Experiments, 196.
  - (4) Effect Where Profits Are Derived from Use, 197.
  - (5) Effect Where Public Derives Benefit from Use, 197.
  - (6) Duration of Durability Test, 197.
  - (7) Evidence of Experimental Use, 197.
- 3. Duration of Use, 198.
- 4. Sale or Use in Foreign Country, 198.
- 5. Effect of Rejection of Application, 198.
- 6. Assignment of Interest to Prior User, 198.
- F. Abandonment of Invention, 199.
  - 1. General Rule, 199.
  - 2. Time of Abandonment, 199.
  - 3. What Constitutes, 199.
    - a. In General, 199.
    - b. Public Use or Sale, 199.
      - (1) By Inventor, 199.
      - (2) By Third Persons, 199.
        - (a) In General, 199.
        - (b) Consent of Inventor, 200.
      - (3) Duration of Use, 200.
    - c. Failure to Perfect Invention, 201.
    - d. Destruction of Invention, 201.
    - e. Failure to Renew Rejected or Withdrawn Application, 201.
    - f. Failure to Patent Secret Invention, 202.
    - g. Failure to Claim All Features of Invention, 202.
    - h. Acquiescence in Another's Claim to Priority, 202.
    - i. Province of Court and Jury, 202.
  - 4. Evidence, 202.
    - a. Grant of Patent as Evidence, 202.
    - b. Rebuttal of Presumption of Abandonment from Lapse of Time, 203.
  - 5. Operation and Effect, 203.

## VI. Proceedings to Obtain Patent, 203.

- A. Application, 203.
  - 1. Specification or Description of Invention, 203.
    - a. Object of Description, 203.
    - b. Necessity and Sufficiency of Description, 203.
      - (1) General Rule, 203.
      - (2) Certainty and Conciseness, 204.
      - (3) Machines, 204.
      - (4) Processes, 205.
      - (5) Composition of Matter, 206.
      - (6) Improvements, 206.
      - (7) Part of Machine, 207.
      - (8) Combinations, 207.
      - (9) Designs, 207.
      - (10) Failure to Describe All Elements, 207.
      - (11) Sufficiency of Description a Question of Fact, 208.
      - (12) Effect of Want or Insufficiency of Specification, 208.
    - c. Fraudulent or Deceptive Specifications, 208.
    - d. Construction and Operation, 208.
      - (1) Construction, 208.

- (2) Effect of Recommendation of Certain Methods, 208.
- (3) Invention as Limited by Description, 208.
  - (a) General Rule, 208.
  - (b) Limitations or Restrictions in Specification, 209
- 2. Models, 209.
- 3. Drawings, 209.
- 4. Claim, 209.
  - a. Necessity and Sufficiency, 209.
    - (1) General Rule, 209.
    - (2) Combinations, 209.
    - (3) Composition of Matter, 210.
    - (4) Omission of Immaterial Matters, 210.
  - b. Effect of One Void Claim on Residue, 210.
  - c. Construction of Claim, 210.
- 5. Amendment, 210.
- 6. Oath of Applicant, 211.
- 7. Joinder of Several Inventions, 212.
- 8. Death of Inventor Pending Application, 212.
- B. Proceedings in Patent Office, 213.
  - 1. Examination as to Right to Patent, 213.
  - 2. Prosecution or Abandonment of Proceedings, 213.
  - 3. Presumption as to Regularity of Issuance, 214.
- C. Remedies of Applicant on Refusal of Patent, 214.
  - 1. Bill in Equity, 214.
  - 2. Appeal, 215.
    - a. Appeal from Decision of Primary Examiner, 215.
    - b. Appeal from Decision of Examiner in Chief, 215.
    - c. Appeal from Decision of Commissioner, 215.
      - (1) Jurisdiction, 215.
        - (a) Courts of District of Columbia, 215.
        - (b) Secretary of Interior, 215.
      - (2) Hearing and Decision, 216.
  - 3. Mandamus, 216.

## VII. Letters-Patent, 216.

- A. Requisites and Validity, 216.
  - 1. Form and Contents, 216.
    - a. In General, 216.
    - b. Joinder of Several Subjects in One Patent, 216.
  - 2. Signing, 217.
  - 3. Sealing, 217.
  - 4. Recording, 217.
  - 5. Evidence as to Validity, 217.
    - a. Presumptions and Burden of Proof, 217.
    - b. Weight and Sufficiency, 217.
- B. Construction and Operation, 218.
  - 1. Construed According to Terms, 218.
  - 2. Intention of Parties as Governing, 218.
  - 3. Construed Liberally, 218.
  - 4. Construed to Uphold Patent, 218.
  - 5. Construed as a Whole, 219.
    - a. General Rule, 219.
    - b. Construed with Specifications, 219.
      - (1) General Rule, 219.
      - (2) Claim Referring to Specification, 219.
        - (a) In General, 219.

- (b) Claim for Invention "Substantially as Described," etc., 219.
- (3) Claim Not to Be Enlarged by Specification, 220.
- 6. Invention Not to Be Extended beyond Claim, 221.
  - a. General Rule, 221.
  - b. Failure to Claim as Disclaimer or Dedication, 222.
  - c. Limitations of Claim, 223.
    - (1) Self-Imposed Limitations, 223.
    - (2) Limitations Imposed by Patent Office, 223.
- 7. Construed with Reference to Prior State of Art, 224.
  - a. General Rule, 224.
  - b. Pioneer Patents, 224.
    - (1) What Are Pioneer Patents, 224.
    - (2) Entitled to Broad Construction, 224.
  - c. Patents for Improvements, 225.
- 8. Construction of Patentee Adopted, 226.
- 9. Construed to Embrace Equivalents, 227.
- 10. Construction of Patents for Combinations, 227.
- 11. Parol Evidence, 227.
- 12. Province of Court and Jury, 228.

## VIII. Reissue, 228.

- A. Definition and Nature, 228.
- B. Power to Grant Reissue, 228.
- C. Persons Entitled to Reissue, 228.
- D. Grounds for Reissue, 229.
  - 1. Necessity for Patent to Be Inoperative or Invalid, 229.
  - 2. Necessity for Mistake, Accident, etc., 229.
  - 3. Mistake of Patent Office, 230.
- E. Defects Remediable by Reissue, 230.
  - 1. Defects in Specification, 230.
  - 2. Defects in Claim, 230.
    - a. Right to Restate Claim, 230.
    - b. Right to Restrict or Narrow Claim, 230.
    - c. Right to Enlarge or Expand Claim, 230.
    - d. Inclusion of Matters Rejected, Disclaimed or Omitted, 232.
  - 3. Defects or Errors in Drawings, 232.
- F. Application, 232.
  - 1. Time for Application, 232.
    - a. In General, 232.
    - b. Reissue to Correct Description, 233.
    - c. Reissue Expanding or Enlarging Claim, 233.
    - d. Reissue Narrowing Claim, 234.
    - e. Excuses for Delay, 235.
    - f. Burden of Proof as to Reasonableness of Time, 235.
    - g. Reasonableness of Time a Question of Law, 235.
  - 2. Form and Requisites, 235.
  - 3. Filing Application, 235.
- G. Identity of Invention, 235.
  - 1. General Rule, 235.
  - 2. Adding New Essential Elements, 236.
  - 3. Omission of Essential Elements of Original, 237.
  - 4. Substitution of Essential Elements, 238.
    - a. In General, 238.
    - b. Substitution of Equivalents, 238.
  - 5. Change in Reissue of Combinations, 238.
  - 6. Patent for Machine Reissued as Process, 239.
  - 7. Patent for Process Reissued as Composition, 239.



8. Patent for Process Reissued for Both Process and Product, 239.
  9. Evidence of Identity, 239.
    - a. Presumptions, 239.
    - b. Admissibility, 240.
  10. Province of Court and Jury, 240.
  - H. Surrender of Original on Reissue, 240.
  - I. Effect of Decision of Commissioner on Application, 241.
  - J. Divisional Reissue, 242.
  - K. Operation and Effect of Reissue, 242.
    1. Effect on Original Claims of Invalidity of New Claims in Reissue, 242.
    2. Relation Back to Original Patent, 242.
      - a. In General, 242.
      - b. Effect of Use of Patented Article between Dates of Original and Reissued Patent, 242.
  - L. Term and Duration of Reissue, 242.
- IX. Date and Duration, 243.**
- A. Date, 243.
  - B. Duration, 243.
    1. Duration of Original Term, 243.
    2. Duration Limited by Foreign Patent, 243.
    3. Extension or Renewal, 245.
- X. Disclaimer, 245.**
- A. Power to Disclaim, 245.
  - B. Persons Entitled to Disclaim, 246.
  - C. Office of Disclaimer, 246.
  - D. When Excess May Be Disclaimed, 247.
    1. Necessity for Accident, Mistake, etc., 247.
    2. Excess Must Be Separable, 247.
  - E. Form and Requisites, 247.
  - F. Time of Filing, 247.
  - G. Operation and Effect, 248.
- XI. Notice of Patent or Marking Patent Articles, 248.**
- XII. Sales, Assignments, Mortgages and Licenses, 249.**
- A. Sales and Assignments of Patent Rights, 249.
    1. Right to Sell or Assign, 249.
      - a. General Rule, 249.
      - b. Splitting Up Patent, 249.
    2. Who Are Assignees, 249.
    3. Time of Transfer, 249.
    4. Contract of Sale or Assignment, 249.
      - a. What Constitutes, 249.
      - b. Form and Requisites, 250.
        - (1) In General, 250.
        - (2) Who May Make, 250.
        - (3) Writing, 250.
        - (4) Sealing, 250.
        - (5) Recording, 250.
        - (6) Compliance with State Statutes, 251.
      - c. Construction, 251.
        - (1) General Rules, 251.
          - (a) Intention as Governing, 251.
          - (b) Several Contracts Construed Together, 251.
          - (c) Parol Evidence to Vary, 251.
        - (2) Rights Passing By Contract, 251.

- (3) Reservations to Patentee, 251.
- 5. Rights and Liabilities of Transferee, 251.
  - a. In General, 251.
  - b. Rights of Transferee, 252.
    - (1) General Rule, 252.
    - (2) What Passes to Transferee, 252.
      - (a) Title and Right to Control, 252.
      - (b) Extensions and Renewals, 252.
      - (c) Improvement, 254.
      - (d) Reissues, 255.
      - (e) After-Acquired Title, 255.
      - (f) Right to Sue for Prior Infringement, 255.
    - (3) Assignee for Specific Territory, 255.
      - (a) Sale for Use Elsewhere, 255.
      - (b) Sale Elsewhere of Product of Patented Machine, 256.
      - (c) Action for Breach of Contract, 256.
        - aa. Right of Action, 256.
        - bb. Damages, 256.
    - (4) Right to Replace Worn Out Parts, 256.
    - (5) Transfer of Contract by Assignee, 256.
  - c. Liability of Assignee for Royalties, 256.
    - (1) In General, 256.
    - (2) Part of Claim Denied by Patent Office, 256.
    - (3) Estoppel to Impeach Patent, 257.
    - (4) Accounting to Assignor for Share of Royalties Derived from Licenses, 257.
- 6. Actions against Transferee, 257.
  - a. Actions for Royalties, 257.
  - b. Actions for Purchase Money, 258.
- 7. Actions for Fraudulent Prevention of Sale, 258.
- B. Mortgages of Patent Rights, 258.
- C. Licenses, 258.
  - 1. What Constitutes, 258.
  - 2. Creation, 259.
    - a. Necessity of Writing, 259.
    - b. Implied Licenses, 259.
      - (1) In General, 259.
      - (2) Inventions by Employees, 259.
  - 3. Rights and Liabilities of Licensee, 260.
    - a. License to Use Patent in "Own Establishment," 260.
    - b. Contract Prohibiting Sale of Competing Devices, 260.
      - (1) Validity of Contract, 260.
      - (2) Construction and Operation, 260.
    - c. License for Specific Devices Obtained before Issuance of Patent, 260.
    - d. Estoppel to Deny Use of Patent, 260.
  - 4. Transfer of License, 261.
  - 5. Duration of License, 261.
  - 6. Termination of License, 261.
    - a. Death of Licensee, 261.
    - b. Dissolution of Corporation Holding License, 261.
    - c. Revocation, 261.
  - 7. Specific Performance of Licensee's Contract, 261.
- D. Right of Purchaser of Specific Patented Articles, 262.
- E. Power of State to Regulate or Prohibit Sale of Patented Articles, 262.
  - 1. General Rule, 262.

2. Prohibiting Sale, 262.
3. Requiring License of Persons Selling Patented Articles, 263.
4. Regulating Form and Requisites of Contract for Sale of Patent Rights, 263.

### **XIII. Infringement, 263.**

#### **A. What Constitutes, 263.**

1. Definitions, 263.
2. Identity, 263.
  - a. Identity of Principle, 263.
    - (1) Necessity for Identity of Principle, 263.
    - (2) What Constitutes, 265.
      - (a) In General, 265.
      - (b) Device Outside of Patentee's Claim, 266.
        - aa. In General, 266.
        - bb. Omission of Essentials of Claim, 266.
        - cc. Device within Letter, but Not within Principle, of Claim, 268.
        - dd. Colorable Avoidance of Claim, 269.
      - (c) Formal Variations, 269.
        - aa. General Rule, 269.
        - bb. When Form Material Element of Patent, 270.
      - (d) As Dependent on Scope of Patent, 271.
        - aa. Pioneer Patents, 270.
        - bb. Patents for Improvements, 272.
      - (e) Use of Equivalents, 274.
        - aa. General Rule, 274.
        - bb. Range of Equivalents, 274.
        - cc. What Constitutes, 275.
          - (aa) Chemical Equivalent, 275.
          - (bb) Mechanical Equivalent, 275.
      - (f) Accidental Adoption of Immaterial Feature, 276.
      - (g) Effect of Superiority or Inferiority, of Later Device, 277.
        - aa. Superiority, 277.
        - bb. Inferiority, 277.
    - b. Identity of Result, 277.
    - c. Application of Patented Device to New Use, 278.
3. Particular Acts as Constituting Infringement, 278.
  - a. Use of Old Part of Patented Device, 278.
  - b. Use of Device on Foreign Vessels in Domestic Ports, 278.
  - c. Use of Patented Improvements by Original Patentee, 278.
  - d. Use of Original Patent by Patentee of Improvements, 278.
  - e. Sale in United States of Patented Article Purchased Abroad, 278.
  - f. Repair or Reconstruction of Patented Article, 279.
    - (1) Articles Licensed for Use Once Only, 279.
    - (2) Replacing Worn Out Parts, 279.
4. Infringement of Particular Kinds of Patents, 279.
  - a. Patent for Machine, 279.
    - (1) In General, 279.
    - (2) Identity of Principle, 279.
    - (3) Identity of Result, 279.
    - (4) Replacing Worn Out Parts, 279.
    - (5) Sale of Product of Machine, 280.
  - b. Patent for Process, 280.



- c. Patent for Design, 281.
  - d. Combinations, 282.
    - (1) General Rule, 282.
    - (2) Use of Less or More Elements than Used in First Combination, 283.
      - (a) Use of Less than all Elements of First Combination, 283.
        - aa. General Rule, 283.
        - bb. Substitution of Element for One Omitted, 284.
          - (aa) New Element or Element Performing New Service, 284.
          - (bb) Equivalent for Omitted Element, 285.
      - (b) Use of More Elements than Used in First Combination, 286.
    - (3) Combination of Both New and Old Elements, 286.
  - e. Product or Manufacture, 286.
- B. Remedies for Infringement, 287.**
- 1. Jurisdiction, 287.
    - a. In What Courts Jurisdiction Vested, 287.
    - b. Effect of Expiration of Patent Pending Suit, 287.
    - c. Equity Jurisdiction, 287.
    - d. Action against Government, 288.
  - 2. Parties, 288.
    - a. Parties Plaintiff, 288.
      - (1) General Rules, 288.
        - (a) Persons "Interested," 288.
        - (b) Patentee, 288.
        - (c) Personal Representatives of Patentee, 288.
      - (2) As Affected by Assignment of Patent, 289.
        - (a) Infringement before Assignment, 289.
        - (b) Infringement after Assignment, 289.
          - aa. Assignment of Whole Interest, 289.
          - bb. Assignment of Part Interest, 289.
            - (aa) Undivided Part, 289.
            - (bb) Assignment for Particular Territory, 289.
            - (cc) Assignment of Interest in Proceeds, 290.
        - cc. Where Contract to Assign Is Not Perfected, 290.
      - (3) As Affected by Mortgage of Patent, 290.
      - (4) As Affected by License, 290.
        - (a) Right of Licensee to Sue, 290.
          - aa. General Rule, 290.
          - bb. Where Patentee Is Infringer, 291.
        - (b) Action after Death of Licensee, 291.
      - (5) Objections for Misjoinder, 292.
    - b. Parties Defendant, 292.
  - 3. Limitations and Laches, 292.
    - a. Limitation, 292.
    - b. Laches, 293.
  - 4. Pleadings, 293.
    - a. Declaration or Bill, 293.
      - (1) Suit to Be Based on Patent Infringed, 293.
      - (2) Averment That Plaintiff Is First Inventor, 293.
      - (3) Averment of Notice of Patent, 293.

- (4) Suit on Renewal or Reissue, 293.
- b. Plea or Answer, 294.
  - (1) Necessity for and Sufficiency of Averments, 294.
    - (a) Want of Novelty or Invention, 294.
    - (b) Prior Invention, 294.
    - (c) Prior Sale or Use, 294.
    - (d) Fraudulent Perfection of Another's Patent, 294
    - (e) License, 294.
    - (f) Want of Notice of Patent, 294.
  - (2) Admissions in Answer, 295.
  - (3) Amendment, 295.
  - (4) Notice of Defenses, 295.
    - (a) Necessity of Notice, 295.
    - (b) Object of Notice, 296.
    - (c) Form and Requisites, 296.
    - (d) Leave or Order of Court as Prerequisite to Notice, 297.
    - (e) Amendment or Substitution of Notice, 297.
- c. Demurrer, 297.
- 5. Evidence, 297.
  - a. Manner of Giving Evidence, 297.
  - b. Necessity of Producing Original in Suit on Reissue, 297.
  - c. Presumptions and Burden of Proof, 297.
    - (1) Novelty or Priority of Invention, 297.
      - (a) In General, 297.
      - (b) Where Patent Is Produced, 297.
    - (2) Notice of Patent, 299.
    - (3) License to Defendant, 299.
    - (4) Infringement, 299.
    - (5) Damages, 299.
    - (6) Notice of Special Matter, 299.
  - d. Competency of Witnesses, 300.
  - e. Admissibility, 300.
    - (1) Declarations of Patentee, 300.
    - (2) Expert Evidence, 300.
    - (3) Prior Patents, 300.
    - (4) Patent under Which Defendant Claims, 301.
    - (5) Prior State of Art, 301.
  - f. Weight and Sufficiency, 301.
- 6. Variance, 301.
- 7. Dismissal, 301.
- 8. Instructions, 301.
- 9. Issues Out of Chancery, 302.
- 10. Province of Court and Jury, 302.
- 11. Recovery of Damages, Profits or Penalties, 302.
  - a. Damages in Actions at Law, 302.
    - (1) Time for Which Damages Are to Be Estimated, 302.
    - (2) Measure and Elements, 303.
      - (a) Measure of Damages, 303.
        - aa. General Rule, 303.
        - bb. Actual Not Speculative, 303.
        - cc. Royalties or License Fees, 303.
        - dd. Profits of Defendant, 304.
        - ee. Damages Paid by Other Infringers, 304.
        - ff. Province of Court and Jury, 304.
      - (b) Elements, 304.

- aa. Damages Accruing before Date of Reissue, 304.
- bb. Deductions Made in Selling Prices to Meet That of Infringers, 304.
- cc. Counsel Fees, 304.
- (c) Evidence, 305.
  - aa. Necessity of Proving Damages, 305.
  - bb. Burden of Proof, 305.
  - cc. Admissibility, 305.
- (d) Jury Must Find Actual Damages, 305.
- (e) Power of Court to Increase Damages, 305.
- (f) Excessive Damages, 305.
- (g) Mitigation of Damages, 305.
- b. Recovery of Profits in Suits in Equity, 305.
  - (1) Right to Recover, 305.
    - (a) General Rule, 305.
    - (b) Profits Due to Unpatented Features of Device, 306.
    - (c) Where Patent Does Not Contribute to Profits, 306.
    - (d) Where Defendant's Business Unprofitable, 306.
    - (e) Recovery by Assignee, 307.
  - (2) Amount Recoverable, 307.
    - (a) Actual, Not Possible, Profits, 307.
    - (b) Profits Must Be Fruits of Invention, 307.
    - (c) Where Entire Profits Due to Invention, 308.
    - (d) Sale or Use of Patented Device Alone, 308.
    - (e) Sale or Use of Patented Device in Connection with Other Elements, 308.
      - aa. General Rule, 308.
      - bb. Patented Improvements, 309.
    - (f) Deductions in Favor of Defendant, 310.
      - aa. In General, 310.
      - bb. Interest on Investment, Plant, etc., 310.
      - cc. Cost of Imperfect or Worthless Devices, 310.
      - dd. Improvements Made by Defendant, 311.
      - ee. Payments Made to Patentee to Protect Purchasers from Defendant from Suit, 311.
  - (3) Evidence of Profits, 311.
    - (a) Burden of Proof, 311.
      - aa. General Rule, 311.
      - bb. Where Only Part of Profits Due to Use of Invention, 311.
    - (b) Admissibility, 311.
  - (4) Interest on Profits, 311.
    - (a) Right to Interest, 311.
    - (b) Time for Which Interest Runs, 311.
  - (5) Damages in Addition to Profits, 312.
    - c. Penalty for Infringement of Design Patents, 312.
- 12. Judgment or Decree, 312.
  - a. Form and Requisites, 312.
  - b. Conclusiveness, 312.
  - c. Effect of Recovery and Satisfaction of Judgment, 313.
- 13. Costs, 312.
- 14. Injunction against Suit for Infringement, 313.
  - a. Right to Enjoin, 313.
  - b. Contempt for Disobedience of Injunction, 314.
- 15. Arbitration and Award, 314.



**XIV. Duty of Patent Office to Furnish Copies of Patent, 314.**

A. Nature and Extent of Duty, 314.

B. Action for Refusal to Furnish Copies, 315.

**XV. Taxation of Patented Articles, 315.****XVI. Setting Aside Patent, 315.**

A. Mode of Proceeding, 315.

B. Grounds for Setting Aside, 316.

C. Collateral Attack, 317.

**CROSS REFERENCES.**

See the titles *APPEAL AND ERROR*, vol. 1, p. 333; *ASSIGNMENTS*, vol. 2, p. 549; *BANKRUPTCY*, vol. 2, p. 792; *COPYRIGHT*, vol. 4, p. 602; *COURTS*, vol. 4, p. 861; *DAMAGES*, vol. 5, p. 157; *DEDICATION*, vol. 5, p. 235; *ESTOPPEL*, vol. 5, p. 913; *EVIDENCE*, vol. 5, p. 1004; *EXECUTIONS*, vol. 6, p. 84; *EXPERT AND OPINION EVIDENCE*, vol. 6, p. 200; *INJUNCTIONS*, vol. 6, p. 1022; *INSOLVENCY*, vol. 7, p. 1; *INTERPRETATION AND CONSTRUCTION*, vol. 7, p. 257; *JUDGMENTS AND DECREES*, vol. 7, p. 544; *JUDICIAL NOTICE*, vol. 7, p. 672; *LACHES*, vol. 7, p. 790; *LICENSES*, vol. 7, p. 869; *LIMITATION OF ACTIONS AND ADVERSE POSSESSION*, vol. 7, p. 900; *PRESUMPTIONS AND BURDEN OF PROOF*.

As to effect of appeal in patent cases, see the title *APPEAL AND ERROR*, vol. 2, p. 285. As to appellate jurisdiction of supreme court, see the title *APPEAL AND ERROR*, vol. 1, p. 699. As to appealability of decisions in patent cases, as dependent on amount in controversy, see the title *APPEAL AND ERROR*, vol. 1, p. 907, et seq. As to dismissal of appeal in suit for infringement where controversy is compromised, or otherwise terminated pending appeal, see the title *APPEAL AND ERROR*, vol. 2, p. 290. As to cost of printing record on appeal in cross suit for infringement, see the title *APPEAL AND ERROR*, vol. 2, p. 248, note 61. As to effect of concurrent decision of two lower courts on questions of fact, see the title *APPEAL AND ERROR*, vol. 1, pp. 1012, 1014. As to patent right as passing to trustee in bankruptcy, see the title *BANKRUPTCY*, vol. 2, p. 807, note 76.

**I. Definitions and Distinctions.**

**A. Definitions.**—A patent in its broadest sense is a grant of some privilege, property or authority made by the government or sovereign of a country.<sup>1</sup> In this sense it includes patents for lands.<sup>2</sup> In its most usual acceptation, the word "patent" denotes those instruments by which the United States secures to inventors for a limited time the exclusive right to their own inventions,<sup>3</sup> and it is in this sense that it is used in this article. Patents are not to be regarded as monopolies but as public franchises given to patentees by way of compensating them for benefits conferred on the public.<sup>4</sup>

**B. Distinctions.**—1. *DISTINGUISHED FROM COPYRIGHT.*—There is a wide distinction between a patent and a copyright. A copyrighted book or article describing what would be the proper subject of a patent does not protect the sub-

1. Patent in its broadest sense.—Bouv. L. Dict.

2. "Patent" as including land patents.—United States v. American Bell Tel. Co., 167 U. S. 224, 238, 42 L. Ed. 144.

3. Patent in usual sense.—Bouv. L. Dict.; Seymour v. Osborne, 11 Wall. 516, 20 L. Ed. 33; United States v. American Bell Tel. Co., 167 U. S. 224, 42 L. Ed. 144. And see post, "Distinguished from Land Patents," I, B, 2.

4. Letters-patent are not to be regarded as monopolies, created by the executive authority at the expense and to the prejudice of all the community except the persons therein named as patentees, but as

public franchises granted to the inventors of new and useful improvements for the purpose of securing to them, as such inventors, for the limited term therein mentioned, the exclusive right and liberty to make and use and vend to others to be used their own inventions, as tending to promote the progress of science and the useful arts, and as matter of compensation to the inventors for their labor, toil, and expense in making the inventions, and reducing the same to practice for the public benefit, as contemplated by the constitution and sanctioned by the laws of congress. Seymour v. Osborne, 11 Wall. 516, 533, 20 L. Ed. 33.

ject of the patent from use by other persons. The only effect of the copyright is to secure the exclusive right of printing and publishing the book, while the invention or discovery, if no patent is taken out, is given to the public.<sup>5</sup>

2. **DISTINGUISHED FROM LAND PATENTS.**—The patent for land is a conveyance to an individual of that which is the absolute property of the government and to which, but for the conveyance, the individual would have no right or title. It is a transfer of tangible property; of property in existence before the right is conveyed; of property which the government has the full right to dispose of as it sees fit, and may retain to itself or convey to one individual or another; and it creates a title which lasts for all time. On the other hand, the patent for an invention is not a conveyance of something which the government owns. It does not convey that which, but for the conveyance, the government could use and dispose of as it sees fit, and to which no one save the government has any right or title except for the conveyance. But for the patent the thing patented is open to the use of any one.<sup>6</sup>

## II. Property in Inventions or Patent Rights.

**A. Unpatented Invention as Property.**—The patentee has no exclusive right of property in his invention, except under and by virtue of the statutes securing it to him, and according to the regulations and restrictions of those statutes.<sup>7</sup> Hence, legislation as to unpatented inventions is not open to the objec-

5. **Distinguished from copyright.**—*Baker v. Selden*, 101 U. S. 99, 102, 25 L. Ed. 841. See, generally, the title COPYRIGHT, vol. 4, p. 602.

The difference between patents and copyrights may be illustrated by reference to the case of medicines. Certain mixtures are found to be of great value in the healing art. If the discoverer writes and publishes a book on the subject (as regular physicians generally do), he gains no exclusive right to the manufacture and sale of the medicine; he gives that to the public. If he desires to acquire such exclusive right, he must obtain a patent for the mixture as a new art, manufacture, or composition of matter. He may copyright his book, if he pleases; but that only secures to him the exclusive right of printing and publishing his book. So of all other inventions or discoveries. *Baker v. Selden*, 101 U. S. 99, 102, 25 L. Ed. 841.

The copyright of a book on perspective, no matter how many drawings and illustrations it may contain, gives no exclusive right to the modes of drawing described, though they may never have been known or used before. By publishing the book, without getting a patent for the art, the latter is given to the public. The fact that the art is described in the book by illustrations of lines and figures which are reproduced in practice in the application of the art, makes no difference. Those illustrations are the mere language employed by the author to convey his ideas more clearly. Had he used words of description instead of diagrams (which merely stand in the place of words), there could not be the slightest doubt that others, applying the art to practical use, might lawfully draw the lines and diagrams which were in the author's mind,

and which he thus described by words in his book. *Baker v. Selden*, 101 U. S. 99, 103, 25 L. Ed. 841.

6. **Distinguished from land patents.**—*United States v. American Bell Tel. Co.*, 167 U. S. 224, 238, 42 L. Ed. 144. As to land patents, see the title PUBLIC LANDS.

7. **Rights of inventor before obtaining patent.**—*Gayler v. Wilder*, 10 How. 477, 493, 13 L. Ed. 504; *Brown v. Duchesne*, 19 How. 183, 195, 15 L. Ed. 595; *Marsh v. Nichols, etc., Co.*, 128 U. S. 605, 612, 32 L. Ed. 538; *Dable Grain Shovel Co. v. Flint*, 137 U. S. 41, 43, 34 L. Ed. 618; *Kirk v. United States*, 163 U. S. 49, 55, 41 L. Ed. 66; *Durham v. Seymour*, 161 U. S. 235, 238, 40 L. Ed. 682; *Shaw v. Cooper*, 7 Pet. 292, 8 L. Ed. 689.

The right of property which a patentee has in his invention, and his right to its exclusive use, is derived altogether from these statutory provisions, and an inventor has no right of property in his invention, upon which he can maintain a suit, unless he obtains a patent for it, according to the acts of congress; and his rights are to be regulated and measured by these laws, and cannot go beyond them. *Brown v. Duchesne*, 19 How. 183, 195, 15 L. Ed. 595.

The inventor of a new and useful improvement certainly has no exclusive right to it, until he obtains a patent. This right is created by the patent, and no suit can be maintained by the inventor against any one for using it before the patent is issued. But the discoverer of a new and useful improvement is vested by law with an inchoate right to its exclusive use, which he may perfect and make absolute by proceeding in the manner which the law requires. *Gayler v. Wilder*,

tion that it deprives the inventor of his invention without due process of law or without just compensation.<sup>8</sup>

**B. Patent Rights as Property**—1. **GENERAL RULES.**—It is well settled that a patent right is property and entitled to protection as such.<sup>9</sup> A patent right is incorporeal,<sup>10</sup> personal property,<sup>11</sup> is not subject to execution,<sup>12</sup> and passes upon the patentee's death, to his personal representatives in trust for his next of kin.<sup>13</sup>

2. **APPROPRIATION BY GOVERNMENT.**—The United States has no more right than any private person to use a patented invention without license of the patentee or making compensation to him.<sup>14</sup>

10 How. 477, 493, 13 L. Ed. 504; *Marsh v. Nichols, etc., Co.*, 128 U. S. 605, 32 L. Ed. 538.

The word "secure" as used in the constitution conferring power on congress to secure to inventors the exclusive rights to their inventions, etc., could not mean the protection of an acknowledged legal right; it refers to inventors, as well as authors; and it has never been pretended by any one, either in this country or in England, that an inventor has a perpetual right, at common law, to sell the thing invented. *Wheaton v. Peters*, 8 Pet. 591, 8 L. Ed. 1055.

8. **Legislation as to unpatented inventions.**—*Dable Grain Shovel Co. v. Flint*, 137 U. S. 41, 34 L. Ed. 618.

Section 7, ch. 88, of the act of March 3, 1839, in force when a patent was obtained, and which provides that any person or corporation who has or shall have with the knowledge and consent of an inventor, purchased or constructed any newly invented machine, prior to the application by the inventor for a patent, shall be held to possess the right to use and lend to others to be used, the specific machine so made or purchased without liability therefor to the inventor or any other person interested in such invention, is not unconstitutional as depriving the inventor of his property without due process of law and without compensation, when applied to the case of an inventor who authorized the company by which he was employed to use his machine before he had made application for letters patent. *Dable Grain Shovel Co. v. Flint*, 137 U. S. 41, 43, 34 L. Ed. 618.

9. **Patent as property.**—*Patterson v. Kentucky*, 97 U. S. 501, 24 L. Ed. 1115; *De La Vergne, etc., Machine Co. v. Featherstone*, 147 U. S. 209, 222, 37 L. Ed. 138; *Ager v. Murray*, 105 U. S. 126, 127, 26 L. Ed. 942; *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33; *Bement v. National Harrow Co.*, 186 U. S. 70, 88, 46 L. Ed. 1058; *Wilson v. Rousseau*, 4 How. 646, 11 L. Ed. 1141; *Consolidated Fruit-Jar Co. v. Wright*, 94 U. S. 92, 96, 24 L. Ed. 68; *Cammeyer v. Newton*, 94 U. S. 225, 226, 24 L. Ed. 72; *Machine Co. v. Murphy*, 97 U. S. 120, 121, 24 L. Ed. 935; *Densmore v. Scofield*, 102 U. S. 375, 378, 26 L. Ed. 214.

The law has impressed upon patent rights all the qualities and characteristics

of property for the specified period, and has enabled patentees to hold and deal with them the same as with any other property. *Bement v. National Harrow Co.*, 186 U. S. 70, 88, 46 L. Ed. 1058; *Wilson v. Rousseau*, 4 How. 646, 11 L. Ed. 1141.

"A patent for an invention is as much property as a patent for land. The right rests on the same foundation, and is surrounded and protected by the same sanctions. There is a like larger domain held in ownership by the public. Neither an individual nor the public can trench upon or appropriate what belongs to the other. The inventor must comply with the conditions prescribed by law. If he fails to do this he acquires no title, and his invention or discovery, no matter what it may be, is lost to him, and is henceforward no more his than if he had never been in any wise connected with it. It is made, thereupon, as it were by accretion, irrevocably a part of the domain which belongs to the community at large." *Consolidated Fruit-Jar Co. v. Wright*, 94 U. S. 92, 96, 24 L. Ed. 68.

10. **Incorporeal property.**—*De La Vergne, etc., Machine Co. v. Featherstone*, 147 U. S. 209, 222, 37 L. Ed. 138; *Patterson v. Kentucky*, 97 U. S. 501, 24 L. Ed. 1115; *Waterman v. Mackenzie*, 138 U. S. 252, 260, 34 L. Ed. 923; *Root v. Railway Co.*, 105 U. S. 189, 212, 26 L. Ed. 975.

11. **Personal property.**—*De La Vergne, etc., Machine Co. v. Featherstone*, 147 U. S. 209, 222, 37 L. Ed. 138; *Patterson v. Kentucky*, 97 U. S. 501, 24 L. Ed. 1115; *Bement v. National Harrow Co.*, 186 U. S. 70, 88, 46 L. Ed. 1058; *Wilson v. Rousseau*, 4 How. 646, 11 L. Ed. 1141.

12. **Patent right not subject to execution.**—See the title **EXECUTIONS**, vol. 5, p. 89.

13. **Descent and distribution.**—*Williams' Executors*, 817; *Schouler's Executors*, § 200; *Williams' Pers. Prop.* 271; *Patterson v. Kentucky*, 97 U. S. 501, 24 L. Ed. 1115; *De La Vergne, etc., Machine Co. v. Featherstone*, 147 U. S. 209, 222, 37 L. Ed. 138; *Bement v. National Harrow Co.*, 186 U. S. 70, 88, 46 L. Ed. 1058; *Wilson v. Rousseau*, 4 How. 646, 11 L. Ed. 1141.

14. **Right of United States to use patent.**—*United States v. Burns*, 12 Wall. 246, 252, 20 L. Ed. 388; *Cammeyer v. Newton*, 94 U. S. 225, 235, 24 L. Ed. 72; *James v. Campbell*, 104 U. S. 356, 358,



### III. Patent Laws.

**A. Power of Congress.**—Congress has power to promote the progress of science and useful arts by securing for limited times to inventors the exclusive right to their discoveries,<sup>15</sup> and may make all laws necessary and proper for carrying this power into execution.<sup>16</sup> The power of congress is plenary, and as there are no restraints on the exercise of this power, there can be no limitation of the right of congress to enact laws at their pleasure,<sup>17</sup> provided rights of property in existing patents are not taken away.<sup>18</sup> The power thus granted to congress is, however, domestic in its character, and necessarily confined within the limits of the United States, and it has no power to regulate commerce, or the vehicles of commerce, which belong to a foreign nation, and occasionally visit our ports in their commercial pursuits.<sup>19</sup>

**B. Object of Patent Laws.**—The object of the patent laws is to encourage useful invention and to secure to the public the advantages to be derived therefrom.<sup>20</sup> The monopoly given to the patentee is by way of compensating him for the benefits conferred on the public by his invention.<sup>21</sup>

**C. Construction of Patent Laws.**—While many of the provisions of our patent act are derived from the principles and practice, which have pre-

26 L. Ed. 786; *Hollister v. Benedict, etc.*, Mfg. Co., 113 U. S. 59, 67, 28 L. Ed. 901; *United States v. Palmer*, 128 U. S. 262, 270, 272, 32 L. Ed. 442; *International Postal Supply Co. v. Bruce*, 194 U. S. 601, 608, 48 L. Ed. 1134; *Belknap v. Schild*, 161 U. S. 10, 16, 40 L. Ed. 599; *Fletcher v. Blake*, 131 U. S., appx. cxcvii, 26 L. Ed. 156; *Fink v. O'Neil*, 106 U. S. 272, 282, 27 L. Ed. 196; *Solomons v. United States*, 137 U. S. 342, 34 L. Ed. 667.

The government of the United States when it grants letters-patent for a new invention or discovery in the arts, confers upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the government itself, without just compensation. *James v. Campbell*, 104 U. S. 356, 357, 26 L. Ed. 786.

"Our law differs from that of England as to the right of the government to use, without compensation, an invention for which it has granted letters of patent." *Belknap v. Schild*, 161 U. S. 10, 15, 40 L. Ed. 599.

**Remedies where government makes use of patent.**—See post, "Action against Government," XIII, B, 1, d.

**15. Power of congress.**—Const., art. 1, § 8.

**Meaning of word "secure"** in constitution conferring power on congress to secure to inventors the exclusive right to their inventions or discoveries for a limited period, see ante, "Unpatented Invention as Property, II, A.

**16. Power of congress to legislation as to patents.**—*United States v. Duell*, 172 U. S. 576, 583, 43 L. Ed. 559.

**17. Power of congress plenary.**—*McClurg v. Kingsland*, 1 How. 202, 206, 11 L. Ed. 102.

**18. Property in patents not to be taken away.**—*McClurg v. Kingsland*, 1 How.

202, 206, 11 L. Ed. 102; *Bloomer v. McQuewan*, 14 How. 539, 14 L. Ed. 532.

It can hardly be maintained that congress could lawfully deprive a citizen of the use of his property after he had purchased the absolute and unlimited right from the inventor, and when that property was no longer held under the protection and control of the general government, but under the protection of the state, and on that account subject to state taxation. *Bloomer v. McQuewan*, 14 How. 539, 553, 14 L. Ed. 532.

**19. Power of congress domestic.**—*Brown v. Duchesne*, 19 How. 183, 195, 15 L. Ed. 595. See the title INTER-STATE AND FOREIGN COMMERCE, vol. 7, p. 269.

**20. Object of patent laws.**—*Mitchell v. Tilghman*, 19 Wall. 287, 418, 22 L. Ed. 125; *Grant v. Raymond*, 6 Pet. 218, 8 L. Ed. 376.

**21. Object of monopoly.**—*Grant v. Raymond*, 6 Pet. 218, 8 L. Ed. 376; *Brown v. Duchesne*, 19 How. 183, 195, 15 L. Ed. 595.

Patent laws secure to the inventor a just remuneration from those who derive a profit or advantage, within the United States, from his genius and mental labors. *Brown v. Duchesne*, 19 How. 183, 195, 15 L. Ed. 595.

The monopoly secured to the inventor is the reward stipulated for advantages derived by the public from the exertions of individuals; and is intended as a stimulus to those exertions. The laws which are passed to give effect to this purpose ought to be construed in the spirit in which they have been made and to execute the contract fairly on the part of the United States, where the full benefit has been received, if this can be done, without transcending the inventions of the statutes, or countenancing acts which

vailed in the construction of the law of England in relation to patents, the construction placed on the patent laws of England was not adopted by us.<sup>22</sup> When congress is legislating to protect inventors, its attention is necessarily attracted to the authority under which it is acting, and it ought not lightly to be presumed that there was an intention to go beyond it, and exercise another and distinct power, conferred for a different purpose.<sup>23</sup> Even if congress can decide the fact, that an individual is an author or inventor, the court can never presume congress to have decided that question in a general act, the words of which do not render such a construction unavoidable.<sup>24</sup>

#### IV. Persons Entitled to Patents.

**A. First Inventor**—1. **NECESSITY FOR PATENT TO BE OBTAINED BY FIRST INVENTOR.**—In order for a patent to be valid it must be obtained by the first inventor,<sup>25</sup> and a patent to be obtained by any one else is void.<sup>26</sup> The fact that the first inventor procures the patent to be issued in the name of another person, as the inventor, does not validate the patent.<sup>27</sup>

2. **WHO IS FIRST INVENTOR.**—Whoever first perfects a machine is entitled to the patent, and is the real inventor, although others may have previously had the idea and made some experiments towards putting it in practice. He is the inventor and is entitled to the patent who first brought the machine to perfection and made it capable of useful operation.<sup>28</sup> While one who discovers the main principle of the invention may make use of the suggestions or writing of others,<sup>29</sup> suggestions which go to make up a complete and perfect machine,

are fraudulent, or may prove mischievous. *Grant v. Raymond*, 6 Pet. 218, 8 L. Ed. 376.

**22. Construction of English laws not adopted.**—*Pennock v. Dialogue*, 2 Pet. 1, 7 L. Ed. 327. See, generally, the title **STATUTES**.

Where English statutes, such, for instance, as the statute of frauds, and the statute of limitations, have been adopted into our own legislation, the known and settled construction of those statutes by courts of law, has been considered as silently incorporated into the acts, or has been received with all the weight of authority. This is not the case with the English statutes of monopolies, which contain an exception, on which the grants of patents for inventions have issued in that country; the language of that clause in the statute is not identical with the patent law of the United States; but the construction of it adopted by the English courts, and the principles and practice which have long regulated the grants of their patents, as they must have been known, and are tacitly referred to in some of the provisions of our own statute, afford materials to illustrate it. *Pennock v. Dialogue*, 2 Pet. 1, 7 L. Ed. 327.

**23. Construed without reference to other's source of congressional power.**—*Brown v. Duchesne*, 19 How. 183, 195, 15 L. Ed. 595.

**24. Congress not presumed to have decided question of novelty.**—*Evans v. Eaton*, 3 Wheat. 454, 513, 4 L. Ed. 433.

**25. Patent to be obtained by first inventor.**—*Agawam Co. v. Jordan*, 7 Wall. 583, 19 L. Ed. 177; *Whitely v. Swayne*,

7 Wall. 685, 19 L. Ed. 199; *Loom Co. v. Higgins*, 105 U. S. 580, 26 L. Ed. 1177; *Coffin v. Ogden*, 18 Wall. 120, 124, 21 L. Ed. 821; *Gayler v. Wilder*, 10 How. 477, 13 L. Ed. 504; *Evans v. Eaton*, 3 Wheat. 454, 4 L. Ed. 433; *Kirk v. United States*, 163 U. S. 49, 41 L. Ed. 66.

**26. Patent to one not inventor void.**—*Kennedy v. Hazelton*, 128 U. S. 667, 32 L. Ed. 576; *Thompson v. Hall*, 130 U. S. 117, 32 L. Ed. 876; *Collar Co. v. Van Dusen*, 23 Wall. 530, 23 L. Ed. 128; *Tilghman v. Proctor*, 102 U. S. 707, 26 L. Ed. 279; *Hartshorn v. Saginaw Barrel Co.*, 119 U. S. 664, 30 L. Ed. 539.

**27. Consent of inventor to issuance of patent to stranger.**—*Kennedy v. Hazelton*, 128 U. S. 667, 32 L. Ed. 576; *Hartshorn v. Saginaw Barrel Co.*, 119 U. S. 664, 30 L. Ed. 539.

**28. Who is first inventor.**—*Agawam Co. v. Jordan*, 7 Wall. 583, 602, 19 L. Ed. 177; *Coffin v. Ogden*, 18 Wall. 120, 124, 21 L. Ed. 821; *The Telephone Cases*, 126 U. S. 1, 31 L. Ed. 863; *Whitely v. Swayne*, 7 Wall. 685, 19 L. Ed. 199; *Loom Co. v. Higgins*, 105 U. S. 580, 26 L. Ed. 1177; *Seymour v. Osborne*, 11 Wall. 516, 552, 20 L. Ed. 33.

The inventor who first perfects a machine, and makes it capable of useful operation, is entitled to the patent. *Agawam Co. v. Jordan*, 7 Wall. 583, 19 L. Ed. 177.

**29. Suggestions or writings of others.**—*Collar Co. v. Van Dusen*, 23 Wall. 530, 564, 23 L. Ed. 128; *Agawam Co. v. Jordan*, 7 Wall. 583, 19 L. Ed. 177; *O'Reilly v. Morse*, 15 How. 62, 14 L. Ed. 601.

An inventor does not lose his right to

embracing the substance of all that is embodied in the patent subsequently issued to the party to whom the suggestions were made, will defeat the patent because the real invention or discovery belongs to another.<sup>30</sup>

3. EFFECT OF LACHES OR DELAY BY FIRST INVENTOR.—While the first inventor may delay his application for a patent for a reasonable time in order to perfect his invention,<sup>31</sup> he must not be guilty of unreasonable delay, either in perfecting his device or in applying for a patent after its perfection.<sup>32</sup>

**B. As between Employer and Employee**—1. GENERAL RULES.—An employee, performing all the duties assigned to him in his department of service, may exercise his inventive faculties in any direction he chooses, with the assurance that whatever invention he may thus conceive and perfect is his individual property.<sup>33</sup> But no suggestion from the employee not amounting to a new method or arrangement which in itself is a complete invention, is sufficient to deprive the employer of the exclusive property in the perfected improvement.<sup>34</sup> Where the employee, in the course of experiments arising from the employment, makes discoveries ancillary to the plan and preconceived design of the employer, such suggested improvements are in general to be regarded as the property of the party who discovered the original principle, and they may be embodied in his patent as part of his invention.<sup>35</sup>

2. GOVERNMENT EMPLOYEES.—There is no difference between the government and any other employer in this respect. The mere fact that a person is

a patent because he has made inquiries or sought information from other persons. If a combination of different elements be used, the inventors may confer with men as well as consult books to obtain this various knowledge. *O'Reilly v. Morse*, 15 How. 62, 14 L. Ed. 601. See post, "Employee Engaged to Perfect Patent," IV, B, 4.

30. Substantial suggestions from others.—*Agawam Co. v. Jordan*, 7 Wall. 583, 603, 19 L. Ed. 177; *Collar Co. v. Van Dusen*, 23 Wall. 530, 23 L. Ed. 128; *Atlantic Works v. Brady*, 107 U. S. 192, 27 L. Ed. 438; *O'Reilly v. Morse*, 15 How. 62, 14 L. Ed. 601.

A patent cannot be sustained when the patentee derived his whole idea from the suggestions of another. *Atlantic Works v. Brady*, 107 U. S. 192, 27 L. Ed. 438.

Suggestions from another, made during the progress of such experiments, in order that they may be sufficient to defeat a patent subsequently issued, must have embraced the plan of the improvement, and must have furnished such information to the person to whom the communication was made that it would have enabled an ordinary mechanic, without the exercise of any ingenuity and special skill on his part, to construct and put the improvement in successful operation. *Agawam Co. v. Jordan*, 7 Wall. 583, 602, 19 L. Ed. 177.

31. Delay to perfect invention.—*Kendall v. Winsor*, 21 How. 322, 16 L. Ed. 165.

32. Delay in perfecting patent or applying for invention.—*Kendall v. Winsor*, 21 How. 322, 328, 16 L. Ed. 165; *Loom Co. v. Higgins*, 105 U. S. 580, 26 L. Ed. 1177. See post, "Public Use or Sale before Obtaining Patent," V, E.

Where two inventors discovered the

same device, the second is entitled to a patent, where the first delayed his application for a patent until after the lapse of two years after the device was in public use. *Loom Co. v. Higgins*, 105 U. S. 580, 26 L. Ed. 1177.

33. General rule.—*Solomons v. United States*, 137 U. S. 342, 346, 34 L. Ed. 667; *Gill v. United States*, 160 U. S. 426, 40 L. Ed. 480; *Collar Co. v. Van Dusen*, 23 Wall. 530, 564, 23 L. Ed. 128; *Agawam Co. v. Jordan*, 7 Wall. 583, 602, 19 L. Ed. 177; *Dalzell v. Dueber, etc., Mfg. Co.*, 149 U. S. 315, 321, 37 L. Ed. 749; *Hapgood v. Hewitt*, 119 U. S. 226, 30 L. Ed. 369.

Persons employed, as much as employers, are entitled to their own independent inventions, and if their suggestions constitute the whole substance of the improvement the patent, if granted to the employer, is invalid, because the real invention or discovery belongs to the person who made the suggestion. *Collar Co. v. Van Dusen*, 23 Wall. 530, 564, 23 L. Ed. 128; *Agawam Co. v. Jordan*, 7 Wall. 583, 602, 19 L. Ed. 177.

A manufacturing corporation, which has employed a skilled workman, for a stated compensation, to take charge of its works, and to devote his time and services to devising and making improvements in articles there manufactured, is not entitled to a conveyance of patents obtained for inventions made by him while so employed, in the absence of express agreement to that effect. *Hapgood v. Hewitt*, 119 U. S. 226, 30 L. Ed. 369; *Dalzell v. Dueber, etc., Mfg. Co.*, 149 U. S. 315, 321, 37 L. Ed. 749.

34. *Agawam Co. v. Jordan*, 7 Wall. 583, 19 L. Ed. 177.

35. Inventions ancillary to one on which employee is engaged.—*Collar Co.*



in the employ of the government does not preclude him from making improvements in the machines with which he is connected, and obtaining patents therefor, as his individual property, and in such case the government would have no more right to seize upon and appropriate such property, than any other proprietor would have.<sup>36</sup>

3. **PATENT PERFECTED AT EMPLOYER'S EXPENSE.**—When one is in the employ of another in a certain line of work, and devises an improved method or instrument for doing that work, and uses the property of his employer and the services of other employees to develop and put his invention in practicable form and explicitly assents to the use by his employer of such invention, a jury, or a court trying the facts, is warranted in finding that he has so far recognized the obligations of service flowing from his employment and the benefits resulting from his use of the property, and the assistance of the coemployees, of his employer, as to have given to such employer an irrevocable license to use such invention.<sup>37</sup>

4. **EMPLOYEE ENGAGED TO PERFECT PATENT.**—If one is employed to devise or perfect an instrument, or a means for accomplishing a prescribed result, he can-

*v. Van Dusen*, 23 Wall. 530, 564, 23 L. Ed. 128; *Agawam Co. v. Jordan*, 7 Wall. 583, 19 L. Ed. 177.

36. **Inventions by government employees.**—*Solomons v. United States*, 137 U. S. 342, 346, 34 L. Ed. 667; *Gill v. United States*, 160 U. S. 426, 40 L. Ed. 480; *United States v. Burns*, 12 Wall. 246, 20 L. Ed. 388.

If an officer in the military service, not specially employed to make experiments with a view to suggest improvements, devises a new and valuable improvement in arms, tents, or any other kind of war material, he is entitled to the benefit of it, and to letters-patent for the improvement from the United States, equally with any other citizen not engaged in such service; and the government cannot, after the patent is issued, make use of the improvement any more than a private individual, without license of the inventor or making compensation to him. *United States v. Burns*, 12 Wall. 246, 252, 20 L. Ed. 388.

37. **Perfection of patents at employee's expense.**—*Solomons v. United States*, 137 U. S. 342, 346, 34 L. Ed. 667; *Lane, etc., Co. v. Locke*, 150 U. S. 193, 199, 37 L. Ed. 1049; *McAleer v. United States*, 150 U. S. 424, 430, 37 L. Ed. 1130; *McClurg v. Kingsland*, 1 How. 202, 11 L. Ed. 102; *Gill v. United States*, 160 U. S. 426, 429, 40 L. Ed. 480; *Keyes v. Eureka Consol. Min. Co.*, 158 U. S. 150, 39 L. Ed. 929. See, also, *Hapgood v. Hewitt*, 119 U. S. 226, 30 L. Ed. 369.

If a person employed in the manufactory of another, while receiving wages, makes experiments at the expense and in the manufactory of his employer, has his wages increased in consequence of the useful result of the experiments, and makes the article invented and permits his employer to use it, no compensation for its use being paid or demanded; and then obtains a patent, these facts will justify the presumption of a license to

use the invention. *McClurg v. Kingsland*, 1 How. 202, 11 L. Ed. 102.

An employee paid by salary or wages, who devises an improved method of doing his work, using the property or labor of his employer to put his invention into practical form, and assenting to the use of such improvements by his employer, cannot, under the law of estoppel in pais, by taking out a patent on such invention, recover the royalty or other compensation for such use. *Gill v. United States*, 160 U. S. 426, 433, 40 L. Ed. 480, citing and affirming *Solomons v. United States*, 137 U. S. 342, 34 L. Ed. 667; *Lane, etc., Co. v. Locke*, 150 U. S. 193, 37 L. Ed. 1049; *McAleer v. United States*, 150 U. S. 424, 37 L. Ed. 1130; *Keyes v. Eureka Consol. Min. Co.*, 158 U. S. 150, 39 L. Ed. 929; *McClurg v. Kingsland*, 1 How. 202, 11 L. Ed. 102.

An engineer and draftsman at a fixed salary, in the employ of the defendants, and using their tools and patterns, invented a stop valve, which the firm used with his knowledge in certain elevators constructed by them until its dissolution, and after that, a corporation organized by the firm used it in the same way and with the like knowledge. It was held that the patentee, having made no claim for remuneration for the use of the patent, saying that he did not desire to disturb his friendly relations with the firm, might be presumed to have recognized an obligation to permit them to use the invention. *Lane, etc., Co. v. Locke*, 150 U. S. 193, 37 L. Ed. 1049.

In *Keyes v. Eureka Consol. Min. Co.*, 158 U. S. 150, 39 L. Ed. 929, a person in the employ of a smelting company invented a new method of withdrawing molten metal from a furnace, took out a patent for it, and permitted his employer to use it without charge so long as he remained in its employ, which was about ten years. It was held that there was at least an implied license to use the im-

not, after successfully accomplishing the work for which he was employed, plead title thereto as against his employer.<sup>38</sup>

5. **PATENT PERFECTED AFTER TERMINATION OF EMPLOYMENT.**—Parties engaging the services of an inventor, under an agreement that he shall devote his ingenuity to the perfecting of a machine for their benefit, can lay no claim to improvements conceived by him after the expiration of such agreement.<sup>39</sup>

6. **LICENSE TO EMPLOYER**—a. *Express License.*—Where an employee gives a written license to the employer to use the patent during the term for which it is granted, the license is binding on him, and is not to be varied by extrinsic evidence.<sup>40</sup>

b. *Implied License.*—As to implied license to employer to use patent perfected by employee while in service, and as to the transferrability and termination thereof, see post, "Inventions by Employees," XII, C, 2, b, (2).

**C. As between Partners.**—A partner who furnished capital will be charged, in a case strongly indicating injustice, with half profits in favor of another of inventive genius, and whom after valuable discoveries he sought to get rid of, alleging, even with truth, intemperate habits and bad character.<sup>41</sup>

provement without payment of royalties during the continuance of his employment, and also a license to use the invention upon the same terms and royalties fixed for other parties, from the time the patentee left the defendant's employment. *Gill v. United States*, 160 U. S. 426, 431, 40 L. Ed. 480.

38. **Employee engaged to perfect device.**—*McAleer v. United States*, 150 U. S. 424, 430, 37 L. Ed. 1130; *Solomons v. United States*, 137 U. S. 342, 34 L. Ed. 667; *Gill v. United States*, 160 U. S. 426, 435, 40 L. Ed. 480.

That which he has been employed and paid to accomplish becomes, when accomplished, the property of his employer. Whatever rights as an individual he may have had in and to his inventive powers, and that which they are able to accomplish, he has sold in advance to his employer. *McAleer v. United States*, 150 U. S. 424, 430, 37 L. Ed. 1130; *Solomons v. United States*, 137 U. S. 342, 34 L. Ed. 667.

One Clark, who was in the employ of the government as chief of the bureau of engraving and printing, conceived the idea of a self-canceling stamp, and prepared a die or plate therefor, making use of the services of the employees of the bureau and the property of the government. While his application for a patent was pending, he assigned his rights to the appellant *Solomons*, in payment of an account between them. On taking out the patent, the appellant notified the commissioner of internal revenue that he was the owner of the patent, and demanded compensation for the use of the stamp on whiskey barrels. It further appeared that Clark, as chief of the bureau, had been assigned the duty of devising a stamp for this purpose, and it was not understood or intimated that the stamp which he was to devise should be patented, or become his personal property. Indeed, before the final adoption of the stamp,

he said that the design was his own, but he should make no charge to the government therefor, as he was employed on a salary by the government, and had used its machinery and other property in the perfection of the stamp. It was held that, having been employed and paid to devise a new stamp, the invention, when accomplished, became the property of the government, and that the patentee had practically sold in advance whatever he might be able to accomplish in that direction. *Solomons v. United States*, 137 U. S. 342, 34 L. Ed. 667; *Gill v. United States*, 160 U. S. 426, 431, 40 L. Ed. 480.

39. **Improvements perfected after termination of service.**—*Appleton v. Bacon*, 2 Black 699, 17 L. Ed. 338.

40. **Express license to employer.**—*McAleer v. United States*, 150 U. S. 424, 432, 37 L. Ed. 1130; *Gill v. United States*, 160 U. S. 426, 432, 40 L. Ed. 480.

A mechanic in the employment of the treasury department having perfected and patented an improvement in paper-perforating machines granted and licensed the treasury department for a valuable consideration "the right to make and use machines containing the improvements claimed in said letters-patent to the full end of the term for which said letters-patent are granted." The instrument constituted a contract fully executed on both sides, which gave the right to the treasury department, without liability for remuneration thereafter, to make and use the machines containing the patented improvement to the end of the term for which the letters were granted. It was a complete legal obligation in itself, with no uncertainty as to the object or extent of the engagement, and could not be defeated, contradicted, or varied by proof of any collateral parol agreement inconsistent with its terms. *McAleer v. United States*, 150 U. S. 424, 432, 37 L. Ed. 1130, citing *Seitz v. Brewers' Refrigerating Mach. Co.*, 141 U. S. 510, 35 L. Ed. 837.

41. **Partners in patent.**—*Ambler v.*

**D. Aliens.**—Aliens are as much entitled to patent their inventions as citizens.<sup>42</sup>

## V. Patentability.

**A. What May Be Patented**—1. **IN GENERAL.**—A patent may be obtained for a new or useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof.<sup>43</sup>

2. **MACHINES**—a. *Definitions.*—The term “machine” includes every mechanical device or combination of mechanical powers and devices to perform some function and produce a certain effect or result.<sup>44</sup> A machine is a thing. A process is an act or a mode of acting. The one is visible to the eye—an object of perpetual observation. The other is a conception of the mind, seen only by its effects when being executed.<sup>45</sup>

b. *Patentability.*—Machines are, of course, a proper subject of a patent, provided they possess the usual requisites of patentability,<sup>46</sup> and this is true although the produce or manufacture made by them are old.<sup>47</sup>

3. **PRODUCTS OR MANUFACTURES.**—The patent laws expressly provide for the issuance of patents for “manufactures.”<sup>48</sup> A process and the product of a process may be both new and patentable, and are wholly disconnected and independent of each other.<sup>49</sup>

4. **COMPOSITIONS OF MATTER.**—“Compositions of matter” are made the subject of a patent by the statute.<sup>50</sup> Whether a patent is for a process or a composition is especially a question of construction, and is for the court to decide; and whether a patent for a process is the same invention as a patent for a composition is cer-

Whipple, 20 Wall. 546, 22 L. Ed. 403. See, generally, the title **PARTNERSHIP**, ante, p. 73.

42. **Aliens.**—Shaw v. Cooper, 7 Pet. 292, 8 L. Ed. 689.

**Foreign patents as limiting duration of American patent,** see post, “Date and Duration,” IX.

43. **What may be patented.**—Rubber-Tip Pencil Co. v. Howard, 20 Wall. 498, 505, 22 L. Ed. 410.

44. **Machine defined.**—Risdon, etc., Locomotive Works v. Medart, 158 U. S. 68, 78, 39 L. Ed. 899; Corning v. Burden, 15 How. 252, 14 L. Ed. 683; Tilghman v. Proctor, 102 U. S. 707, 722, 26 L. Ed. 279.

Burden's patent for “a new and useful machine for rolling puddler's balls and other masses of iron, in the manufacture of iron,” was a patent for a machine, and not a process, although the language of the claim was equivocal. Corning v. Burden, 15 How. 252, 14 L. Ed. 683.

Construction of Dubois's patent, of September 23rd, 1862, “for building piers for bridges, and setting the same.” Held, to be for a device or instrument used in a process, and not for the process itself. Railroad Co. v. Dubois, 12 Wall. 47, 20 L. Ed. 265.

An improvement in the construction of a jail is not patentable as a machine. Jacobs v. Baker, 7 Wall. 295, 19 L. Ed. 200; Fond Du Lac County v. May, 137 U. S. 395, 34 L. Ed. 714; May v. Juneau County, 137 U. S. 408, 34 L. Ed. 729.

45. **Machine distinguished from process.**—Tilghman v. Proctor, 102 U. S. 707, 728, 26 L. Ed. 279.

46. **Patentability.**—Rubber Co. v. Goodyear, 9 Wall. 788, 796, 19 L. Ed. 566; O'Reilly v. Morse, 15 How. 62, 119, 14 L. Ed. 601; Tilghman v. Proctor, 102 U. S. 707, 727, 26 L. Ed. 279; Burr v. Duryee, 1 Wall. 531, 17 L. Ed. 650.

47. **Machines making known product.**—Rubber Co. v. Goodyear, 9 Wall. 788, 19 L. Ed. 566.

48. **Products or manufactures.**—Rubber Co. v. Goodyear, 9 Wall. 788, 19 L. Ed. 566; O'Reilly v. Morse, 15 How. 62, 119, 14 L. Ed. 601; Tilghman v. Proctor, 102 U. S. 707, 727, 26 L. Ed. 279; Burr v. Duryee, 1 Wall. 531, 17 L. Ed. 650.

49. **Where process patentable.**—Rubber Co. v. Goodyear, 9 Wall. 788, 19 L. Ed. 566.

A manufacture or a product of a process may be no novelty, and, therefore, unpatentable; while the process or agency by which it is produced may be both new and useful. The Wood-Paper Patent, 23 Wall. 566, 23 L. Ed. 31.

50. **Composition of matter.**—Rubber Co. v. Goodyear, 9 Wall. 788, 19 L. Ed. 566; O'Reilly v. Morse, 15 How. 62, 119, 14 L. Ed. 601; Tilghman v. Proctor, 102 U. S. 707, 727, 26 L. Ed. 279; Burr v. Duryee, 1 Wall. 531, 17 L. Ed. 650; Cochran v. Badische, etc., Soda Fabrik, 111 U. S. 293, 28 L. Ed. 433.

**An improvement in the construction of a jail is not patentable as a composition of matter.** Jacobs v. Baker, 7 Wall. 295, 19 L. Ed. 200; Fond Du Lac County v. May, 137 U. S. 395, 34 L. Ed. 714; May v. Juneau County, 137 U. S. 408, 34 L. Ed. 729.



tainly a mere question of law.<sup>51</sup>

5. ARTS AND PROCESSES—*a. What Constitutes*—(1) *What Constitutes an Art*.—The term “art,” applies to all those cases where the application of a principle is the most important part of the invention, and where the machinery, apparatus or other means, by which the principle is applied, are incidental only and not of the essence of his invention. It applies also to all those cases where the result effect, or manufactured article is old, but the invention consists in a new process or method of producing such result, effect, or manufacture.<sup>52</sup>

(2) *What Constitutes a Process*.—A process within the meaning of patent law is a mode of treatment of certain materials to produce a given result. It is an act or a series of acts, performed upon the subject matter to be transformed and reduced to a different state or thing.<sup>53</sup> The mixing of certain substances together, or the heating of a substance to a certain temperature, is a process.<sup>54</sup> But the term process is often used in a more vague sense, in which it cannot be the subject of a patent.<sup>55</sup>

51. *Powder Co. v. Powder Works*, 98 U. S. 126, 134, 25 L. Ed. 77.

52. “Art” defined.—Curtis on Pat. 10, quoted in *O'Reilly v. Morse*, 15 How. 62, 130, 14 L. Ed. 601.

“Now, without attempting to define the term ‘art’ with logical accuracy, we take as examples of it, some things which, in their concrete form, exhibit what we all concede to come within a correct definition, such as the art of printing, that of telegraphy, or that of photography. The art of tanning leather might also come within the category, because it requires various processes and manipulations.” *Jacobs v. Baker*, 7 Wall. 295, 297, 19 L. Ed. 200.

53. *Process defined*.—*Fond Du Lac County v. May*, 137 U. S. 395, 407, 34 L. Ed. 714; *Cochrane v. Deener*, 94 U. S. 780, 788, 24 L. Ed. 139; *Risdon, etc., Locomotive Works v. Medart*, 158 U. S. 68, 39 L. Ed. 899; *Eames v. Andrews*, 122 U. S. 40, 30 L. Ed. 1064.

An invention which requires that certain things be done with certain substances in a certain order, is patentable as a process. *Cochrane v. Deener*, 94 U. S. 780, 788, 24 L. Ed. 139.

Where a result or effect is produced by chemical action, by the operation or application of some element or power of nature, or of one substance to another, such modes, methods, or operations are called processes. *Corning v. Burden*, 15 How. 252, 14 L. Ed. 683; *Risdon, etc., Locomotive Works v. Medart*, 158 U. S. 68, 39 L. Ed. 899; *Tilghman v. Proctor*, 102 U. S. 707, 722, 26 L. Ed. 279.

An invention is patentable as a process and outside of the field of mechanical contrivance, when it consists in the new application of power of nature, by which new application a new and useful result is attained. Thus a patent for an improved method of constructing artesian wells, the element of novelty in which consists in the driving of a tube tightly into the earth, without removing the earth upwards, to serve as a well pit, and attaching thereto a pump, which process

puts to practical use the new principle of forcing the water in the water-bearing strata of the earth from the earth into a well pit, by the use of artificial power applied to create a vacuum, in the manner described, is one for a process. *Eames v. Andrews*, 122 U. S. 40, 55, 30 L. Ed. 1064; *Beedle v. Bennett*, 122 U. S. 71, 30 L. Ed. 1074.

An improvement in the construction of a jail is not patentable as a product of manufacture. *Jacobs v. Baker*, 7 Wall. 295, 19 L. Ed. 200; *Fond Du Lac County v. May*, 137 U. S. 395, 34 L. Ed. 714; *May v. Juneau County*, 137 U. S. 408, 34 L. Ed. 729.

The arts of tanning, dyeing, making water-proof cloth, vulcanizing india rubber, smelting ores, and numerous others are usually carried on by processes, as distinguished from machines. One may discover a new and useful improvement in the process of tanning, dyeing, etc., irrespective of any particular form of machinery or mechanical device. And another may invent a labor-saving machine, by which this operation or process may be performed, and each may be entitled to his patent. *Corning v. Burden*, 15 How. 252, 14 L. Ed. 683; *Risdon, etc., Locomotive Works v. Medart*, 158 U. S. 68, 39 L. Ed. 899; *Tilghman v. Proctor*, 102 U. S. 707, 722, 26 L. Ed. 279.

54. *Tilghman v. Proctor*, 102 U. S. 707, 728, 26 L. Ed. 279.

55. *Process in vague sense not subject of patent*.—Thus we say that a board is undergoing the process of being planed, grain of being ground, iron of being hammered or rolled. Here the term is used subjectively or passively as applied to the material operated on, and not to the method or mode of producing that operation, which is by mechanical means, and the use of a machine, as distinguished from a process. In this use of the term it represents the function of a machine, or the effect produced by it on the material subjected to the action of the machine. But it is well settled that a man cannot have a patent for the function

b. *Patentability*.—(1) *In General*.—A process *eo nomine* is not made the subject of a patent in our act of congress. It is included under the general term: "useful art."<sup>56</sup> If new and useful, a process is just as patentable as a piece of machinery.<sup>57</sup> The fact that the product is patentable does not defeat the patentability of the process.<sup>58</sup>

(2) *Process Consisting of Function of Machine*.—A process of manufacture consisting solely of the operation of a machine is not patentable, since it is well settled that the patent cannot issue for the function of a machine.<sup>59</sup>

or abstract effect of a machine, but only for the machine which produces it. *Corning v. Burden*, 15 How. 252, 268, 14 L. Ed. 683; *Risdon, etc., Locomotive Works v. Medart*, 158 U. S. 68, 39 L. Ed. 899; *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 555, 42 L. Ed. 1136.

**56. Process is an "art" within patent laws.**—*Risdon, etc., Locomotive Works v. Medart*, 158 U. S. 68, 39 L. Ed. 899; *Corning v. Burden*, 15 How. 252, 14 L. Ed. 683; *Cochrane v. Deener*, 94 U. S. 780, 788, 24 L. Ed. 139; *Tilghman v. Proctor*, 102 U. S. 707, 723, 26 L. Ed. 279.

Letters patent for a process, irrespective of the particular mode or form of apparatus for carrying it into effect, are admissible under the patent laws of the United States. *Tilghman v. Proctor*, 102 U. S. 707, 26 L. Ed. 279.

**57. Process patentable if new and useful.**—*Cochrane v. Deener*, 94 U. S. 780, 788, 24 L. Ed. 139; *LeRoy v. Tatham*, 14 How. 156, 175, 14 L. Ed. 367; *Risdon, etc., Locomotive Works v. Medart*, 158 U. S. 68, 39 L. Ed. 899; *Grant v. Walter*, 148 U. S. 547, 553, 37 L. Ed. 552; *McClurg v. Kingsland*, 1 How. 202, 11 L. Ed. 102; *Burr v. Duryee*, 1 Wall. 531, 17 L. Ed. 650; *The Telephone Cases*, 126 U. S. 1, 533, 31 L. Ed. 863; *Corning v. Burden*, 15 How. 252, 267, 14 L. Ed. 683; *Tilghman v. Proctor*, 102 U. S. 707, 722, 724, 725, 26 L. Ed. 279; *New Process Fermentation Co. v. Maus*, 122 U. S. 413, 427, 428, 30 L. Ed. 1193.

A patent for an improved process for manufacturing cast-iron railroad wheels, by retarding their cooling by a second application of heat, until all parts of the wheel are raised to the same temperature, and then permitting the heat to subside gradually, is patentable. *Risdon, etc., Locomotive Works v. Medart*, 158 U. S. 68, 75, 39 L. Ed. 899.

A patent for a process in manufacturing flour, which consists in passing the ground meal through a series of bolting reels composed of cloth of progressively finer meshes, and at the same time subjecting the meal to blasts or currents of air, by which the superfine flour is separated and the impurities so eliminated as to be capable of being ground and rebolted, so as to produce superfine flour, is valid, and the patentee is not limited to any special arrangement of machinery. *Cochrane v. Deener*, 94 U. S. 780, 24 L. Ed. 139. See, also, *Risdon,*

*etc., Locomotive Works v. Medart*, 158 U. S. 68, 39 L. Ed. 899.

In *Tilghman v. Proctor*, 102 U. S. 707, 26 L. Ed. 279, a patent for a process for separating the component parts of fats and oils, so as to render them better adapted to the uses of the arts, or, as stated in the claim, "the manufacturing of fat acids and glycerine from fatty bodies by the action of water at a high temperature and pressure," was sustained.

The word "means" as used in the statute providing that a patent may issue to one who discovers a means of producing a useful result is not limited to a machine or apparatus but includes a process. Either may be the means of producing a useful result. *Tilghman v. Proctor*, 102 U. S. 707, 728, 26 L. Ed. 279.

**58. Effect of patentability of product.**—*Rubber Co. v. Goodyear*, 9 Wall. 788, 19 L. Ed. 566.

**59. Function of machine not patentable as a process.**—*Risdon, etc., Locomotive Works v. Medart*, 158 U. S. 68, 39 L. Ed. 899; *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 553, 42 L. Ed. 1136. See ante, "Function of Machine," V, A, 7.

A patent for a process and a patent for an implement or a machine are very different things. *Powder Co. v. Powder Works*, 98 U. S. 126, 25 L. Ed. 77; *James v. Campbell*, 104 U. S. 356, 376, 26 L. Ed. 786.

A process, and a machine for applying the process, are not necessarily one and the same invention. They are generally distinct and different. The process or act of making a postmark and canceling a postage stamp by a single blow or operation, as a subject of invention is a totally different thing in the patent law from a stamp constructed for performing that process. *James v. Campbell*, 104 U. S. 356, 377, 26 L. Ed. 786.

It is for the discovery or invention of some practicable method or means of producing a beneficial result or effect, that a patent is granted, and not for the result or effect itself. *Corning v. Burden*, 15 How. 252, 14 L. Ed. 683; *Risdon, etc., Locomotive Works v. Medart*, 158 U. S. 68, 39 L. Ed. 899; *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 555, 42 L. Ed. 1136.

A patent for an improved process of manufacturing belt pulleys, being a purely mechanical process, the various steps of which are set forth in more or less detail,

(3) *Process Carried into Effect by Machinery*—(a) *General Rule*.—A process of manufacture which involves chemical or other similar elemental action is patentable, though mechanism may be necessary in its application or for the purpose of carrying it out.<sup>60</sup>

(b) *Where Machinery Is Old*.—A new process for obtaining a result is patentable although the mechanism used is all old.<sup>61</sup>

(4) *New Process for Making Old Substance*.—A new chemical process for

cannot be sustained where no reference is made in the claims to the mechanism employed. *Risdon, etc., Locomotive Works v. Medart*, 158 U. S. 68, 71, 39 L. Ed. 899.

60. *Risdon, etc., Locomotive Works v. Medart*, 158 U. S. 68, 39 L. Ed. 899; *New Process Fermentation Co. v. Maus*, 122 U. S. 413, 30 L. Ed. 1193; *Cochrane v. Deener*, 94 U. S. 780, 24 L. Ed. 139; *Corning v. Burden*, 15 How. 252, 14 L. Ed. 683; *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 553, 42 L. Ed. 1136; *Tilghman v. Proctor*, 102 U. S. 707, 36 L. Ed. 279; *O'Reilly v. Morse*, 15 How. 62, 133, 14 L. Ed. 601.

Most processes which have been held to be patentable require the aid of mechanism in their practicable application, but where such mechanism is subsidiary to the chemical action, the fact that the patentee may be entitled to a patent upon his mechanism does not impair his right to a patent for the process; since he would lose the benefit of his real discovery, which might be applied in a dozen different ways, if he were not entitled to such patent. *Risdon, etc., Locomotive Works v. Medart*, 158 U. S. 68, 72, 39 L. Ed. 899.

It is when the term process is used to represent the means or method of producing a result that it is patentable, and it will include all methods or means which are not effected by mechanism or mechanical combinations. *Corning v. Burden*, 15 How. 252, 14 L. Ed. 683; *Risdon, etc., Locomotive Works v. Medart*, 158 U. S. 68, 78, 39 L. Ed. 899; *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 553, 42 L. Ed. 1136.

61. *New process of producing result by old mechanism*.—*New Process Fermentation Co. v. Maus*, 122 U. S. 413, 428, 30 L. Ed. 1193; *Lawther v. Hamilton*, 124 U. S. 1, 31 L. Ed. 325; *McClurg v. Kingsland*, 1 How. 202, 11 L. Ed. 102; *Burr v. Duryee*, 1 Wall. 531, 17 L. Ed. 650; *Cochrane v. Deener*, 94 U. S. 780, 788, 24 L. Ed. 139; *Risdon, etc., Locomotive Works v. Medart*, 158 U. S. 68, 75, 39 L. Ed. 899. See, also, *LeRoy v. Tatham*, 22 How. 132, 137, 16 L. Ed. 366; *LeRoy v. Tatham*, 14 How. 156, 14 L. Ed. 367.

"The apparatus for carrying out the process is of secondary consequence, and may itself be old, separately considered, without invalidating the patent, if the process be new and produces a new result." *New Process Fermentation Co.*

*v. Maus*, 122 U. S. 413, 428, 30 L. Ed. 1193.

A patent may be obtained for a process of working oil seeds to obtain oil, although the process consists of the use of rollers, mixing machinery, and an hydraulic press all of which are old. *Lawther v. Hamilton*, 124 U. S. 1, 6, 31 L. Ed. 325; *Crescent Brewing Co. v. Gottfried*, 128 U. S. 158, 167, 32 L. Ed. 390.

"In *New Process Fermentation Co. v. Maus*, 122 U. S. 413, 30 L. Ed. 1193, a patent was sustained for preparing and preserving beer for the market, which consisted in holding it under controllable pressure of carbonic acid gas from the beginning of the krausen stage until such time as it is transferred to kegs and bunged. The process was strictly a chemical one, and was patentable within all the authorities upon the subject, although the mechanism by which the process was applied was also set forth in the patent." *Risdon, etc., Locomotive Works v. Medart*, 158 U. S. 68, 76, 39 L. Ed. 899.

A workman in a foundry observed, in pumping water into a bucket, that the water entering at a tangent to the circle of the bucket, acquired a circular motion, diminishing when it approached the centre, where bits of straw and other lighter materials would be concentrated. In casting iron rolls, the metal was required to have this rotary motion for the same purpose. This effect had previously been produced by stirring the liquid metal. The thought all at once struck the mind of this observer, that the application of this principle or law of nature might be beneficially made to the casting of rolls by merely introducing the metal at the bottom of the mould at a tangent. The thought being once suggested, it required no skill or invention to devise a plan for the application of the principle. This, though classed as an invention, partook more of the nature of a discovery. In that case the court say: "We find the invention consists solely in the angular direction given to the tube through which the metal is conducted into the cylinder in which the roll is cast. Every part of the machinery is old; the roll itself is no part of the invention." And yet, it was a patentable invention or discovery, though it came not within the description of the statute, as "machine, manufacture, or composition of matter." *McClurg v. Kingsland*, 1 How. 202, 11 L. Ed. 102. See, also, *Burr v. Duryee*, 1 Wall. 531, 568, 17 L. Ed. 650.



producing an old substance is patentable.<sup>62</sup>

(5) *Process of Applying New Principle or Law of Nature*.—One who first discovers that an element or law of nature can be made operative for the production of some valuable result, some new art, or the improvement of some known art and who devises the machinery or process to make it operative, and introduces it in a practical form to the knowledge of mankind, is entitled to a patent for the process.<sup>63</sup>

(6) *Combinations*.—When a patent is for an entire process made up of several constituent steps or stages, the patentee not pretending to be the inventor of those constituents, his claim to the process as an entirety does not secure to him the exclusive use of the constituents singly. What is secured is their use when arranged in the process.<sup>64</sup>

6. PRINCIPLES OR IDEAS.—A patent cannot issue for an abstract principle or idea, but only for the means by which it is made practically useful.<sup>65</sup>

**62. New process for producing old substance.**—*Cochrane v. Badische, etc.*, Soda Fabrik, 111 U. S. 293, 28 L. Ed. 433; *The Wood-Paper Patent*, 23 How. 566, 23 L. Ed. 31.

Thus a chemical process for producing alizarine is patentable where it was a product made artificially for the first time, although the same thing was previously well known, having been obtained by extracting it from madder root. *Cochrane v. Badische, etc.*, Soda Fabrik, 111 U. S. 293, 311, 28 L. Ed. 433.

**63. Process of applying new principle.**—*Mitchell v. Tilghman*, 19 Wall. 287, 392, 22 L. Ed. 125; *O'Reilly v. Morse*, 15 How. 62, 14 L. Ed. 601.

An invention may be good though the subject of it consists in the discovery of some principle of science or property of matter, never before known or used, by which some new and useful result is obtained, and such an invention or discovery may be the subject of a valid patent without including in the claim any new arrangement of machinery to accomplish the object, provided the inventor describes, as required in the patent law, the method, process, or means of applying the invention to practical use and of obtaining the described new and useful result. *Mitchell v. Tilghman*, 19 Wall. 287, 392, 22 L. Ed. 125.

**64. Combinations.**—*Mowry v. Whitney*, 14 Wall. 620, 20 L. Ed. 860; *O'Reilly v. Morse*, 15 How. 62, 132, 14 L. Ed. 601.

Where by a new combination of known powers, of which electro-magnetism is one, a person discovered a method by which intelligible marks or signs may be printed at a distance by means of the telegraph, it was held that he was entitled to a patent for the method or process thus discovered, but since he did not discover that the electro-magnetic current, used as motive power, in any other method, and with any other combination would do as well, he was not entitled to a patent for an electro-magnetic current as a motive power. *O'Reilly v. Morse*, 15 How. 62, 116, 14 L. Ed. 601.

**65. Principle or idea.**—*LeRoy v. Tat-*

*ham*, 22 How. 132, 136, 16 L. Ed. 366; *Rubber-Tip Pencil Co. v. Howard*, 20 Wall. 498, 507, 22 L. Ed. 410; *Fuller v. Yentzer*, 94 U. S. 288, 24 L. Ed. 103; *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 556, 42 L. Ed. 1136; *Burr v. Duryee*, 1 Wall. 531, 17 L. Ed. 650.

"The distinction between a patent for a principle and a patent which can be supported is, that you must have an embodiment of the principle in some practical mode described in the specification of carrying into actual effect; and then you take out your patent, not for the principle, but for the mode of carrying the principle into effect." *LeRoy v. Tatham*, 22 How. 132, 136, 16 L. Ed. 366.

However brilliant the discovery of the new principle may be, to make it useful it must be applied to some practical purpose. Short of this, no patent can be granted. *LeRoy v. Tatham*, 22 How. 132, 137, 16 L. Ed. 366.

The word "principle" is used by elementary writers on patent subjects, and sometimes in adjudications of courts, with such a want of precision in its application, as to mislead. It is admitted, that a principle is not patentable. A principle, in the abstract, is a fundamental truth; an original cause; a motive; these cannot be patented, as no one can claim in either of them an exclusive right. Nor can an exclusive right exist to a new power, should one be discovered in addition to those already known. Through the agency of machinery a new steam power may be said to have been generated. But no one can appropriate this power exclusively to himself, under the patent laws. The same may be said of electricity, and of any other power in nature, which is alike open to all, and may be applied to useful purposes by the use of machinery. In all such cases, the processes used to extract, modify, and concentrate natural agencies, constitute the invention. The elements of the power exist; the invention is not in discovering them, but in applying them to useful objects. Whether the machinery used be novel, or consist of a new

7. FUNCTION OF MACHINE.—It is well settled that a man cannot have a patent for the function or abstract effect of a machine, but only for the machine which produces it.<sup>66</sup>

8. DESIGNS.—Designs for ornamental purposes, or ornament and utility, or for new and useful shapes in articles of manufacture, are patentable.<sup>67</sup> The statutes which authorize the grant of a patent for designs contemplate not so much utility as appearance; and the thing invented or produced for which a patent is given is that which gives a peculiar or distinctive appearance to the manufacture or article to which it is applied.<sup>68</sup> The thing produced must have originality and beauty, and must be the product of the brain as well as the hand.<sup>69</sup>

combination of parts known, the right of the inventor is secured against all who use the same mechanical power, or one that shall be substantially the same. *LeRoy v. Tatham*, 14 How. 156, 175, 14 L. Ed. 367.

**66. Function of machine not patentable.**—*Morley Sewing Machine Co. v. Lancaster*, 129 U. S. 263, 32 L. Ed. 715; *The Corn-Planter Patent*, 23 Wall. 181, 23 L. Ed. 161; *Corning v. Burden*, 15 How. 252, 14 L. Ed. 683; *Risdon, etc., Locomotive Works v. Medart*, 158 U. S. 68, 39 L. Ed. 899; *Electric R. Signal Co. v. Hall R. Signal Co.*, 114 U. S. 87, 96, 29 L. Ed. 96; *O'Reilly v. Morse*, 15 How. 62, 120, 14 L. Ed. 601; *LeRoy v. Tatham*, 14 How. 156, 174, 14 L. Ed. 367; *Burr v. Duryee*, 1 Wall. 531, 581, 17 L. Ed. 650; *Fuller v. Yentzer*, 94 U. S. 288, 24 L. Ed. 103; *Wicke v. Ostrum*, 103 U. S. 461, 26 L. Ed. 409; *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 556, 42 L. Ed. 1136; *Rubber-Tip Pencil Co. v. Howard*, 20 Wall. 498, 22 L. Ed. 410; *Miller v. Eagle Mfg. Co.*, 151 U. S. 186, 201, 38 L. Ed. 121.

The end or purpose sought to be accomplished by the device is not the subject of a patent. The invention covered thereby must consist of new and useful means of obtaining that end. In other words the subject of a patent is the device or mechanical means by which the desired result is to be secured. *Carver v. Hyde*, 16 Pet. 513, 519, 10 L. Ed. 1051; *LeRoy v. Tatham*, 14 How. 156, 14 L. Ed. 367; *Corning v. Burden*, 15 How. 252, 14 L. Ed. 683; *Burr v. Duryee*, 1 Wall. 531, 17 L. Ed. 650; *Fuller v. Yentzer*, 94 U. S. 288, 24 L. Ed. 103; *Knapp v. Morss*, 150 U. S. 221, 227, 37 L. Ed. 1059; *Wollensak v. Sargent*, 151 U. S. 221, 227, 38 L. Ed. 137; *National Cash Register Co. v. Boston, etc., Recorder Co.*, 156 U. S. 502, 515, 39 L. Ed. 511.

It is not the result, effect, or purpose to be accomplished which constitutes invention, or entitles a party to a patent, but the mechanical means or instrumentalities by which the object sought is to be attained. *Miller v. Eagle Mfg. Co.*, 151 U. S. 186, 201, 38 L. Ed. 121.

"A single element or function of a patented invention cannot be made the

subject of a separate and subsequent patent." *Miller v. Eagle Mfg. Co.*, 151 U. S. 186, 201, 38 L. Ed. 121.

A patent is not good for an effect, or the result of a certain process, as that would prohibit all other persons from making the same thing by any means whatsoever. This, by creating monopolies, would discourage arts and manufactures, against the avowed policy of the patent laws. *LeRoy v. Tatham*, 14 How. 156, 174, 14 L. Ed. 367.

A claim for an effect produced by the use of electro-magnetism, distinct from the process or machinery necessary to produce it, is void. *O'Reilly v. Morse*, 15 How. 62, 120, 14 L. Ed. 601.

"A valid patent cannot be obtained for a process which involves nothing more than the operation of a piece of mechanism, or, in other words, for the function of a machine. The distinction between the two classes of cases nowhere better appears than in the earliest reported case upon that subject, viz, *Wyeth v. Stone*, 1 Story 273, in which the patentee claimed as his invention the cutting of ice of a uniform size by means of an apparatus worked by any other power than human. This was said to be a claim for an art or principle in the abstract, and not for any particular method or machinery by which ice was to be cut, and to be unobtainable in point of law, although the patent was held to be good for the machinery described in the specification." *Risdon, etc., Locomotive Works v. Medart*, 158 U. S. 68, 77, 39 L. Ed. 899.

**67. Designs.**—Rev. Stat., § 4929; *Smith v. Whitman Saddle Co.*, 148 U. S. 674, 677, 37 L. Ed. 606; *Gorham Co. v. White*, 14 Wall. 511, 20 L. Ed. 731.

A claim for arranging an elastic bed for printing designs, is not a claim for a design under the eleventh section of the act of March 2d, 1861, entitled "An act in addition to an act to promote the progress of the useful arts."—but is a claim for a device. *Clark v. Bousfield*, 10 Wall. 133, 19 L. Ed. 862.

**68. Appearance the test.**—*Gorham Co. v. White*, 14 Wall. 511, 20 L. Ed. 731.

**69. Originality and beauty required.**—*Smith v. Whitman Saddle Co.*, 148 U. S. 674, 679, 37 L. Ed. 606.



**B. Invention**—1. **NECESSITY OF INVENTION**.—In order to be patentable, a thing must not only be new and useful, but, according to the express provisions of the constitution and statutes, it must involve invention or discovery.<sup>70</sup>

2. **WHAT CONSTITUTES**—a. *Definitions*.—The word "invention" as used in the patent law is very hard to define.<sup>71</sup> While no accurate definition can be given, it may be stated that invention involves an operation of the intellect, and is a product of intuition, or of something akin to genius, as distinguished from mere mechanical skill,<sup>72</sup> and that the result must spring from the inventive faculty of the mind put forth in the search for new results, or new methods, creating what had not before existed, or bringing to life what lay hidden from vision.<sup>73</sup>

**70. Necessity for invention**.—*Burt v. Ivory*, 133 U. S. 349, 359, 33 L. Ed. 647; *Gardner v. Herz*, 118 U. S. 180, 191, 30 L. Ed. 158; *Dunbar v. Myers*, 94 U. S. 187, 24 L. Ed. 34; *Gates Iron Works v. Fraser*, 153 U. S. 332, 38 L. Ed. 734; *Stimpson v. Woodman*, 10 Wall. 117, 121, 19 L. Ed. 866; *Collar Co. v. Van Dusen*, 23 Wall. 530, 23 L. Ed. 128; *Pennock v. Dialogue*, 2 Pet. 1, 20, 7 L. Ed. 327; *Thompson v. Boisselier*, 114 U. S. 1, 11, 29 L. Ed. 70; *Hill v. Wooster*, 132 U. S. 693, 701, 33 L. Ed. 502; *Roemer v. Simon*, 95 U. S. 214, 217, 24 L. Ed. 384; *The Corn-Planter Patent*, 23 Wall. 181, 182, 23 L. Ed. 161; *Pearce v. Mulford*, 102 U. S. 112, 26 L. Ed. 93; *Yale Lock Mfg. Co. v. Greenleaf*, 117 U. S. 554, 29 L. Ed. 952; *Gardner v. Herz*, 118 U. S. 180, 30 L. Ed. 158; *Pomace Holder Co. v. Ferguson*, 119 U. S. 335, 30 L. Ed. 406; *Hendy v. Golden State, etc., Iron Works*, 127 U. S. 370, 375, 32 L. Ed. 207; *Holland v. Shipley*, 127 U. S. 396, 32 L. Ed. 185; *Pattee Plow Co. v. Kingman*, 129 U. S. 294, 32 L. Ed. 700; *Brown v. District of Columbia*, 130 U. S. 87, 32 L. Ed. 863; *Day v. Fair Haven, etc., R. Co.*, 132 U. S. 98, 33 L. Ed. 265; *Watson v. Cincinnati, etc., R. Co.*, 132 U. S. 161, 33 L. Ed. 295; *Marchand v. Emken*, 132 U. S. 195, 33 L. Ed. 332; *Royer v. Roth*, 132 U. S. 201, 33 L. Ed. 322.

"Invention or discovery is the requirement which constitutes the foundation of the right to obtain a patent; and it was decided by this court, more than a quarter of a century ago, that unless more ingenuity and skill were required in making or applying the said improvement than are possessed by an ordinary mechanic acquainted with the business, there is an absence of that degree of skill and ingenuity which constitute the essential elements of every invention. *Hotchkiss v. Greenwood*, 11 How. 248, 267, 13 L. Ed. 683." *Dunbar v. Myers*, 94 U. S. 187, 197, 24 L. Ed. 34.

New articles of commerce are not patentable as new manufactures unless it appears in the given case that the production of the new article involved the exercise of invention or discovery beyond what was necessary to construct the apparatus for its manufacture. *Collar Co. v. Van Dusen*, 23 Wall. 530, 23 L. Ed. 128.

The improvement must be of such a

character that it involved invention to make it, as the patent act confers no right to obtain a patent except to a person who has invented or discovered some new and useful art, machine, manufacture, or composition of matter, or some new and useful improvement in one or the other of those described subject matters. *Dunbar v. Myers*, 94 U. S. 187, 24 L. Ed. 34; *Fond Du Lac County v. May*, 137 U. S. 395, 34 L. Ed. 714; *May v. Juneau County*, 137 U. S. 408, 34 L. Ed. 729.

**71. Invention hard to define**.—*McClain v. Ortmyer*, 141 U. S. 419, 35 L. Ed. 800.

"The truth is the word cannot be defined in such manner as to afford any substantial aid in determining whether a particular device involves an exercise of the inventive faculty or not. In a given case we may be able to say that there is present invention of a very high order. In another we can see that there is lacking that impalpable something which distinguishes invention from simple mechanical skill. Courts, adopting fixed principles as a guide, have by a process of exclusion determined that certain variations in old devices do or do not involve invention; but whether the variation relied upon in a particular case is anything more than ordinary mechanical skill is a question which cannot be answered by applying the test of any general definition." *McClain v. Ortmyer*, 141 U. S. 419, 427, 35 L. Ed. 800.

To say that the act of invention is the production of something new and useful does not solve the difficulty of giving an accurate definition, since the question of what is new as distinguished from that which is colorable variation of what is old, is usually the very question in issue. *McClain v. Ortmyer*, 141 U. S. 419, 426, 35 L. Ed. 800.

**72. Definitions**.—*McClain v. Ortmyer*, 141 U. S. 419, 426, 35 L. Ed. 800.

**73. Hollister v. Benedict, etc., Mfg. Co.**, 113 U. S. 59, 28 L. Ed. 901; *Thompson v. Boisselier*, 114 U. S. 1, 29 L. Ed. 76; *Marchand v. Emken*, 132 U. S. 195, 200, 33 L. Ed. 332.

In determining the question of invention it must be presumed that the patentee was fully informed of everything which preceded him, whether such were the actual fact or not. *Mast, etc., Co. v. Stover Mfg. Co.*, 177 U. S. 485, 494, 44 L. Ed. 856.

A shadow or shade of an idea is not



It is not sufficient that the thing produced is useful.<sup>74</sup>

b. *Perfection of Conception and Representation in Physical Form.*—While a conception of the mind is not an invention until represented in some physical form,<sup>75</sup> and crude and imperfect experiments,<sup>76</sup> or unsuccessful experiments or projects, abandoned by the inventor,<sup>77</sup> are not sufficient to constitute invention, the law does not require that a discoverer or inventor, in order to get a patent for a process, must have succeeded in bringing his art to the highest degree of perfection. It is enough if he describes his method with sufficient clearness and precision to enable those skilled in the matter to understand what the process is, and if he points out some practicable way of putting it into operation.<sup>78</sup>

c. *Mechanical Skill.*—It is well settled that improvements in machinery or methods attributable to mechanical skill alone do not involve patentable invention.<sup>79</sup> Thus it has been said that "the natural outgrowth of the development

patentable. *Atlantic Works v. Brady*, 107 U. S. 192, 200, 27 L. Ed. 438.

Giving to oxygenated water a well-known rotary motion is not invention. *Marchard v. Emken*, 132 U. S. 195, 200, 33 L. Ed. 332.

A patent for the telephone which contained a discovery that speech can be transmitted by gradually changing the intensity of a continuous electric current so as to make it correspond exactly to the changes in the density of the air caused by the sound of the voice, and the means in which these changes in intensity could be made, and speech actually transmitted, involved invention. *The Telephone Cases*, 126 U. S. 1, 532, 31 L. Ed. 863.

**74. Usefulness of device not conclusive of invention.**—*Rubber-Tip Pencil Co. v. Howard*, 20 Wall. 498, 22 L. Ed. 410; *Richards v. Chase Elevator Co.*, 159 U. S. 477, 40 L. Ed. 225; *Hill v. Wooster*, 132 U. S. 693, 700, 33 L. Ed. 502; *Thompson v. Boisselier*, 114 U. S. 1, 29 L. Ed. 76.

Although a device for transferring grain may be both a convenient and a valuable one, it does not thereby necessarily involve invention. *Richards v. Chase Elevator Co.*, 159 U. S. 477, 485, 40 L. Ed. 225.

Though an idea of a person who afterwards obtains a patent for a device to give his idea effect may be a good idea, yet if the device is not new his patent is void, even though it be useful. The principle applied to the patent of J. B. Blair, of July 23d, 1867, for a new manufacture, being rubber heads for lead pencils, and the patent held void as being for nothing more than making a hole smaller than the pencil in a piece of india rubber and putting the pencil in the hole, the elastic and erasive qualities of india rubber being known to every one, and every one possessing capacity to make a hole in a piece of rubber, and to put a pencil in the hole, so as to be held there for an eraser by the elasticity of the rubber. *Rubber-Tip Pencil Co. v. Howard*, 20 Wall. 498, 22 L. Ed. 410.

**75. Conception must be represented in physical form.**—*Clark Thread Co. v. Willimantic Linen Co.*, 140 U. S. 481, 489, 35

L. Ed. 521; *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33; *Coffin v. Ogden*, 18 Wall. 120, 21 L. Ed. 821; *Dashiell v. Grosvenor*, 162 U. S. 425, 40 L. Ed. 1025.

In order to constitute an invention, the party must have proceeded so far as to have reduced his idea to practice, and embodied it in some distinct form. *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33.

**76. Crude and imperfect experiments.**—*Seymour v. Osborne*, 11 Wall. 516, 552, 20 L. Ed. 33.

**77. Unsuccessful, abandoned experiments.**—*Clark Thread Co. v. Willimantic Linen Co.*, 140 U. S. 481, 35 L. Ed. 521; *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33; *Deering v. Winona Harvester Works*, 155 U. S. 286, 39 L. Ed. 153; *Brush v. Condit*, 132 U. S. 39, 33 L. Ed. 251.

**78. Highest degree of perfection not required.**—*The Telephone Cases*, 126 U. S. 1, 536, 31 L. Ed. 863.

**79. Mechanical skill not patentable.**—*Pennsylvania R. Co. v. Locomotive, etc., Truck Co.*, 110 U. S. 490, 28 L. Ed. 222; *Phillips v. Detroit*, 111 U. S. 604, 28 L. Ed. 532; *Morris v. McMillin*, 112 U. S. 244, 28 L. Ed. 702; *Hollister v. Benedict, etc., Mfg. Co.*, 113 U. S. 59, 28 L. Ed. 901; *Thompson v. Boisselier*, 114 U. S. 1, 29 L. Ed. 76; *Stephenson v. Brooklyn, etc., R. Co.*, 114 U. S. 149, 29 L. Ed. 58; *Yale Lock Mfg. Co. v. Sargent*, 117 U. S. 536, 554, 29 L. Ed. 954; *Gardner v. Herz*, 118 U. S. 180, 30 L. Ed. 158; *The Corn-Planter Patent*, 23 Wall. 181, 23 L. Ed. 161; *Sargent v. Covert*, 152 U. S. 516, 38 L. Ed. 536; *Cluett v. Clafin*, 140 U. S. 180, 35 L. Ed. 385; *Cluett v. McNeany*, 140 U. S. 183, 35 L. Ed. 386; *Royer v. Roth*, 132 U. S. 201, 33 L. Ed. 322; *Brown v. District of Columbia*, 130 U. S. 87, 32 L. Ed. 863; *Hotchkiss v. Greenwood*, 11 How. 248, 13 L. Ed. 683; *Yale Lock Mfg. Co. v. Greenleaf*, 117 U. S. 554, 29 L. Ed. 952; *Stimpson v. Woodman*, 10 Wall. 117, 19 L. Ed. 866; *Preston v. Manard*, 116 U. S. 661, 29 L. Ed. 736; *Day v. Fair Haven, etc., R. Co.*, 132 U. S. 98, 33 L. Ed. 265; *Butler v. Steckel*, 137 U. S. 21, 34 L. Ed. 582; *Kremetz v. The S. Cattle Co.*, 148 U. S. 556, 559, 37 L. Ed. 558; *Burt v. Ivory*, 133 U. S. 349, 33 L. Ed. 647; *Brown v. Piper*,

of mechanical skill,"<sup>80</sup> "the display of the expected skill of the calling,"<sup>81</sup> or "the exercise of the ordinary faculties of reasoning upon the materials supplied by a special knowledge, and the facilities of manipulation which result from its habitual and intelligent practice,"<sup>82</sup> is not invention. Instances of machines or devices held to involve mechanical skill only and not patentable, for that reason, are given in the notes.<sup>83</sup>

91 U. S. 37, 23 L. Ed. 200; *Florsheim v. Schilling*, 137 U. S. 64, 34 L. Ed. 574; *Magowan v. New York, etc., Packing Co.*, 141 U. S. 332, 35 L. Ed. 781; *Stephenson v. Brooklyn, etc., R. Co.*, 114 U. S. 149, 29 L. Ed. 58; *Watson v. Cincinnati, etc., R. Co.*, 132 U. S. 161, 33 L. Ed. 295; *Howard v. Detroit Stove Works*, 150 U. S. 164, 37 L. Ed. 1039; *Pope Mfg. Co. v. Gormully, etc., Mfg. Co.*, No. 4, 144 U. S. 254, 260, 36 L. Ed. 426; *Lovell Mfg. Co. v. Cary*, 147 U. S. 623, 635, 37 L. Ed. 307; *Ryan v. Hard*, 145 U. S. 241, 246, 36 L. Ed. 691; *Palmer v. Corning*, 156 U. S. 342, 344, 39 L. Ed. 445; *Holmes v. Hurst*, 174 U. S. 82, 89, 43 L. Ed. 904; *Corbin Cabinet Lock Co. v. Eagle Lock Co.*, 150 U. S. 38, 37 L. Ed. 989; *Peters v. Hanson*, 129 U. S. 541, 32 L. Ed. 742; *Pomace Holder Co. v. Ferguson*, 119 U. S. 335, 338, 30 L. Ed. 406; *Vinton v. Hamilton*, 104 U. S. 485, 26 L. Ed. 807; *Hall v. Macneale*, 107 U. S. 90, 27 L. Ed. 367; *Atlantic Works v. Brady*, 107 U. S. 192, 27 L. Ed. 438; *Slawson v. Grand St. R. Co.*, 107 U. S. 649, 27 L. Ed. 571; *King v. Gallun*, 109 U. S. 99, 27 L. Ed. 870; *Double-Pointed Tack Co. v. Two Rivers Mfg. Co.*, 109 U. S. 117, 27 L. Ed. 877; *Estey v. Burdett*, 109 U. S. 633, 27 L. Ed. 1058; *Bussey v. Excelsior Mfg. Co.*, 110 U. S. 131, 28 L. Ed. 95; *Pattee Plow Co. v. Kingman*, 129 U. S. 294, 304, 32 L. Ed. 700; *Aron v. Manhattan R. Co.*, 132 U. S. 84, 33 L. Ed. 272; *Duer v. Corbin Cabinet Lock Co.*, 149 U. S. 216, 37 L. Ed. 707.

80. **Natural outgrowth of mechanical skill.**—*Burt v. Ivory*, 133 U. S. 349, 33 L. Ed. 647; *Florsheim v. Schilling*, 137 U. S. 61, 34 L. Ed. 574.

81. **Display of expected skill of the calling.**—*Hollister v. Benedict, etc., Mfg. Co.*, 113 U. S. 59, 28 L. Ed. 901; *Magowan v. New York, etc., Packing Co.*, 141 U. S. 332, 35 L. Ed. 781; *Thompson v. Boisselier*, 114 U. S. 1, 29 L. Ed. 76.

82. **Ordinary reason coupled with supplied knowledge.**—*Hollister v. Benedict, etc., Mfg. Co.*, 113 U. S. 59, 28 L. Ed. 901; *Magowan v. New York, etc., Packing Co.*, 141 U. S. 332, 35 L. Ed. 781; *Thompson v. Boisselier*, 114 U. S. 1, 29 L. Ed. 76; *Howe Machine Co. v. National Needle Co.*, 134 U. S. 388, 397, 33 L. Ed. 963.

83. **Instances of devices or articles involving mechanical skill only.**—The following articles have been held to have been the result of mechanical skill only and not to involve invention: Cutting wooden blocks for paving purposes so as to get the grain in a particular way, and to avoid waste (*Brown v. District of Co-*

*lumbia*, 130 U. S. 87, 32 L. Ed. 863); making a single die to cut dough, on a flat surface, in the shape of a bretzel (*Butler v. Steckel*, 137 U. S. 21, 34 L. Ed. 582); casting in one piece an article formerly cast in two pieces and put together (*Howard v. Detroit Stove Works*, 150 U. S. 164, 37 L. Ed. 1039); compressing and tying in one bale several packages of plasterer's hair, so that when the bale is broken the packages remain intact (*King v. Gallun*, 109 U. S. 99, 100, 27 L. Ed. 870); the application of a diagonal brace to a track scraper to prevent lateral displacement (*Day v. Fair Haven, etc., R. Co.*, 132 U. S. 98, 33 L. Ed. 265); the application of old and familiar arrangement of shafts and cog wheels of the power of an auxiliary engine to a capstan instead of a windlass (*Morris v. McMillin*, 112 U. S. 244, 28 L. Ed. 702); placing designs on a roller in an old combination, where rollers with designs on them had been previously used in other combinations (*Stimpson v. Woodman*, 10 Wall. 117, 19 L. Ed. 866); a shirt bosom bound at its edges and stitched through the binding to the body of the shirt (*Cluett v. Clafin*, 140 U. S. 180, 35 L. Ed. 385; *Cluett v. McNeany*, 140 U. S. 183, 35 L. Ed. 386); placing cuts or bevels on the same side of each leg of a staple so as to give both points, in driving, an inclination in the same direction, where staples had been previously beveled so as to bring the points together after driving (*Double-Pointed Tack Co. v. Two Rivers Mfg. Co.*, 109 U. S. 117, 27 L. Ed. 877) putting rollers under an article so as to make it movable (*Hendy v. Golden State, etc., Iron Works*, 127 U. S. 370, 32 L. Ed. 207); placing a reinforcing strip of cloth under a seam in clothing (*Patent Clothing Co. v. Glover*, 141 U. S. 560, 35 L. Ed. 858); a revolving cue rack (*St. Germain v. Brunswick*, 135 U. S. 227, 34 L. Ed. 122); increasing the weight of hand wheels in road machines in order to correct the tendency of smaller wheels to reverse (*American Road Machine Co. v. Pennock, etc., Co.*, 164 U. S. 26, 41 L. Ed. 337); making a nonportable device portable (*Black Diamond Coal Min. Co. v. Excelsior Coal Co.*, 156 U. S. 611, 39 L. Ed. 553); putting at the part of a vehicle dash frame to which the foot is to be attached, a proper bearing surface to support the brace and dash, either by an increase in the quantity of metal or otherwise (*Peters v. Hanson*, 129 U. S. 541, 553, 32 L. Ed. 742); the prolongation of a transom rod and its confinement within a metallic loop, thereby providing



d. *Carrying Forward Old Ideas*.—A mere carrying forward of the original thought, a change only in form, proportions, or degree, doing the same thing in the same way, by substantially the same means, with better results, is not such an invention as will sustain a patent.<sup>84</sup>

a support where it was needed, where the mechanical device is found in a prior patent and only the use to which the combination is put is novel (*Wollensak v. Sargent*, 151 U. S. 221, 38 L. Ed. 137); the use of dies, shaped in a particular way for swaging or welding together two pieces of iron, where neither the use of dies nor the shape was new (*Peters v. Active Mfg. Co.*, 130 U. S. 626, 32 L. Ed. 1057); changing an apparatus, consisting of a metallic case filled with sand designed for cooling beer passing through an enclosed supply pipe in the metallic case, by means of drippings from an upper ice box, by converting the metallic case into an open air chamber (*Magin v. Karle*, 150 U. S. 387, 37 L. Ed. 1118).

A device, used upon rope halters, consisting of a tube adapted to a slip upon a rope and having on one side an enlargement with interior screw threads, through which passes a sharp pointed set screw with an eye for the reception of a snap hook is not a patentable novelty where a prior device was alike in all respects save in the use of a screw with rounded end and double eyes, for the improvement was such as would have occurred to any one practically interested in the subject. *Sargent v. Covert*, 152 U. S. 516, 520, 38 L. Ed. 536.

A patent described as being for a new and improved mode of constructing the arch or central and main part of straddle-row cultivator beam-yokes or axles, and of connecting the side parts thereto, and the invention as consisting in constructing said arch of curved adjacent bars of iron or steel, to the ends of which may be attached, by riveting, the cast-iron parts for securing thereto the plows and wheels, and which may be strengthened by the use of stiffening bolts, embraces nothing that is not old and really nothing that is patentable, that is, which involves invention rather than mechanical skill. *Pattee Plow Co. v. Kingman*, 129 U. S. 294, 304, 32 L. Ed. 700.

The fact that water will flow through a hose wound on a reel, if the diameter of the reel is large enough, and the curves or angles are not too abrupt is a matter of common knowledge, which no one can appropriate to his own use, to the exclusion of the public. In which view of the case, the specification describes nothing that the patentee is entitled to claim, but only what every one has a right to use without his assistance. *Preston v. Manard*, 116 U. S. 661, 664, 29 L. Ed. 736.

The plaintiff claimed a revenue stamp consisting of a stub, a stamp, and a removable part of metal or other material, displaying a serial number similar to that

of the stub, and which upon removal remained intact but mutilated the stamp. The stamp, the stub and the removable part were all old, the new feature claimed being the removable quality of the removable piece, the retention by it of its integrity upon removal, and mutilation by it of the stamp. It was held that this did not involve invention. *Hollister v. Benedict, etc., Mfg. Co.*, 113 U. S. 59, 28 L. Ed. 901.

Where in one patent for railroad or crossing frogs, the invention consisted in forming a metallic plate into a U-shape trough for the purpose of connecting the outer rails, leaving the V-shaped ends of the point rails to be secured by means of a V-shaped recess in the bed of the plate at the wide end of the trough, there is no invention in dividing that trough into two, so as to connect the centre rails on each side, by means of a separate channel iron or U-shaped trough, with the outer rail exterior to them. *Weir v. Morden*, 125 U. S. 98, 108, 31 L. Ed. 645.

In a patent for an improvement in car doors, there was nothing new in flexible or rigid doors, outside and inside. There was nothing new in the use of outside and inside rigid doors in combination, the inside door filling only part of the opening. The substitution of the old flexible sliding inside door, reduced in size to correspond with the old inside rigid grain door, may have required some mechanical skill, and may have been new and useful, but it did not involve the exertion of the inventive faculty, and embraced nothing that was patentable. *Watson v. Cincinnati, etc., R. Co.*, 132 U. S. 161, 33 L. Ed. 295.

**84. Carrying forward old idea.**—*Stimpson v. Woodman*, 10 Wall. 117, 19 L. Ed. 866; *Smith v. Nichols*, 21 Wall. 112, 22 L. Ed. 566; *Guidet v. Brooklyn*, 105 U. S. 550, 26 L. Ed. 1106; *Hall v. Macneale*, 107 U. S. 90, 27 L. Ed. 367; *Wright v. Yuengling*, 155 U. S. 47, 53, 39 L. Ed. 64; *Roberts v. Ryer*, 91 U. S. 150, 23 L. Ed. 267; *Belding Mfg. Co. v. Challenge Corn Planter Co.*, 152 U. S. 100, 104, 38 L. Ed. 370; *Morris v. McMillin*, 112 U. S. 244, 28 L. Ed. 702; *Risdon, etc., Locomotive Works v. Medart*, 158 U. S. 68, 39 L. Ed. 899; *Estep v. Burdett*, 109 U. S. 633, 27 L. Ed. 1058; *Market St. Cable R. Co. v. Rowley*, 155 U. S. 621, 629, 39 L. Ed. 284; *Ansonia, etc., Copper Co. v. Electrical Supply Co.*, 144 S. 11, 36 L. Ed. 327; *Busell Trimmer Co. v. Stevens*, 137 U. S. 423, 34 L. Ed. 719; *Atlantic Works v. Brady*, 107 U. S. 192, 199, 27 L. Ed. 438; *Burt v. Ivory*, 133 U. S. 349, 358, 33 L. Ed. 647; *Lovell Mfg. Co. v. Cary*, 147 U. S. 623, 634, 37 L. Ed. 307; *Consolidated Roller Mill Co. v. Walker*, 138 U. S. 124, 34 L. Ed. 920; *Grant v.*



*e. Change in Form.*—It is well settled that a mere change in the form of an existing device or machine, is not invention,<sup>85</sup> unless the particular form is

Walter, 148 U. S. 547, 553, 37 L. Ed. 552; Ryan v. Hard, 145 U. S. 241, 246, 36 L. Ed. 691; Dunbar v. Myers, 94 U. S. 187, 199, 24 L. Ed. 34; Stephenson v. Brooklyn, etc., R. Co., 114 U. S. 149, 29 L. Ed. 58; Packing Co. Cases, 105 U. S. 566, 26 L. Ed. 1172; Thompson v. Boisselier, 114 U. S. 1, 29 L. Ed. 76; Hill v. Wooster, 132 U. S. 693, 33 L. Ed. 502.

"If a certain device differs from what precedes it only in superiority of finish, or in greater accuracy of detail, it is but the carrying forward of an old idea, and does not amount to invention. Thus, if it had been customary to make an article of unpolished metal, it does not involve invention to polish it. If a telescope had been made with a certain degree of power, it involves no invention to make one which differs from the other only in its having greater power. If boards had heretofore been planed by hand, a board better planed by machinery would not be patentable, although in all these cases the machinery itself may be patentable." *Risdon, etc., Locomotive Works v. Medart*, 158 U. S. 68, 81, 39 L. Ed. 899.

To grant to a single party a monopoly of every slight advance made, except where the exercise of invention, somewhat above ordinary mechanical or engineering skill, is distinctly shown, is unjust in principle and injurious in its consequences. The design of the patent laws is to reward those who make some substantial discovery or invention, which adds to our knowledge and makes a step in advance in the useful arts. *Atlantic Works v. Brady*, 107 U. S. 192, 200, 27 L. Ed. 438; *Morris v. McMillin*, 112 U. S. 244, 28 L. Ed. 702.

A patent for a pavement consisting of stones with rough sides, so that when laid the roughness of the sides will keep the cracks between them open so as to enable horses to get a foothold, and dispenses with artificial means of keeping the joints open, merely carries forward an old idea, and is void for want of invention. *Guidet v. Brooklyn*, 105 U. S. 550, 26 L. Ed. 1106.

A change in the mode of cooking the meat to be canned, from broiling, roasting, or steaming to boiling, all the other parts of the process remaining unchanged, cannot be called invention, and does not entitle the party who suggests the change to a patent for the process. *Packing Co. Cases*, 105 U. S. 566, 571, 26 L. Ed. 1172.

In *Hall v. Macneale*, 107 U. S. 90, 27 L. Ed. 367, a cored conical bolt, in a safe, with a screw-thread on it, having existed before, and also a solid conical bolt, it was held to be no invention to add the screw-thread to the solid conical bolt. *Thompson v. Boisselier*, 114 U. S. 1, 11, 29 L. Ed. 76.

It was not a patentable invention to add

a lower compartment to a box creamery on legs. *Hill v. Wooster*, 132 U. S. 693, 700, 33 L. Ed. 502.

**85. Change in form.**—*Roberts v. Ryer*, 91 U. S. 150, 23 L. Ed. 267; *Belding Mfg. Co. v. Challenge Corn Planter Co.*, 152 U. S. 100, 104, 38 L. Ed. 370; *Market St. Cable R. Co. v. Rowley*, 155 U. S. 621, 629, 39 L. Ed. 284; *Smith v. Nichols*, 21 Wall. 112, 22 L. Ed. 566; *Ansonia, etc., Copper Co. v. Electrical Supply Co.*, 144 U. S. 11, 36 L. Ed. 327; *Burt v. Ivory*, 133 U. S. 349, 358, 33 L. Ed. 647; *Lovell Mfg. Co. v. Cary*, 147 U. S. 623, 634, 37 L. Ed. 307; *O'Reilly v. Morse*, 15 How. 62, 14 L. Ed. 601; *Winans v. Denmead*, 15 How. 330, 14 L. Ed. 717; *Phillips v. Detroit*, 111 U. S. 604, 28 L. Ed. 532; *Reckendorfer v. Faber*, 92 U. S. 347, 23 L. Ed. 719; *Heald v. Rice*, 104 U. S. 737, 26 L. Ed. 910; *Hicks v. Kelsey*, 18 Wall. 670, 21 L. Ed. 852; *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.*, 152 U. S. 425, 38 L. Ed. 500; *Holland v. Shipley*, 127 U. S. 396, 32 L. Ed. 185; *Crescent Brewing Co. v. Gottfried*, 128 U. S. 158, 32 L. Ed. 390; *Howard v. Detroit Stove Works*, 150 U. S. 164, 170, 37 L. Ed. 1039; *Hailes v. Van Wormer*, 20 Wall. 353, 22 L. Ed. 241; *Rubber-Tip Pencil Co. v. Howard*, 20 Wall. 498, 22 L. Ed. 410; *Pomace Holder Co. v. Ferguson*, 119 U. S. 335, 30 L. Ed. 406; *Pope Mfg. Co. v. Gormully*, 144 U. S. 224, 36 L. Ed. 414; *French v. Carter*, 137 U. S. 239, 34 L. Ed. 664; *Mosler Safe, etc., Co. v. Mosler*, 127 U. S. 354, 355, 32 L. Ed. 182; *McCarty v. Lehigh Valley R. Co.*, 160 U. S. 110, 40 L. Ed. 358; *Dunbar v. Myers*, 94 U. S. 187, 199, 24 L. Ed. 34.

A change from a square-cornered iron safe to a round-cornered one, is one in form only and is not patentable. *Mosler Safe, etc., Co. v. Mosler*, 127 U. S. 354, 355, 32 L. Ed. 182.

There is no invention in using a can for meat constructed in pyramidal instead of square form, so as to permit the meat to be discharged in a solid cake. *Packing Co. Cases*, 105 U. S. 566, 26 L. Ed. 1172.

In a patent for an improvement in stoves, no invention is involved in making the shape of the grate correspond with that of the fire-pot. *Howard v. Detroit Stove Works*, 150 U. S. 164, 170, 37 L. Ed. 1039.

A patent for an improvement in roofs for vaults, which differs only from prior schemes for constructing the same article, with respect to the difference in the size of the stones used, is not patentable, involving as it does only mechanical skill. *French v. Carter*, 137 U. S. 239, 34 L. Ed. 664.

Where lead holding tubes for pencils with two or more slots at the lower end, so as to form elastic clamping fingers, closing upon the lead by means of a sliding sleeve were old, as well as tubes with

specified as the means by which the effect described is produced.<sup>86</sup> The law requires more than a change of form, or juxtaposition of parts, or of the external arrangement of things, or of the order in which they are used, to give patentability.<sup>87</sup>

*f. Change in Arrangement or Location of Elements.*—A mere change in the

a single slot and an interior screw-thread, it was held that the slots, the screw-thread within, and the outer sleeve being all old, the combination of two or more slots with the sleeve, or of a single slot with the screw-thread, being also old, it was clear that to make one or more slots in a tube threaded inside and sleeved outside required no invention. *Hoiland v. Shipley*, 127 U. S. 396, 398, 32 L. Ed. 185.

Where the coating of pedals to prevent slipping being once conceded to be old, there is no novelty in the particular shape in which these rubber coverings are made, or the form which the corrugations or groovings shall take; it is a mere matter of taste or mechanical skill. *Pope Mfg. Co. v. Gormully, etc., Mfg. Co.*, No. 2, 144 U. S. 238, 36 L. Ed. 420.

A patent for an oval roll of toilet paper is void for lack of invention where it is a mere enlargement of prior devices, although by such enlargement the roll became capable of being used in a somewhat different manner. *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.*, 152 U. S. 425, 530, 38 L. Ed. 500.

There is no invention in regulating the size of the valve opening in the reed board of an organ, in making its length and size greater or less in a reed board of a given width, or where the reed board was made narrower or wider, or had more or less sets of reeds in it, either full or partial. *Estey v. Burdett*, 109 U. S. 633, 27 L. Ed. 1058.

An apparatus for heating the interior of casks by forcing hot air into them, consisting of a furnace, pipe and blower, the pipe terminating in the inside of the cask is not patentable, merely because in prior devices of a similar nature the nozzle of the pipe terminated in the air and the blast was partially reoxygenated after leaving the pipe and before reaching its objective point. *Crescent Brewing Co. v. Gottfried*, 128 U. S. 158, 32 L. Ed. 390.

A rack on which to place the pomace was old, and a cloth to cover the pomace lying on the rack was old, the two being used in connection, and an enclosure was used with them, which enabled the operator to make the pomace of uniform depth on each rack, and prevented the lateral spreading of the pomace. The only point of the invention would seem to be the use of a guide-frame smaller than the rack, or, in other words, the use of a rack larger than the guide-frame. There was no invention in making the guide-frame or the rack of the desired size. It required only ordinary mechanical skill and judgment. *Pomace Holder Co. v. Fergu-*

*son*, 119 U. S. 335, 338, 30 L. Ed. 406.

In view of the state of the art as manifested by several prior patents, a patent for an improvement in car axle lubricators is void for want of patentable novelty where, although some differences are disclosed in the shape of the several parts, the patentees declined to confine themselves to the shape or form described in the drawings. *Market St. Cable R. Co. v. Rowley*, 155 U. S. 621, 629, 39 L. Ed. 284.

Where the applications state that the shape of the grating for a spark arrester on a locomotive is immaterial and may be made either from bars or netting or perforated plate, a patent for a particular construction of grate with long vertical bars, being a mere equivalent for grates shown in prior patents, and a mere change of form constituting no advance in the art, is void for want of patentable novelty. *Lehigh Valley R. Co. v. Kearney*, 158 U. S. 461, 477, 39 L. Ed. 1055.

A patent for a recess cut or carved out of the top of a mould board on a shovel plow so that the earth may pass over it, is void for want of invention. *Eddy v. Dennis*, 95 U. S. 560, 24 L. Ed. 363.

A patent for the preserving, filing and verifying of bonds and coupons, and for a book constructed and used for that purpose, is void for want of invention, where the only difference between it and an earlier scheme is that in the earlier books there was no place for the bonds, and the coupons were grouped according to their dates of payment, instead of being grouped together with the bonds to which they respectively belonged. The providing of spaces for the bonds, and the change in the order or arrangement of the coupons, cannot, upon the most liberal construction of the patent laws, be held to involve any invention. *Munson v. New York City*, 124 U. S. 601, 31 L. Ed. 586.

**86. Particular form specified as means by which the effect is produced.**—*O'Reilly v. Morse*, 15 How. 62, 123, 14 L. Ed. 601; *Winans v. Denmead*, 15 How. 330, 14 L. Ed. 717.

**87. Change in form, arrangement, etc., not invention.**—*Atlantic Works v. Brady*, 107 U. S. 192, 27 L. Ed. 438; *Rubber-Tip Pencil Co. v. Howard*, 20 How. 498, 22 L. Ed. 410; *Hailes v. Van Wormer*, 20 How. 353, 22 L. Ed. 241; *Reckendorfer v. Faber*, 92 U. S. 347, 356, 23 L. Ed. 719; *Phillips v. Detroit*, 111 U. S. 604, 607, 28 L. Ed. 532; *Idle v. Ball Engine Co.*, 149 U. S. 550, 555, 37 L. Ed. 843. See post, "Change in Arrangement or Location of Elements." V, B, f.

arrangement of several elements of a device or in the location of its parts is not invention.<sup>88</sup>

g. *Change in Proportions or Degree*.—See ante, "Carrying Forward Old Ideas," V, B, 2, d.

h. *Improvement of Existing Devices*.—While improvements in existing devices may be patentable,<sup>89</sup> it is well settled that not every improvement in an article is patentable; it must be the product of an original conception and involve something more than what is obvious to persons skilled in the art.<sup>90</sup>

**88. Change in arrangement or location of elements.**—*Atlantic Works v. Brady*, 107 U. S. 192, 27 L. Ed. 438; *Slawson v. Grand St. R. Co.*, 107 U. S. 649, 27 L. Ed. 576; *Ide v. Ball Engine Co.*, 149 U. S. 550, 37 L. Ed. 843; *Burt v. Ivory*, 133 U. S. 349, 33 L. Ed. 647. See, also, *Hartshorn v. Saginaw Barrel Co.*, 119 U. S. 664, 679, 30 L. Ed. 539.

The placing of a screw for dredging at the stem of a screw propeller, when the dredging had been previously accomplished by turning the propeller stern foremost and dredging with the propelling screw, was not a patentable invention. *Atlantic Works v. Brady*, 107 U. S. 192, 27 L. Ed. 438.

Where governors without dash pots had been attached indiscriminately, not only to the old fly-ball governor, but to the shaft governors, whether connected with the fly-wheel or the pulley-wheel, or a separate wheel of their own, connected with the shaft, and a governor with a dash pot had also been attached to a separate wheel revolving with the shaft, a patent consisting only in removing the governor, with the dash pot, from a separate wheel to the fly-wheel, is void for want of invention. *Ide v. Ball Engine Co.*, 149 U. S. 550, 555, 37 L. Ed. 843.

**89. Improvements may be patentable.**—*Cantrell v. Wallick*, 117 U. S. 689, 29 L. Ed. 1017; *Clough v. Manufacturing Co.*, 106 U. S. 178, 27 L. Ed. 138; *Consolidated Safety-Valve Co. v. Crosby Steam Gauge Valve Co.*, 113 U. S. 157, 28 L. Ed. 939; *The Barbed Wire Patent*, 143 U. S. 275, 283, 36 L. Ed. 154.

Two patents may both be valid when the second is an improvement on the first, in which event, if the second includes the first, neither of the two patentees can lawfully use the invention of the other without the other's consent. *Cantrell v. Wallick*, 117 U. S. 689, 29 L. Ed. 1017.

A patent for fastening a brake shoe to the brake beam of a car by means of one bolt where three were formerly required, and in which the whole structure can be taken off from the clevis by removing one bolt, while in prior structures it required the removal of two bolts to take the sole from the shoe, and the removal of the third bolt to take the shoe from the clevis, involves invention. *Lake Shore, etc., R. Co. v. National Car-Brake Shoe Co.*, 110 U. S. 229, 28 L. Ed. 129.

A collar button formed from a single

sheet of metal, free from sutures, of a convenient shape, and uniting strength with lightness, would involve invention and comes fairly within the meaning of the patent laws. *Krementz v. The S. Cottle Co.*, 148 U. S. 556, 559, 37 L. Ed. 558.

**Improved gas burner held to involve invention.**—*Clough v. Manufacturing Co.*, 106 U. S. 178, 180, 27 L. Ed. 138.

**90. Improvement not necessarily invention.**—*Rubber-Tip Pencil Co. v. Howard*, 20 Wall. 498, 22 L. Ed. 410; *Hotchkiss v. Greenwood*, 11 How. 248, 13 L. Ed. 683; *Stimpson v. Woodman*, 10 Wall. 117, 19 L. Ed. 866; *International Tooth Crown Co. v. Gaylord*, 140 U. S. 55, 62, 35 L. Ed. 347; *Atlantic Works v. Brady*, 107 U. S. 192, 199, 27 L. Ed. 438; *National Hat Pouncing Machine Co. v. Hedden*, 148 U. S. 482, 37 L. Ed. 529; *Belding Mfg. Co. v. Challenge Corn Planter Co.*, 152 U. S. 100, 38 L. Ed. 370; *Risdon, etc., Locomotive Works v. Medart*, 158 U. S. 68, 39 L. Ed. 899; *Pickering v. McCullough*, 104 U. S. 310, 26 L. Ed. 749; *Crouch v. Roemer*, 103 U. S. 797, 799, 26 L. Ed. 426; *Brush v. Condit*, 132 U. S. 39, 33 L. Ed. 251; *Smith v. Nichols*, 21 Wall. 112, 22 L. Ed. 566; *Packing Co. Cases*, 105 U. S. 566, 571, 26 L. Ed. 1172; *Pearce v. Mulford*, 102 U. S. 112, 118, 26 L. Ed. 93; *Slawson v. Grand St. R. Co.*, 107 U. S. 649, 27 L. Ed. 576; *Munson v. New York City*, 124 U. S. 601, 31 L. Ed. 586; *Burt v. Ivory*, 133 U. S. 349, 358, 33 L. Ed. 647; *Western Electric Mfg. Co. v. Ansonia Brass, etc., Co.*, 114 U. S. 447, 29 L. Ed. 210; *Double-Pointed Tack Co. v. Two Rivers Mfg. Co.*, 109 U. S. 117, 27 L. Ed. 877; *Gardner v. Herz*, 118 U. S. 180, 30 L. Ed. 158.

The fact that a machine seems to be capable of doing more work and at less expense for labor and material than the prior devices, which it appears to have largely supplanted, while persuasive, is by no means decisive, and is only available to turn the scale in cases of grave doubt respecting the validity of the invention. *National Hat Pouncing Machine Co. v. Hedden*, 148 U. S. 482, 490, 37 L. Ed. 529.

It is no invention, within the meaning of the law, to perform with increased speed a series of surgical operations old in themselves, and in the order in which they were before performed. With what celerity these successive operations shall be performed depends entirely upon the judgment and skill of the operator, and does not involve any question of novelty which



Improvements in degree only,<sup>91</sup> slight advances over what had preceded it,<sup>92</sup> or mere superiority in workmanship,<sup>93</sup> do not amount to invention.

i. *Applying Old Devices to New Uses*—(1) *Analogous or Double Use*.—The

would entitle him to a patent therefor. *International Tooth Crown Co. v. Gaylord*, 140 U. S. 55, 64, 35 L. Ed. 347.

**91. Improvements in degree only.**—*Smith v. Nichols*, 21 Wall. 112, 22 L. Ed. 566; *Brush v. Condit*, 132 U. S. 39, 33 L. Ed. 251; *Roberts v. Ryer*, 91 U. S. 150, 23 L. Ed. 267; *Grant v. Walter*, 148 U. S. 547, 554, 37 L. Ed. 552; *Estey v. Burdett*, 109 U. S. 633, 27 L. Ed. 1058; *Ansonia, etc., Copper Co. v. Electrical Supply Co.*, 144 U. S. 11, 36 L. Ed. 327; *Belding Mfg. Co. v. Challenge Corn Planter Co.*, 152 U. S. 100, 104, 38 L. Ed. 370; *Market St. Cable R. Co. v. Rowley*, 155 U. S. 621, 629, 39 L. Ed. 284; *Burt v. Ivory*, 133 U. S. 349, 33 L. Ed. 647; *Busell Trimmer Co. v. Stevens*, 137 U. S. 423, 435, 34 L. Ed. 719; *Lovell Mfg. Co. v. Cary*, 147 U. S. 623, 634, 37 L. Ed. 307; *Risdon, etc., Locomotive Works v. Medart*, 158 U. S. 68, 80, 39 L. Ed. 899.

"Thus in *Smith v. Nichols*, 21 Wall. 112, 119, 22 L. Ed. 566, the subject matter of the patent was an elastic woven fabric, and it appeared that, owing to the excellent manner of weaving, and perhaps from other causes, the fabric had gone into extensive use, and, for the special purpose of elastic gores in gaiterboots, had supplanted every other similar fabric. It appeared, however, that a fabric substantially the same in construction and possessing virtually the same properties had been previously known and used, and that the superiority of the fabric patented was due solely to improved machinery or to greater mechanical skill in the formation of the fabric, by which an excellence in degree was obtained, but not one in kind. In delivering the opinion, Mr. Justice Swayne observed: 'All the particulars claimed by the complainant, if conceded to be his, are within the category of degree. Many textile fabrics, especially those of cotton and wool, are constantly improved. Sometimes the improvement is due to the skill of the workmen, and sometimes to the perfection of the machinery employed. The results are higher finish, greater beauty of surface, and increased commercial value. A patent for the better fabric in such cases would, we apprehend, be unprecedented.'" *Risdon, etc., Locomotive Works v. Medart*, 158 U. S. 68, 82, 39 L. Ed. 899.

"So in *Burt v. Ivory*, 133 U. S. 349, 33 L. Ed. 647, the invention consisted in a novel mode of constructing shoes and gaiters, whereby the ordinary elastic goring at the sides and lacing at the front were both dispensed with. The claim was treated as one for a manufactured article and not for a mode of producing it. It was held that the changes made 'were changes of degree only, and did not in-

volve any new principle. Their shoe performed no new function. In the construction of the vamp, the quarters and the expansible gore flap were cut somewhat differently, it is true, from like parts of the shoe constructed under the earlier patents referred to, but they subserved the same purposes.'" *Risdon, etc., Locomotive Works v. Medart*, 158 U. S. 68, 82, 39 L. Ed. 899.

In a patent for improvements in electric lamps, a clamp surrounding the carbon holder being a feature, the improvement if any, in the use of the circular clamp over the rectangular clamp, was only a question of degree, in the use of substantially the same means. *Brush v. Condit*, 132 U. S. 39, 50, 33 L. Ed. 251.

**92. Slight advances.**—*International Tooth Crown Co. v. Gaylord*, 140 U. S. 55, 35 L. Ed. 347; *Atlantic Works v. Brady*, 107 U. S. 192, 27 L. Ed. 438; *Smith v. Nichols*, 21 Wall. 112, 22 L. Ed. 566; *Pickering v. McCullough*, 104 U. S. 310, 26 L. Ed. 749; *Gardner v. Herz*, 118 U. S. 180, 30 L. Ed. 158.

**93. Superiority of workmanship.**—*International Tooth Crown Co. v. Gaylord*, 140 U. S. 55, 35 L. Ed. 347; *Smith v. Nichols*, 21 Wall. 112, 22 L. Ed. 566; *Atlantic Works v. Brady*, 107 U. S. 192, 199, 27 L. Ed. 438; *Crouch v. Roemer*, 103 U. S. 797, 799, 26 L. Ed. 426; *Pickering v. McCullough*, 104 U. S. 310, 26 L. Ed. 749; *Risdon, etc., Locomotive Works v. Medart*, 158 U. S. 68, 39 L. Ed. 899; *Dane v. Chicago Mfg. Co.*, 131 U. S., appx. cxxxvi, cxxxii, 23 L. Ed. 82; *Reckendorfer v. Faber*, 92 U. S. 347, 357, 23 L. Ed. 719; *Rubber-Tip Pencil Co. v. Howard*, 20 Wall. 498, 22 L. Ed. 410.

Hence, where a textile fabric, having a certain substantial construction and possessing essential properties, has been long known and in use, a patent is void when all that distinguishes a new fabric is higher finish, greater beauty of surface, the result perhaps of greater tightness of weaving, and due to the observation or skill of the workman, or to the perfection of the machinery employed. *Smith v. Nichols*, 21 Wall. 112, 22 L. Ed. 566.

A claim for an improved belt pulley, having the rims and the ends of the spider arms ground off concentrically with the axis of the pulley, by which method alone perfection of balance can be obtained, is invalid, being in reality a claim for superior workmanship. *Risdon, etc., Locomotive Works v. Medart*, 158 U. S. 68, 80, 39 L. Ed. 899.

"In *Pickering v. McCullough*, 104 U. S. 310, 26 L. Ed. 749, the patent was for an improvement in the manufacture of moulding crucibles and pots, made of a plastic material composed of black lead and fire

application of an old process or machine to a similar or analogous subject, with no change in the manner of application, and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result has not before been contemplated.<sup>94</sup> Instances of analogous or double uses are given

clay. It appeared that difficulty had been experienced in removing the crucibles from the mould, in consequence of the adhesive nature of the black-lead mixture employed in the manufacture. The invention obviated this difficulty, and by an improved mode of manufacture much labor and expense were saved, and crucibles were produced which were superior to those made by any particular mode known prior to the device in question. It was held that this did not involve invention." *Risdon, etc., Locomotive Works v. Med-art*, 158 U. S. 68, 82, 39 L. Ed. 899.

In a patent for an improvement in refrigerators the fact that the air passages are not prolonged along the lid, although perhaps a better way of introducing the air into the ice chamber, does not amount to a patentable improvement, since it is merely doing the same thing by substantially the same means with better results. *Belding Mfg. Co. v. Challenge Corn Plater Co.*, 152 U. S. 100, 106, 38 L. Ed. 370.

Where shawl straps were in use, a patent for stiffening the cross piece by metal or other substance, is not patentable. *Crouch v. Roemer*, 103 U. S. 797, 799, 26 L. Ed. 426.

**94. Analogous or double uses.**—*Pennsylvania R. Co. v. Locomotive, etc., Truck Co.*, 110 U. S. 490, 494, 28 L. Ed. 222; *Peters v. Active Mfg. Co.*, 129 U. S. 530, 32 L. Ed. 738; *Peters v. Hanson*, 129 U. S. 541, 542, 32 L. Ed. 742; *Hotchkiss v. Greenwood*, 11 How. 248, 13 L. Ed. 683; *Phillips v. Page*, 24 How. 164, 167, 16 L. Ed. 639; *Jones v. Morehead*, 1 Wall. 155, 17 L. Ed. 662; *Hicks v. Kelsey*, 18 Wall. 670, 21 L. Ed. 832; *Smith v. Nichols*, 21 Wall. 112, 22 L. Ed. 566; *Brown v. Piper*, 91 U. S. 37, 23 L. Ed. 200; *Roberts v. Ryer*, 91 U. S. 150, 23 L. Ed. 267; *Key-stone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274, 276, 24 L. Ed. 344; *Planing-Machine Co. v. Keith*, 101 U. S. 479, 491, 25 L. Ed. 939; *Pearce v. Mulford*, 102 U. S. 112, 26 L. Ed. 93; *Heald v. Rice*, 104 U. S. 737, 754, 756, 26 L. Ed. 910; *Atlantic Works v. Brady*, 107 U. S. 192, 27 L. Ed. 438; *Morris v. McMillin*, 112 U. S. 244, 248, 28 L. Ed. 702; *St. Germain v. Brunswick*, 135 U. S. 227, 230, 34 L. Ed. 122; *Slawson v. Grand St. R. Co.*, 107 U. S. 649, 27 L. Ed. 576; *Lovell Mfg. Co. v. Cary*, 147 U. S. 623, 637, 37 L. Ed. 307; *Ansonia, etc., Copper Co. v. Electrical Supply Co.*, 144 U. S. 11, 36 L. Ed. 327; *Smith v. Whitman Saddle Co.*, 148 U. S. 674, 679, 37 L. Ed. 606; *Grant v. Walter*, 148 U. S. 547, 555, 37 L. Ed. 552; *Stephenson v. Brooklyn, etc., R. Co.*, 114 U. S. 149, 29 L. Ed. 58; *Dunbar v. Myers*, 94 U. S. 187, 198, 24 L. Ed. 34; *Potts v. Creager*,

155 U. S. 597, 39 L. Ed. 275; *Hobbs v. Beach*, 180 U. S. 383, 389, 45 L. Ed. 586; *Risdon, etc., Locomotive Works v. Med-art*, 158 U. S. 68, 82, 39 L. Ed. 899; *Bussey v. Excelsior Mfg. Co.*, 110 U. S. 131, 137, 28 L. Ed. 95; *Mast, etc., Co. v. Stover Mfg. Co.*, 177 U. S. 485, 493, 44 L. Ed. 856; *Pope Mfg. Co. v. Gormully*, 144 U. S. 224, 36 L. Ed. 414; *Royer v. Roth*, 132 U. S. 201, 33 L. Ed. 322; *National Cash Register Co. v. Boston, etc., Recorder Co.*, 156 U. S. 502, 514, 39 L. Ed. 511; *Gates Iron Works v. Fraser*, 153 U. S. 332, 38 L. Ed. 734; *Thatcher Heating Co. v. Burtis*, 121 U. S. 286, 30 L. Ed. 942; *Western Electric Co. v. LaRue*, 139 U. S. 601, 606, 35 L. Ed. 294; *Tucker v. Spalding*, 13 Wall. 453, 20 L. Ed. 515; *Haughey v. Lee*, 151 U. S. 282, 38 L. Ed. 162; *Knapp v. Morss*, 150 U. S. 221, 228, 37 L. Ed. 1059; *Blake v. San Francisco*, 113 U. S. 679, 28 L. Ed. 1070; *Thompson v. Boisselier*, 114 U. S. 1, 29 L. Ed. 76; *Miller v. Foree*, 116 U. S. 22, 29 L. Ed. 552; *Dreyfus v. Searle*, 124 U. S. 60, 31 L. Ed. 352; *Brown v. District of Columbia*, 130 U. S. 87, 32 L. Ed. 863; *Aron v. Manhattan R. Co.*, 132 U. S. 84, 33 L. Ed. 272; *Watson v. Cincinnati, etc., R. Co.*, 132 U. S. 161, 33 L. Ed. 295; *Marchand v. Emken*, 132 U. S. 195, 33 L. Ed. 332; *Royer v. Roth*, 132 U. S. 201, 33 L. Ed. 322; *Hill v. Wooster*, 132 U. S. 693, 701, 33 L. Ed. 502; *Burt v. Ivory*, 133 U. S. 349, 33 L. Ed. 647; *Howe Machine Co. v. National Needle Co.*, 134 U. S. 388, 33 L. Ed. 963; *Florsheim v. Schilling*, 137 U. S. 64, 34 L. Ed. 574; *Consolidated Roller Mill Co. v. Walker*, 138 U. S. 124, 34 L. Ed. 920; *Crescent Brewing Co. v. Gottfried*, 128 U. S. 158, 32 L. Ed. 390; *Dreyfus v. Searle*, 124 U. S. 60, 31 L. Ed. 352; *Miller v. Foree*, 116 U. S. 22, 27, 29 L. Ed. 552; *Ryan v. Hard*, 145 U. S. 241, 36 L. Ed. 691; *Vinton v. Hamilton*, 104 U. S. 485, 26 L. Ed. 807; *Stow v. Chicago*, 104 U. S. 547, 26 L. Ed. 816; *Piper v. Moon*, 91 U. S. 44, 23 L. Ed. 202.

There must be some new process or some new machinery to produce the result, in order that the supposed inventor may properly have a patent for the alleged improvement. *Dunbar v. Myers*, 94 U. S. 187, 199, 24 L. Ed. 34.

"If the new use be so nearly analogous to the former one that the applicability of the device to its new use would occur to a person of ordinary mechanical skill, it is only a case of double use." *Mast, etc., Co. v. Stover Mfg. Co.*, 177 U. S. 485, 493, 44 L. Ed. 856; *Potts v. Creager*, 155 U. S. 597, 606, 39 L. Ed. 275; *Hobbs v. Beach*, 180 U. S. 383, 389, 45 L. Ed. 586.

If the new use be analogous to the former one, the court will undoubtedly be disposed to construe the patent more



in the notes.<sup>95</sup>

(2) *When Application to New Use Requires Invention.*—If an old device or process be put to a new use which is not analogous to the old one, and the adaption of such process to the new use is of such a character as to require the exercise of inventive skill to produce it, such new use will not be denied

strictly, and to require clearer proof of the exercise of the inventive faculty in adapting it to the new use—particularly if the device be one of minor importance in its new field of usefulness. *Potts v. Creager*, 155 U. S. 597, 606, 39 L. Ed. 275.

The inventor of a machine is entitled to the benefit of all the uses to which it can be put, no matter whether he had conceived the idea of the use or not. *Roberts v. Ryer*, 91 U. S. 150, 23 L. Ed. 267.

The exercise of the inventive or origina-tive faculty is required, and a person cannot be permitted to select an existing form and simply put it to a new use any more than he can be permitted to take a patent for the mere double use of a machine. *Smith v. Whitman Saddle Co.*, 148 U. S. 674, 679, 37 L. Ed. 606.

It has been often held that the mere fact that one who uses a patented process finds it applicable to more extended use than has been perceived by the patentee, is not a defense to a charge of infringement. It follows necessarily that the public cannot be deprived of an old process because some one has discovered that it is capable of producing a better result, or has a wider range of use than was before known. *Lovell Mfg. Co. v. Cary*, 147 U. S. 623, 634, 37 L. Ed. 307.

**95. Instances of analogous or double uses.**—In the following cases the new uses to which old devices were applied were held to be analogous or double uses and not patentable: Application of the wood turning art to manufacturing needles and awls (*Howe Machine Co. v. National Needle Co.*, 134 U. S. 388, 33 L. Ed. 963); the use of hooks and lugs to fasten detachable base pans to a stove (*Bussey v. Excelsior Mfg. Co.*, 110 U. S. 131, 137, 28 L. Ed. 95); the use of a railroad car truck under a locomotive engine (*Pennsylvania R. Co. v. Locomotive, etc., Truck Co.*, 110 U. S. 490, 28 L. Ed. 222); a contrivance for closing the rear door on street cars from the front by devices previously in use for closing doors of furnaces or sugar refineries (*Stephenson v. Brooklyn, etc., R. Co.*, 114 U. S. 149, 29 L. Ed. 58); applying the principle of an ice cream freezer to a device for preserving fish (*Brown v. Piper*, 91 U. S. 37, 23 L. Ed. 200); applying a valve previously used on a steam fire engine on ships to a portable steam fire engine on land (*Blake v. San Francisco*, 113 U. S. 679, 28 L. Ed. 1070); using a coffee mill as a spice mill (*Potts v. Creager*, 155 U. S. 597, 607, 39 L. Ed. 275); applying an apparatus for forcing heated air into a flask to perform the same service with respect to a cask (*Crescent Brewing Co. v. Gott-*

*fried*, 128 U. S. 158, 32 L. Ed. 390); applying to the heating of one or other liquor, for the purpose of ageing it, from the inside of the cask, an apparatus which had been previously used to heat other liquids in the same way (*Dreyfus v. Searle*, 124 U. S. 60, 31 L. Ed. 352); applying a shifting device which operates automatically to reverse the action of a machine, to a fulling machine (*Royer v. Roth*, 132 U. S. 201, 33 L. Ed. 322); applying the principles of a common umbrella to a skirt form (*Knapp v. Morss*, 150 U. S. 221, 37 L. Ed. 1059); using safety break pins in connection with the driving gear of a stone crushing machine (*Gates Iron Works v. Fraser*, 153 U. S. 332, 38 L. Ed. 734); the application of belting to drive roller grinding mills, where the use of belting was old (*Consolidated Roller Mill Co. v. Walker*, 138 U. S. 124, 34 L. Ed. 920); applying a fuel magazine formerly used in an outstanding base burning stove to a fire place heater (*Thatcher Heating Co. v. Burtis*, 121 U. S. 286, 30 L. Ed. 942); application of a cinder notch to a cupola furnace, where cinder notches had formerly been used to draw off cinders from a blast furnace (*Vinton v. Hamilton*, 104 U. S. 485, 26 L. Ed. 807); making velocipede handles in a way in which other handles had formerly been made (*Pope Mfg. Co. v. Gormully, etc., Mfg. Co.*, No. 2, 144 U. S. 238, 245, 36 L. Ed. 420); applying the process of stamping tobacco, which was already well known, to the same tobacco at a later stage in the process of manufacture (*Miller v. Foree*, 116 U. S. 22, 29 L. Ed. 552); the application of old devices in making dash frames for vehicles, and in channelling or recessing the rail or bar thereof (*Peters v. Hanson*, 129 U. S. 541, 32 L. Ed. 742; *Peters v. Active Mfg. Co.*, 129 U. S. 530, 32 L. Ed. 738); applying the ordinary means of converting a rotary into a reciprocating motion, in combination with a windmill (*Mast, etc., Co. v. Stover Mfg. Co.*, 177 U. S. 485, 44 L. Ed. 856); making the teeth in saws or sawplates removable where cutters of the same general form as saw teeth, attached to a circular disk, and used for the purpose of cutting tongues and grooves, etc., were formerly in use (*Tucker v. Spalding*, 13 Wall. 453, 20 L. Ed. 515); applying a device to prevent horses from kicking so as to prevent them from interfering (*Haughey v. Lee*, 151 U. S. 282, 38 L. Ed. 162); using an old contrivance for lighting the interior of a fare box on street cars at night by using the headlight (*Slawson v. Grand St. R. Co.*, 107 U. S. 649, 27 L. Ed. 576); the using of an additional pane of glass in the ordinary



the merit of patentability.<sup>96</sup> The adaption of the elements of an old device to a new use involves invention, where the adaption to the new use and the minor changes required for that purpose result in the establishment of a practically new industry and is a decided step in advance of any theretofore made.<sup>97</sup>

(3) *Changing Device to Adapt It to New Use.*—Changes in the construction and operation of an old machine, so as to adapt it to a new and valuable use which the old machine had not, are patentable, and may consist either in a material modification of old devices, or in a new and useful combination of the several parts of the old machine.<sup>98</sup>

j. *Substitution of One Material for Another*—(1) *General Rule.*—The substitution of one material for another, which does not involve change of method

fare box of a street car opposite the side next the driver (*Slawson v. Grand St. R. Co.*, 107 U. S. 649, 27 L. Ed. 576).

**96. When discovery of new use requires invention.**—*Ansonia, etc., Copper Co. v. Electrical Supply Co.*, 144 U. S. 11, 18, 36 L. Ed. 327; *Lovell Mfg. Co. v. Cary*, 147 U. S. 623, 637, 37 L. Ed. 307; *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33; *Hobbs v. Beach*, 180 U. S. 383, 45 L. Ed. 586; *Western Electric Co. v. LaRue*, 139 U. S. 601, 35 L. Ed. 294; *Potts v. Creager*, 155 U. S. 597, 607, 39 L. Ed. 275; *Phillips v. Page*, 24 How. 164, 166, 16 L. Ed. 639; *Smith v. Goodyear, Dental Vulcanite Co.*, 93 U. S. 486, 496, 23 L. Ed. 952; *National Cash Register Co. v. Boston, etc., Recorder Co.*, 156 U. S. 502, 515, 39 L. Ed. 511; *DuBois v. Kirk*, 158 U. S. 58, 63, 39 L. Ed. 895; *Gosling v. Roberts*, 106 U. S. 39, 27 L. Ed. 61; *Smith v. Whitman Saddle Co.*, 148 U. S. 674, 679, 37 L. Ed. 606; *Blake v. San Francisco*, 113 U. S. 679, 682, 28 L. Ed. 1070; *Potts v. Creager*, 155 U. S. 597, 608, 39 L. Ed. 275.

The promotion of an old device, such, for instance, as a torsional spring, to a new sphere of action, in which it performs a new function, involves invention. *Western Electric Co. v. LaRue*, 139 U. S. 601, 606, 35 L. Ed. 294.

The employment in a cash register of the mechanism formerly used to ring the bell and open the drawer, to attain a more perfect action of the indicators, is not a mere case of double use, for invention was involved in the conception though only mechanical skill was necessary to adopt the contrivance to its new use. *National Cash Register Co. v. Boston, etc., Recorder Co.*, 156 U. S. 502, 514, 39 L. Ed. 511.

Although the mechanism of a device be analogous to that employed in prior devices, the results may be so important, and the ingenuity displayed to bring them about be such as to merit protection as an invention. *National Cash Register Co. v. Boston, etc., Recorder Co.*, 156 U. S. 502, 515, 39 L. Ed. 511.

In an invention for an improvement in the manufacture of hydrogen peroxide, where both the formula and the apparatus are old, it does not constitute invention to stir, by a well-known and simple mechanical device, what had before been stirred

by hand. *Marchand v. Emken*, 132 U. S. 195, 199, 33 L. Ed. 332.

Although waste ways were a common and well-known method of relieving the pressure of water upon dams, by drawing off the water from the pond above, the invention of an open sluice, so arranged relatively to the dam that the water not required to support the leaves escapes and relieves the dam of all unnecessary pressure, was the application of an old device to meet a novel exigency and to subserve a new purpose. *DuBois v. Kirk*, 158 U. S. 58, 63, 39 L. Ed. 895.

If, in case of design patents, the selection and adaptation of an existing form is more than the exercise of the imitative faculty and the result is in effect a new creation, the design may be patentable. *Smith v. Whitman Saddle Co.*, 148 U. S. 674, 679, 37 L. Ed. 606.

**97. What constitutes "invention" in this sense.**—*Hobbs v. Beach*, 180 U. S. 383, 392, 45 L. Ed. 586.

**98. Changing machine to adapt it to new use.**—*Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33; *Phillips v. Page*, 24 How. 164, 166, 16 L. Ed. 639; *Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 486, 496, 23 L. Ed. 952.

Particular changes may be made in the construction and operation of an old machine so as to adapt it to a new and valuable use not known before, and to which the old machine had not been, and could not be, applied without those changes, and, under those circumstances, if the machine, as changed and modified, produces a new and useful result, it may be patented, and the patent will be upheld under existing laws. *Seymour v. Osborne*, 11 Wall. 516, 548, 20 L. Ed. 33; *Phillips v. Page*, 24 How. 164, 166, 16 L. Ed. 639.

Such a change in an old machine may consist merely of a new and useful combination of the several parts of which the old machine is composed, or it may consist of a material alteration or modification of one or more of the several devices which entered into its construction, and whether it be the one or the other, if the change of construction and operation actually adapts the machine to a new and valuable use not known before, and it actually produces a new and useful result,

nor develop novelty of use, even though it may result in a superior article, is not necessarily a patentable invention.<sup>99</sup>

then a patent may be granted for the same, and it will be upheld as a patentable improvement. *Seymour v. Osborne*, 11 Wall. 516, 548, 20 L. Ed. 33.

**99. Substitution of one material for another.**—*Florsheim v. Schilling*, 137 U. S. 64, 76, 34 L. Ed. 574; *Hotchkiss v. Greenwood*, 11 How. 248, 13 L. Ed. 683; *Hicks v. Kelsey*, 18 Wall. 670, 21 L. Ed. 852; *Terhune v. Phillips*, 99 U. S. 592, 25 L. Ed. 293; *Gardner v. Herz*, 118 U. S. 180, 30 L. Ed. 158; *Brown v. District of Columbia*, 130 U. S. 87, 32 L. Ed. 863; *Dunbar v. Myers*, 94 U. S. 187, 198, 24 L. Ed. 34; *Leggett v. Standard Oil Co.*, 149 U. S. 287, 297, 37 L. Ed. 737; *Smith v. Good-year Dental Vulcanite Co.*, 93 U. S. 486, 496, 23 L. Ed. 952; *Shenfield v. Nashawannuck Mfg. Co.*, 137 U. S. 56, 59, 34 L. Ed. 573; *Heald v. Rice*, 104 U. S. 737, 26 L. Ed. 910; *Potts v. Creager*, 155 U. S. 597, 608, 39 L. Ed. 275; *Underwood v. Gerber*, 149 U. S. 224, 229, 37 L. Ed. 710; *Brigham v. Coffin*, 149 U. S. 557, 562, 37 L. Ed. 845.

There was no patentable novelty or invention, in view of the earlier patents and publications put in evidence, in applying an existing coloring substance to paper. *Underwood v. Gerber*, 149 U. S. 224, 229, 37 L. Ed. 710; *Brigham v. Coffin*, 149 U. S. 557, 562, 37 L. Ed. 845.

**The substitution of metal for wood** was destitute both of patentable invention and utility. *Terhune v. Phillips*, 99 U. S. 592, 25 L. Ed. 293.

**The substitution of wood or wood strengthened with iron for iron alone**, is not invention in the sense of the patent act, and therefore is not the subject of a patent. *Hicks v. Kelsey*, 18 Wall. 670, 21 L. Ed. 852; *Dunbar v. Myers*, 94 U. S. 187, 198, 24 L. Ed. 34.

**The substitution of a well-known porcelain door knob for a clay knob**, in combination with a particular shank, is not invention. *Hotchkiss v. Greenwood*, 11 How. 248, 13 L. Ed. 683.

**Substitution for flat for round cord.**—It does not involve invention "to make a suspender end of flat cord in substantially the same way that suspender ends of round cord had been made, and in substantially the same way in which flat button ends had been made for the purpose of fastening or securing other articles of wearing apparel than trousers." The connection of the end to the attaching piece gave no patentable character to the loop and was old, as was the attachment to the buckle, nor was any new mode of operation produced by the combination of the devices in this article. *Shenfield v. Nashawannuck Mfg. Co.*, 137 U. S. 56, 59, 34 L. Ed. 573.

**Substitution of wood for stone or other material.**—A wood pavement "composed of blocks, each side having a single plain

surface and one or more of the sides being inclined, and the blocks being so laid on their larger ends as to form wedge-shaped grooves or spaces to receive concrete or other suitable filling," was not patentable, where, prior to that time, pavements had been made in a similar way out of other material. *Brown v. District of Columbia*, 130 U. S. 87, 99, 32 L. Ed. 863.

**Substitution of a paper for linen.**—The object in turning down a collar on a curved line instead of a straight line is precisely the same, whether the collar be all paper, paper and linen, or all linen. Hence, where it appeared that linen collars had been turned over on a curved line, to prevent wrinkling, and to afford space for the cravat, held, that it was not patentable to apply the same mode of turning down to collars of paper or paper and linen. *Collar Co. v. Van Dusen*, 23 Wall. 530, 23 L. Ed. 128.

It appearing that the collars made by Evans, apart from the paper composing them, were identical in form, structure, and arrangement with collars previously made of linen paper of different quality, and of other fabrics, and that Evans did not invent the special paper used by him, nor the process by which it was obtained, held, that he was not entitled to a patent for the collars as a new manufacture. *Collar Co. v. Van Dusen*, 23 Wall. 530, 23 L. Ed. 128.

**New material for chair bottoms.**—The fabric being old, the suggestion to construct chair seats out of it being old, the shaping of it in a former being old, the perforation of the seat for ventilation and ornamentation being old, and the giving of a concave shape to a wooden seat by pressure being old, there cannot, in view of the disclaimers in the second reissue, be anything patentable in the structure. It was convenient to sell and convenient to buy, and commercially a good article. But a patent cannot be taken out for an article, old in purpose and shape and mode of use, when made for the first time out of an existing material, and with accompaniments before applied to such an article, merely because the idea has occurred that it would be a good thing to make the article out of that particular old material. *Gardner v. Herz*, 118 U. S. 180, 192, 30 L. Ed. 158.

**Use of glue in liquid instead of dry state.**—The claim of invention was that previous to the discovery the process in lining barrels with glue had been to melt the dried glue of commerce and pour it into a barrel, close up the barrel, and roll it around until the inside surface thereof was thoroughly coated; and that the discovery made it cheaper for the oil people to manufacture their own glue and use it

(2) *Material Performing New Function or Accomplishing New Result.*—But the substitution of one material for another may involve invention. This has been held to be true where the patent claimed is one for the material used, and it has a different result from that formerly in use,<sup>1</sup> and where the substituted material performs a different function or has different capabilities from the old.<sup>2</sup>

k. *Substitution of Equivalents.*—A change in an existing machine or device

in the same manner, but before it had been dried. This use of the liquid glue before drying differed in no essential respect from the use of the liquid glue which had been obtained by melting the dried glue of commerce, and certainly does not rise to the dignity of invention. It would have occurred, and did occur, as the testimony shows, to manufacturers of glue where there was occasion or necessity for using glue in large quantities. The alleged invention was properly held by the court below to be a commercial suggestion that would naturally occur to any one engaged largely in the use of glue. *Leggett v. Standard Oil Co.*, 149 U. S. 287, 295, 37 L. Ed. 737.

It being thus clearly established that the use of liquid glue was well known to glue manufacturers and oil refiners, and had been actually applied in the very way and for the very purposes described by the complainant, long before the date of his alleged invention, it is too clear for discussion that he could have no valid patent which would cover a process for using liquid glue for coating or sizing purposes as a new discovery or invention. *Leggett v. Standard Oil Co.*, 149 U. S. 287, 297, 37 L. Ed. 737.

**Insulating material.**—A patent for insulation for electric wires to prevent combustion which differs from a covering previously used on such wires, but which was not used to prevent combustion and was probably not known to have that effect, involves no invention, where both processes consist of layers of paint and braid, and the only difference between the processes is that in the one the second braid was put on before the previous coat of paint was dry, and in the other the coat of paint was dried before the second braid was put on. *Ansonia, etc., Copper Co. v. Electrical Supply Co.*, 144 U. S. 11, 16, 36 L. Ed. 327.

**1. Patent for material.**—*Magowan v. New York, etc., Packing Co.*, 141 U. S. 332, 35 L. Ed. 781; *Gandy v. Main Belting Co.*, 143 U. S. 587, 36 L. Ed. 272. See, also, *Hicks v. Kelsey*, 18 Wall. 670, 21 L. Ed. 852; *Potts v. Creager*, 155 U. S. 597, 609, 39 L. Ed. 275.

A patent for canvas belting for machinery made out of thin hard woven canvas, the warp of which was stouter than the weft, saturated with oil, the peculiar feature of its structure equalizing the strain on all parts of the belt, constitutes invention, and is not such as would have occurred to an ordinary mechanic. In order

to make such belt, one must have been familiar not only with the impossibility of making a practicable belt out of ordinary canvas, but with a method of overcoming the difficulty. *Gandy v. Main Belting Co.*, 143 U. S. 587, 36 L. Ed. 272.

A patent for piston rod packing consisting of alternate layers of canvas and india rubber, the canvas being cut bias, and vulcanized into one homogenous mass, which is itself vulcanized to a rubber backing of pure gum free from layers of canvas, the idea of the rubber backing being to increase the elasticity of the backing so that a tight joint may result, is a patentable invention, although packing made of alternate layers of canvas and india rubber, or made of canvas rolled around a rubber core, were already in use. *Magowan v. New York, etc., Packing Co.*, 141 U. S. 332, 35 L. Ed. 781.

**2. Material with new functions or capabilities.**—*Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 486, 23 L. Ed. 952; *Gosling v. Roberts*, 106 U. S. 39, 27 L. Ed. 61; *Potts v. Creager*, 155 U. S. 597, 609, 39 L. Ed. 275.

The use of hard rubber in lieu of the materials previously used for a plate for holding artificial teeth, or such teeth and gums, is a superior product, having capabilities and performing functions which differ from anything preceding it, and which cannot be ascribed to mere mechanical skill, but is to be justly regarded as the results of inventive efforts, as making the manufacture of which they are attributes a novel thing in kind, and, consequently, patentable as such. *Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 486, 23 L. Ed. 952.

A patent for a combined step cover, wheel fender, and door holder, for carriages is patentable, even though a device of the same shape formerly was in use which served as a wheel cover and fender, but which, because it was not made out of flexible material, did not operate as a door holder. *Gosling v. Roberts*, 106 U. S. 39, 27 L. Ed. 61.

A device for polishing boards, which consists of a cylinder, provided on its periphery with a series of projecting glass bars, fitted into longitudinal grooves, does not anticipate a device in which steel bars are substituted for glass, for a purpose wholly different from that for which they had been employed, where the new machine secured a new and valuable result. *Potts v. Creager*, 155 U. S. 597, 608, 39 L. Ed. 275.



made by the substitution of known equivalents for the parts of the old machine which are not substantially reproduced does not constitute invention, nor entitle the originator to a patent.<sup>3</sup>

1. *Omission of Minor or Immaterial Features.*—The omission of minor or immaterial features of an old device, does not involve invention, nor make the new devices with the omitted features patentable.<sup>4</sup>

m. *Combination of Old Elements.*—It is well settled that a combination of old elements may be patentable.<sup>5</sup> But in order for a patent to issue for a com-

**3. Substitution of equivalents.**—Smith v. Nichols, 21 Wall. 112, 115, 22 L. Ed. 566; Dunbar v. Myers, 94 U. S. 187, 199, 24 L. Ed. 34; Stephenson v. Brooklyn, etc., R. Co., 114 U. S. 149, 29 L. Ed. 58; O'Reilly v. Morse, 15 How. 62, 14 L. Ed. 601; Hartshorn v. Saginaw Barrel Co., 119 U. S. 664, 30 L. Ed. 539; Sargent v. Covert, 152 U. S. 516, 38 L. Ed. 536; Lehigh Valley R. Co. v. Kearney, 158 U. S. 461, 39 L. Ed. 1055; DuBois v. Kirk, 158 U. S. 58, 39 L. Ed. 895; Marchand v. Emken, 132 U. S. 195, 33 L. Ed. 332; Hoyt v. Horne, 145 U. S. 302, 36 L. Ed. 713; Clough v. Manufacturing Co., 106 U. S. 178, 27 L. Ed. 138.

Where an invention for a shade roller by which the pawl and ratchet were upon the roller in such a way as to allow the roller to be removed from its bracket without permitting the spring to unwind had become public property, there was no invention in a patent for a shade roller in which the pawl was described as acting substantially at right angles with the ratchet or notched hub, which was substantially an equivalent for the other first patent. Hartshorn v. Saginaw Barrel Co., 119 U. S. 664, 30 L. Ed. 539.

**What constitutes an equivalent.**—See post, "What Constitutes," XIII, A, 2, a, (2), (e), cc.

**4. Omission of minor features.**—National Hat Pouncing Machine Co. v. Hedden, 148 U. S. 482, 37 L. Ed. 529; McClain v. Ortmyer, 141 U. S. 419, 35 L. Ed. 800.

The omission of the feed roll in a hat pouncing machine does not involve invention where the hat support and pouncing cylinder of the former patent will accomplish practically the same functions as the later device, though not so perfectly. National Hat Pouncing Machine Co. v. Hedden, 148 U. S. 482, 489, 37 L. Ed. 529.

One who has already invented a sweat pad for horses' collars which fastens to the collar by means of double roll springs embracing both the fore and after wales of the collar is not entitled to a patent for a sweat pad which fastens to the front roll with wire only, as discarding the after roll does not involve invention. McClain v. Ortmyer, 141 U. S. 419, 35 L. Ed. 800.

**5. Combinations.**—Richards v. Chase Elevator Co., 159 U. S. 477, 40 L. Ed. 225; Office Specialty Mfg. Co. v. Fenton Metallic Mfg. Co., 174 U. S. 492, 43 L. Ed. 1058; Gould v. Rees, 15 Wall. 187, 21 L. Ed. 39; Loom Co. v. Higgins, 105 U. S.

580, 26 L. Ed. 1177; Knapp v. Morss, 150 U. S. 221, 227, 37 L. Ed. 1059; Hailes v. Van Wormer, 20 Wall. 353, 22 L. Ed. 241; Reckendorfer v. Faber, 92 U. S. 347, 23 L. Ed. 719; Phillips v. Detroit, 111 U. S. 604, 28 L. Ed. 532; Brinkerhoff v. Aloe, 146 U. S. 515, 36 L. Ed. 1068; Palmer v. Corning, 156 U. S. 342, 39 L. Ed. 445; Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 446, 46 L. Ed. 968; Computing Scale Co. v. Automatic Scale Co., 204 U. S. 609, 616, 51 L. Ed. 645; Wicke v. Ostrum, 103 U. S. 461, 26 L. Ed. 409; Pickering v. McCullough, 104 U. S. 310, 26 L. Ed. 749; Thatcher Heating Co. v. Burtis, 121 U. S. 286, 30 L. Ed. 942; Potts v. Creager, 155 U. S. 597, 608, 39 L. Ed. 275; Gill v. Wells, 22 Wall. 1, 14, 22 L. Ed. 699; Prouty v. Draper, 16 Pet. 336, 341, 10 L. Ed. 985; Vance v. Campbell, 1 Black 427, 428, 17 L. Ed. 168; Fuller v. Yentzer, 94 U. S. 288, 297, 24 L. Ed. 103; Cantrell v. Wallick, 117 U. S. 689, 29 L. Ed. 1017; Seymour v. Osborne, 11 Wall. 516, 20 L. Ed. 33; Beecher Mfg. Co. v. Atwater Mfg. Co., 114 U. S. 523, 29 L. Ed. 232; Stephenson v. Brooklyn, etc., R. Co., 114 U. S. 149, 29 L. Ed. 58; Busell Trimmer Co. v. Stevens, 137 U. S. 423, 34 L. Ed. 719; Bussey v. Excelsior Mfg. Co., 110 U. S. 131, 28 L. Ed. 95; Kremenitz v. The S. Cottle Co., 148 U. S. 556, 37 L. Ed. 558; Consolidated Safety-Valve Co. v. Crosby Steam Gange Valve Co., 113 U. S. 157, 28 L. Ed. 939; Magowan v. New York, etc., Packing Co., 141 U. S. 332, 35 L. Ed. 781; The Barbed Wire Patent, 143 U. S. 275, 36 L. Ed. 154; Gandy v. Main Belting Co., 143 U. S. 587, 36 L. Ed. 272.

A combination of old elements so as to produce the new machine, capable of performing a new task, is patentable. Wicke v. Ostrum, 103 U. S. 461, 26 L. Ed. 409.

A defense to an infringement suit based on the theory that a patent cannot be valid unless it is new in all its elements as well as in the combination, if it is for a combination, cannot be maintained. If it were sound no patent for an improvement on a known contrivance or process could be valid. And yet the great majority of patents are for improvements in old and well-known devices, or on patented inventions. Changes in the construction of an old machine which increase its usefulness are patentable. Cantrell v. Wallick, 117 U. S. 689, 694, 29 L. Ed. 1017; Seymour v. Osborne, 11 Wall. 516, 20 L. Ed. 33.

bination of old elements it must either accomplish a new result,<sup>6</sup> or an old result, in a cheaper or otherwise more advantageous way,<sup>7</sup> and the advantage thus accruing must be due to the joint and co-operating action of all the old elements.<sup>8</sup> An aggregation of old elements, each working out its own effect, and

**6. Necessity for accomplishment of new result.**—*Richards v. Chase Elevator Co.*, 159 U. S. 477, 40 L. Ed. 225; *Office Specialty Mfg. Co. v. Fenton Metallic Mfg. Co.*, 174 U. S. 492, 43 L. Ed. 1058; *Loom Co. v. Higgins*, 105 U. S. 580, 26 L. Ed. 1177; *Knapp v. Morss*, 150 U. S. 221, 227, 37 L. Ed. 1059; *Hailes v. Van Wormer*, 20 Wall. 353, 22 L. Ed. 241; *Reckendorfer v. Faber*, 92 U. S. 347, 23 L. Ed. 719; *Phillips v. Detroit*, 111 U. S. 604, 28 L. Ed. 532; *Potts v. Creager*, 155 U. S. 597, 608, 39 L. Ed. 275; *Prouty v. Draper*, 16 Pet. 336, 341, 10 L. Ed. 985; *Vance v. Campbell*, 1 Black 427, 428, 17 L. Ed. 168; *Fuller v. Yentzer*, 94 U. S. 288, 297, 24 L. Ed. 103; *Stephenson v. Brooklyn, etc., R. Co.*, 114 U. S. 149, 29 L. Ed. 58; *Brinkerhoff v. Aloe*, 146 U. S. 515, 36 L. Ed. 1068; *Palmer v. Corning*, 156 U. S. 342, 39 L. Ed. 445; *Carnegie Steel Co. v. Cambria Iron Co.*, 185 U. S. 403, 446, 46 L. Ed. 968; *Computing Scale Co. v. Automatic Scale Co.*, 204 U. S. 609, 616, 51 L. Ed. 645; *Pickering v. McCullough*, 104 U. S. 310, 26 L. Ed. 749; *Burt v. Ivory*, 133 U. S. 349, 33 L. Ed. 647; *Mosler Safe, etc., Co. v. Mosler*, 127 U. S. 354, 361, 32 L. Ed. 182; *Peters v. Hanson*, 129 U. S. 541, 32 L. Ed. 742.

"The combination, to be patentable," said Mr. Justice Hunt, in *Reckendorfer v. Faber*, 92 U. S. 347, 357, 23 L. Ed. 719, "must produce a different force or effect, or result, in the combined forces or processes, from that given by their separate parts. There must be a new result produced by their union; if not so, it is only an aggregation of separate elements." *Pickering v. McCullough*, 104 U. S. 310, 318, 26 L. Ed. 749.

It is not invention to combine old devices into a new article without producing any new mode of operation. *Burt v. Ivory*, 133 U. S. 349, 359, 33 L. Ed. 647; *Stimpson v. Woodman*, 10 Wall. 117, 19 L. Ed. 866; *Heald v. Rice*, 104 U. S. 737, 26 L. Ed. 910; *Hall v. Macneale*, 107 U. S. 90, 27 L. Ed. 367.

Unless the combination accomplishes some new result, the mere multiplicity of elements does not make it patentable. So long as each element performs some old and well-known function, the result is not a patentable combination, but an aggregation of elements. Indeed, the multiplicity of elements may go on indefinitely without creating a patentable combination, unless by their collocation a new result be produced. *Richards v. Chase Elevator Co.*, 158 U. S. 299, 302, 39 L. Ed. 991.

A patent for a device in which it is manifest that every element of the combination is found in some prior device, is invalid for lack of invention when the results also are old and no new function is

evolved from the combination. *Office Specialty Mfg. Co. v. Fenton Metallic Mfg. Co.*, 174 U. S. 492, 497, 43 L. Ed. 1058.

It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result, never attained before, it is evidence of invention. *Loom Co. v. Higgins*, 105 U. S. 580, 581, 26 L. Ed. 1177; *Potts v. Greager*, 155 U. S. 597, 608, 39 L. Ed. 275; *Carnegie Steel Co. v. Cambria Iron Co.*, 185 U. S. 403, 446, 46 L. Ed. 968; *Knapp v. Morss*, 150 U. S. 221, 227, 37 L. Ed. 1059.

It is a new and useful result to make a loom produce fifty yards a day when it never before had produced more than forty; and a combination of elements by which this was effected, even if those elements were separately known before, was invention sufficient to form the basis of a patent. *Loom Co. v. Higgins*, 105 U. S. 580, 591, 26 L. Ed. 1177.

In an improvement in frames for horizontal engines, the only invention being in the combination of a cylindrical guide and trough, where each performs practically the same functions as in prior patents and no new and valuable result is accomplished, a patent therefor cannot be sustained. *Wright v. Yuengling*, 155 U. S. 47, 53, 39 L. Ed. 64.

**7. Cheapening old result.**—*Stephenson v. Brooklyn, etc., R. Co.*, 114 U. S. 149, 157, 29 L. Ed. 58.

But a combination in a corset of prior inventions secured and put into use by prior patents, making it a superior and cheaper article, is not of itself a patentable invention. *Florsheim v. Schilling*, 137 U. S. 64, 77, 34 L. Ed. 574.

**Increasing effectiveness of machine.**—A new combination of known devices, whereby the effectiveness of a machine is increased, may be the subject of a patent. *Cantrell v. Wallick*, 117 U. S. 689, 694, 29 L. Ed. 1017; *Loom Co. v. Higgins*, 105 U. S. 580, 26 L. Ed. 1177; *Hailes v. Van Wormer*, 20 Wall. 353, 22 L. Ed. 241.

**8. New result must be due to co-operation of elements.**—*Pickering v. McCullough*, 104 U. S. 310, 26 L. Ed. 749; *Hailes v. Van Wormer*, 20 Wall. 353, 22 L. Ed. 241; *Brinkerhoff v. Aloe*, 146 U. S. 515, 516, 36 L. Ed. 1068; *Palmer v. Corning*, 156 U. S. 342, 344, 39 L. Ed. 445; *Phillips v. Detroit*, 111 U. S. 604, 28 L. Ed. 532; *Richards v. Chase Elevator Co.*, 159 U. S. 477, 40 L. Ed. 225; *Burt v. Ivory*, 133 U. S. 349, 33 L. Ed. 647; *Reckendorfer v. Faber*, 92 U. S. 347, 23 L. Ed. 719; *Busell Trimmer Co. v. Stevens*, 137 U. S. 423, 34 L. Ed. 719; *Stephenson v. Brooklyn, etc., R. Co.*, 114 U. S. 149, 157, 29 L. Ed. 58; *Beecher Mfg. Co. v. Atwater Mfg. Co.*



performing the same service that it performed before being joined with the others, without securing a new and useful result, as the product of the combination, does not involve patentable invention.<sup>9</sup> Merely bringing old devices into juxtaposition, and there allowing each to work out its own effect, without

114 U. S. 523, 29 L. Ed. 232; *Preston v. Manard*, 116 U. S. 661, 29 L. Ed. 736; *LeRoy v. Tatham*, 14 How. 156, 14 L. Ed. 367; *Florsheim v. Schilling*, 137 U. S. 64, 34 L. Ed. 574.

"If several old devices are so put together as to produce even a better machine or instrument than was formerly in use, but each of the old devices does what it had formerly done in the instrument or machine from which it was borrowed and in the old way, without uniting with other old devices to perform any joint function, it seems that the combination is not patentable. *Hailes v. Van Wormer*, 20 Wall. 353, 22 L. Ed. 241; *Reckendorfer v. Faber*, 92 U. S. 347, 23 L. Ed. 719." *Brinkerhoff v. Aloe*, 146 U. S. 515, 516, 36 L. Ed. 1068.

In a patentable combination of old elements, all the constituents must so enter into it as that each qualifies every other. It must form either a new machine of a distinct character and function, or produce a result due to the joint and co-operating action of all the elements, and which is not the mere adding together of separate contributions. Otherwise it is only a mechanical juxtaposition, and not a vital union. *Pickering v. McCullough*, 104 U. S. 310, 318, 26 L. Ed. 749.

A combination, to be patentable, must produce a different force, effect, or result in the combined forces or processes from that given by their separate parts. There must be a new result produced by their union; otherwise it is only an aggregation of separate elements. *Reckendorfer v. Faber*, 92 U. S. 347, 23 L. Ed. 719.

"In a patentable combination of old elements, all the constituents must so enter into it as that each qualifies every other; to draw an illustration from another branch of the law, they must be joint tenants of the domain of the invention, seized each of every part, per my et per tout, and not mere tenants in common, with separate interests and estates. It must form either a new machine of a distinct character and function, or produce a result due to the joint and co-operating action of all the elements, and which is not the mere adding together of separate contributions. Otherwise it is only a mechanical juxtaposition, and not a vital union. *Pickering v. McCullough*, 104 U. S. 310, 318, 26 L. Ed. 749." *Palmer v. Corning*, 156 U. S. 342, 345, 39 L. Ed. 415.

**9. Aggregation of old elements.**—*Phillips v. Detroit*, 111 U. S. 604, 28 L. Ed. 532; *Union Edge Setter Co. v. Keith*, 139 U. S. 530, 539, 35 L. Ed. 261; *Reckendorfer v. Faber*, 92 U. S. 347, 23 L. Ed. 719; *Pickering v. McCullough*, 104 U. S.

310, 26 L. Ed. 749; *Stephenson v. Brooklyn, etc., R. Co.*, 114 U. S. 149, 29 L. Ed. 58; *Hendy v. Golden State, etc., Iron Works*, 127 U. S. 370, 32 L. Ed. 207; *Hailes v. Van Wormer*, 20 Wall. 353, 22 L. Ed. 241; *Smith v. Whitman Saddle Co.*, 148 U. S. 674, 680, 37 L. Ed. 606; *Royer v. Roth*, 132 U. S. 201, 33 L. Ed. 322; *Day v. Fair Haven, etc., R. Co.*, 132 U. S. 98, 33 L. Ed. 265; *Morris v. McMillin*, 112 U. S. 244, 249, 28 L. Ed. 702; *Watson v. Cincinnati, etc., R. Co.*, 132 U. S. 161, 167, 33 L. Ed. 295; *Mosler Safe, etc., Co. v. Mosler*, 127 U. S. 354, 355, 32 L. Ed. 182; *Richards v. Chase Elevator Co.*, 158 U. S. 299, 39 L. Ed. 991; *Holmes v. Hurst*, 174 U. S. 82, 89, 43 L. Ed. 904; *Bussey v. Excelsior Mfg. Co.*, 110 U. S. 131, 28 L. Ed. 95; *Fond Du Lac County v. May*, 137 U. S. 395, 407, 34 L. Ed. 714; *Double-Pointed Track Co. v. Two Rivers Mfg. Co.*, 109 U. S. 117, 27 L. Ed. 877; *Aron v. Manhattan R. Co.*, 132 U. S. 84, 33 L. Ed. 272; *Adams v. Bellaire Stamping Co.*, 141 U. S. 539, 35 L. Ed. 849; *Derby v. Thompson*, 146 U. S. 476, 481, 36 L. Ed. 1051; *Packing Co. Cases*, 105 U. S. 566, 574, 26 L. Ed. 1172; *Rubber-Coated Harness-Trimming Co. v. Welling*, 97 U. S. 7, 12, 24 L. Ed. 942.

Where the patentee had taken a fire pot from one stove, a flue from another, and a coal reservoir from the third, and had put them into a new stove, where each fulfilled the office it had fulfilled in its old situation and nothing more, the patent was held void for want of invention. *Hailes v. Van Wormer*, 20 Wall. 353, 22 L. Ed. 241; *Phillips v. Detroit*, 111 U. S. 604, 607, 28 L. Ed. 532.

The combination of a washer with a wire staple, both being old, and both being used independently in the same way that they had always been used, is not patentable. *Double-Pointed Tack Co. v. Two Rivers Mfg. Co.*, 109 U. S. 117, 27 L. Ed. 877.

Combining a saddle cantle in common use with a tree in common use, is not invention, especially where saddle makers had previously used the different cantles and trees on saddles, when so ordered by their customers. *Smith v. Whitman Saddle Co.*, 148 U. S. 674, 680, 37 L. Ed. 606.

A patent for an improvement in track scrapers is invalid, where the scraper and draw bar are both confessedly old and the diagonal brace to prevent lateral displacement of the scraper, the only element of the combination claimed as new, involves no patentable novelty. *Day v. Fair Haven, etc., R. Co.*, 132 U. S. 98, 103, 33 L. Ed. 265.

Securing a lid to a lantern by means of a catch on one side and a hinge on one



the production of something novel, is not invention.<sup>10</sup> While the omission of an element in a combination may constitute invention, if the result of the new combination be the same as before; yet if the omission of an element is attended by a corresponding omission of the function performed by that element, there is no invention if the elements retained performed the same function as before.<sup>11</sup>

n. *Effect of Simplicity or Obviousness of Device.*—The mere fact that an invention is simple and obvious, does not defeat invention,<sup>12</sup> where the thing is not so obvious that it would occur to one ordinarily skilled in the art.<sup>13</sup>

3. EVIDENCE OF INVENTION—*a. Judicial Notice.*—As to judicial notice of things in common use, see the title JUDICIAL NOTICE, vol. 7, p. 672.

b. *General Use as Evidence of Invention.*—While it is true that the mere fact that a device has gone into general use, and has displaced other devices which had previously been employed for analogous uses, does not establish, in all cases, that the later device involves invention within the meaning of the patent laws,<sup>14</sup> yet such fact is always of importance, and is entitled to weight, when the question is whether the machine exhibits patentable invention.<sup>15</sup> And when the other facts in the case leave the question of invention in doubt, the fact that the device has gone into general use and has displaced other devices,

is not patentable, it being a mere aggregation. *Adams v. Bellaire Stamping Co.*, 141 U. S. 539, 35 L. Ed. 849.

In a patent for an improved fountain hose carriage, the hose reel, the standard, the brace, the nozzle holder, and their use in combination, being all old, the description of the hose reel, in the specification and claim, as "a reel of large diameter to allow the water to pass through the hose when partially wound thereon," is not sufficient to sustain the patent. *Preston v. Manard*, 116 U. S. 661, 664, 29 L. Ed. 736.

Where the elements of which a combination described in a patent was composed were all old and well known, consisting of a mirror, the hood of a street car over the driver's platform, and a glass panel in the front end of the car over the door, the combination was not patentable. *Stephenson v. Brooklyn, etc., R. Co.*, 114 U. S. 149, 157, 29 L. Ed. 58.

A combination which consists only of the application of a piece of rubber to one end of the same piece of wood which makes a lead pencil, is not patentable. *Reckendorfer v. Faber*, 92 U. S. 347, 23 L. Ed. 719.

A patent for a combination for a pavement formed by blocks of wood cut from the trunks of trees, set with their fibers vertical upon a bed of broken stones, sand or gravel, the spaces between the blocks being filled with sand or gravel, is void for want of novelty where the use of blocks so formed, the foundation or bed, and the filling, are all old. *Phillips v. Detroit*, 111 U. S. 604, 28 L. Ed. 532.

Letters-patent No. 37,941, granted March 17, 1863, to William M. Welling, for an improvement in rings for martingales, are void for want of novelty, being merely for a product consisting of a metallic ring enveloped in a composition of ivory or similar material. *Rubber-Coated Har-*

*ness-Trimming Co. v. Welling*, 97 U. S. 7, 24 L. Ed. 942.

10. *Pickering v. McCullough*, 104 U. S. 310, 318, 26 L. Ed. 749; *Hailes v. Van Wormer*, 20 Wall. 353, 368, 22 L. Ed. 241; *Palmer v. Corning*, 156 U. S. 342, 344, 39 L. Ed. 445.

11. *Omission of element of old combination.*—*Richards v. Chase Elevator Co.*, 159 U. S. 477, 486, 40 L. Ed. 225; *National Hat Pouncing Machine Co. v. Hedden*, 148 U. S. 482, 489, 37 L. Ed. 529. See, also, *The Corn-Planter Patent*, 23 Wall. 181, 182, 23 L. Ed. 161.

A patent for an improved method of transferring and weighing grain, which differs from the ordinary elevator method only in the omission of the storage feature, lacks the necessary quality of invention. *Richards v. Chase Elevator Co.*, 159 U. S. 477, 486, 40 L. Ed. 225.

12. *Obviousness does not defeat invention.*—*Loom Co. v. Higgins*, 105 U. S. 580, 591, 26 L. Ed. 1177.

13. *Invention obvious to mechanism.*—See ante, "Mechanical Skill," V, B, 2, c.

14. *General use of device not conclusive.*—*Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 486, 495, 23 L. Ed. 952; *Keystone Mfg. Co. v. Adams*, 151 U. S. 139, 143, 38 L. Ed. 103; *Olin v. Timken*, 155 U. S. 141, 155, 39 L. Ed. 100; *Duer v. Corbin Cabinet Lock Co.*, 149 U. S. 216, 223, 37 L. Ed. 707; *McClain v. Ortmyer*, 141 U. S. 419, 35 L. Ed. 800; *Adams v. Bellaire Stamping Co.*, 141 U. S. 539, 35 L. Ed. 849.

15. *General use may be considered.*—*Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 486, 23 L. Ed. 952; *Keystone Mfg. Co. v. Adams*, 151 U. S. 139, 143, 38 L. Ed. 103; *Topliff v. Topliff*, 145 U. S. 156, 163, 36 L. Ed. 658; *The Barbed Wire Patent*, 143 U. S. 275, 36 L. Ed. 154; *Consolidated Safety-Valve Co. v. Crosby Steam Gauge Valve Co.*, 113 U. S. 157, 179, 28 L. Ed. 939.

which had previously been employed for analogous uses, is sufficient to turn the scale in favor of the existence of invention.<sup>16</sup>

**C. Novelty and Anticipation—1. NOVELTY—**a. *Necessity for Novelty.*—In order for an invention to be patentable, it is well settled that it must not only be useful but it must be new or novel in the sense of the patent law.<sup>17</sup>

b. *What Constitutes*—(1) *Definitions.*—To render an article new within that law, it must be more or less efficacious, or possess new properties by a combination with other ingredients.<sup>18</sup> Articles of manufacture may be new in the commercial sense when they are not new in the sense of the patent law.<sup>19</sup> A change in form,<sup>20</sup> or in the use to which the invention is put,<sup>21</sup> is not sufficient. The phrase "patentable novelty," is frequently used by courts and judges as synonymous with "invention," and the cases in which it is so used are treated in another section.<sup>22</sup>

(2) *Machines.*—In case of a patent for a machine or device, the machine or device itself must be new.<sup>23</sup> It is not sufficient that it produces a product, by the application of a new principle or idea.<sup>24</sup>

**16. General use sufficient evidence in doubtful cases.**—*Krementz v. The S. Cottle Co.*, 148 U. S. 556, 560, 37 L. Ed. 558; *Topliff v. Topliff*, 145 U. S. 156, 36 L. Ed. 658; *Computing Scale Co. v. Automatic Scale Co.*, 204 U. S. 609, 616, 51 L. Ed. 645; *Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 486, 23 L. Ed. 952; *The Barbed Wire Patent*, 143 U. S. 275, 284, 36 L. Ed. 154; *Magowan v. New York, etc.*, *Packing Co.*, 141 U. S. 332, 35 L. Ed. 781; *Gandy v. Main Belting Co.*, 143 U. S. 587, 36 L. Ed. 272; *Keystone Mfg. Co. v. Adams*, 151 U. S. 139, 38 L. Ed. 103.

**17. Necessity for novelty.**—*Collins Co. v. Coes*, 130 U. S. 56, 32 L. Ed. 858; *Gosling v. Roberts*, 106 U. S. 39, 47, 27 L. Ed. 61; *Johnson v. Railroad Co.*, 105 U. S. 539, 26 L. Ed. 1162; *The Wood-Paper Patent*, 23 Wall. 566, 567, 23 L. Ed. 31; *Sewall v. Jones*, 91 U. S. 171, 23 L. Ed. 275; *Eddy v. Dennis*, 95 U. S. 560, 24 L. Ed. 363; *Densmore v. Scofield*, 102 U. S. 375, 26 L. Ed. 214; *Dunbar v. Myers*, 94 U. S. 187, 24 L. Ed. 34; *Glue Co. v. Upton*, 97 U. S. 3, 24 L. Ed. 985; *The Corn-Planter Patent*, 23 Wall. 181, 23 L. Ed. 161.

**18. What articles are new in sense of patent law.**—*Glue Co. v. Upton*, 97 U. S. 3, 24 L. Ed. 985.

It is only where one of these results follows that the product of the compound can be treated as the result of invention or discovery, and be regarded as a new and useful article. *Glue Co. v. Upton*, 97 U. S. 3, 6, 24 L. Ed. 985.

**19. Distinguished from novelty in commercial sense.**—*Collar Co. v. Van Dusen*, 23 Wall. 530, 23 L. Ed. 128; *Glue Co. v. Upton*, 97 U. S. 3, 6, 24 L. Ed. 985.

A distinction must be observed between a new article of commerce and a new article which, as such, is patentable. Any change in form from a previous condition may render the article new in commerce; as powdered sugar is a different article in commerce from loaf sugar, and ground coffee is a different article in commerce from coffee in the berry. *Glue Co. v. Upton*, 97 U. S. 3, 6, 24 L. Ed. 985.

**20. The mere change in form of a soluble article of commerce, by reducing it to small particles so that its solution is accelerated and it is rendered more ready for immediate use, convenient for handling, and, by its improved appearance, more merchantable, does not make it a new article, within the sense of the patent law.** *Glue Co. v. Upton*, 97 U. S. 3, 24 L. Ed. 985.

Where certain properties are known to belong generally to classes of articles, there can be no invention in putting a new species of the class in a condition for the development of its properties similar to that in which other species of the same class have been placed for similar development; nor can the changed form of the article from its condition in bulk to small particles, by breaking or bruising or slicing or rasping or filing or grinding or sifting, or other similar mechanical means, make it a new article in the sense of the patent law. *Glue Co. v. Upton*, 97 U. S. 3, 6, 24 L. Ed. 985.

**21. Change in use.**—*Knapp v. Morss*, 150 U. S. 221, 37 L. Ed. 1059; *Wollensak v. Sargent*, 151 U. S. 221, 227, 38 L. Ed. 137. See ante, "Applying Old Devices to New Uses," V, B, 2, i.

**22. Patentable novelty in sense of "invention."**—See post, "Invention," V, B.

**23. Machinery must be new.**—*LeRoy v. Tatham*, 14 How. 156, 14 L. Ed. 367; *Evans v. Eaton*, 7 Wheat. 356, 5 L. Ed. 472; *Sut-ter v. Robinson*, 119 U. S. 530, 30 L. Ed. 492. See post, "Machines," V, C, 2, c, (10), (a).

If the patent be for the whole of a machine, the claimant can maintain a title to it, only by establishing that it is substantially new in its structure and mode of operation. *Evans v. Eaton*, 7 Wheat. 356, 5 L. Ed. 472.

**24. Production of product by new idea.**—*LeRoy v. Tatham*, 14 How. 156, 14 L. Ed. 367; *Risdon, etc., Locomotive Works v. Medart*, 158 U. S. 68, 84, 39 L. Ed. 899.

In a patent for improvements upon the machinery used for making pipes and tubes



(3) *Manufactures*.—A patent for a product or manufacture cannot be obtained where the product, though never produced in the same way, was in fact a well-known substance.<sup>25</sup>

(4) *Processes*.—A patent having issued for a product, as made by a certain process, a later patent cannot be granted for the process which results in the product.<sup>26</sup>

(5) *Composition of Matter*.—In order for a composition of matter to be patentable, it must be new.<sup>27</sup> It is not sufficient that it is produced by chemical means, where formally it was produced by extracting it from herbs or roots,<sup>28</sup> or that it is produced by a new or different process.<sup>29</sup>

(6) *Designs*.—There is no novelty in printing or stamping a rubber cloth with

from lead, or tin, when in a set, or solid state, by forcing it under great pressure, from out of a receiver, through apertures, dies, and cores, the claim of the patentees was thus stated: "What we claim as our invention, and desire to secure by letters patent, is the combination of the following parts, above described, to wit, the core and bridge, or guide piece, the chamber, and the die, when used to form pipes of metal, under heat and pressure, in the manner set forth, or in any other manner substantially the same." The circuit court charged the jury, "that the originality did not consist in the novelty of the machinery, but in bringing a newly-discovered principle into practical application, by which an useful article of manufacture is produced, and wrought pipe made as distinguished from cast pipe." It was held that this instruction was erroneous, that under the claim of the patent, the combination of the machinery must be novel, that the newly-discovered principle, to wit, that lead could be forced, by extreme pressure, when in a set or solid state, to cohere and form a pipe, was not in the patent, and the question whether it was or was not the subject of a patent, was not in the case. *Le-Roy v. Tatham*, 14 How. 156, 14 L. Ed. 367.

A claim for a "wrought metal rimmed pulley having a crown formed on its rim during the process of manufacture," is invalid as it does not describe a pulley which differs at all in its completed state from prior pulleys, and it being usual to form the rim with a crown, it makes no difference, so far as the completed article is concerned, whether it be formed in the process of manufacture or in any other way. *Risdon, etc., Locomotive Works v. Medart*, 158 U. S. 68, 84, 39 L. Ed. 899.

**25. Products or manufactures.**—*Cochrane v. Badische, etc., Soda Fabrik*, 111 U. S. 293, 28 L. Ed. 433; *The Wood-Paper Patent*, 23 How. 566, 23 L. Ed. 31. See post, "Manufactures," V, C, 2, c, (10), (b).

Alizarine made by process of manufacture is not patentable as a product, where it had been previously extracted from madder root. *Cochrane v. Badische, etc., Soda Fabrik*, 111 U. S. 293, 28 L. Ed. 433.

Paper pulp extracted from wood by chemical agencies alone, is not a different

manufacture from paper pulp obtained from vegetable substances by chemical and mechanical processes. *The Wood-Paper Patent*, 23 Wall. 566, 23 L. Ed. 31.

In cases of chemical inventions, when the manufacture claimed as novel is not a new composition of matter, but an extract obtained by the decomposition or disintegration of material substances, it is of no importance, in considering its patentability, to inquire from what it has been extracted. *The Wood-Paper Patent*, 23 Wall. 566, 23 L. Ed. 31.

When the substance of two articles produced by different processes is the same, and their uses are the same, they cannot be considered different manufactures. *The Wood-Paper Patent*, 23 Wall. 566, 23 L. Ed. 31.

**26. Processes.**—*Mosler Safe, etc., Co. v. Mosler*, 127 U. S. 354, 32 L. Ed. 182; *Miller v. Eagle Mfg. Co.*, 151 U. S. 186, 197, 38 L. Ed. 121. See post, "Processes," V, C, 2, c, (10), (c).

**27. Composition must be new.**—*Cochrane Badische, etc., Soda Fabrik*, 111 U. S. 293, 28 L. Ed. 433; *Klein v. Russell*, 19 Wall. 433, 434, 22 L. Ed. 116.

Where one claim of a patent was for treatment by a compound composed of a liquid and other ingredients mentioned, a request for an instruction that the addition to the liquid of the ingredients is not patentable if such addition does not change the properties of the liquid, or its effect or usefulness, when applied to the purposes mentioned in the patent, is rightly modified by charging as requested with the addition of the words "or to other like purposes." *Klein v. Russell*, 19 Wall. 433, 434, 22 L. Ed. 116.

**28. Artificial instead of natural compound.**—*Cochrane v. Badische, etc., Soda Fabrik*, 111 U. S. 293, 28 L. Ed. 433.

Alizarine made by chemical process is not patentable as a composition of matter, where the same thing was previously well known, it having been obtained by extracting it from madder root. *Cochrane v. Badische, etc., Soda Fabrik*, 111 U. S. 293, 28 L. Ed. 433.

**29. New process for old product.**—*The Wood-Paper Patent*, 23 How. 566, 23 L. Ed. 31.



designs in an ink of a different color or shade.<sup>30</sup> And a design patent is void for want of novelty, where it consists only in transferring to material never before used, designs previously in common use as to other materials.<sup>31</sup>

(7) *Combinations*.—In order for a combination of old elements to be patented, the combination must be new or it must produce a new result.<sup>32</sup> One new and operative agency in the production of the desired result would give novelty to the entire combination.<sup>33</sup>

2. *ANTICIPATION*—a. *Effect of Anticipation*.—It is well settled that a patent is defeated, where anticipation is clearly established.<sup>34</sup>

b. *Ways in Which Patent May Be Anticipated*—(1) *Prior Patent*—(a) *Prior Domestic Patent*.—An improvement, to be patentable, must not have been patented, before the invention or discovery, in this country.<sup>35</sup> It is well settled that two patents cannot issue for the same invention,<sup>36</sup> either to the same or different parties,<sup>37</sup> although the second patent contains a broader claim, more general in

30. *Designs*.—Brigham v. Coffin, 149 U. S. 557, 560, 37 L. Ed. 845.

31. New York, etc., Packing Co. v. New Jersey, etc., Rubber Co., 137 U. S. 445, 34 L. Ed. 741.

A design for a rubber mat, consisting of corrugations, depressions or ridges in parallel lines, combined or arranged relatively, to produce variegated, kaleidoscopic, moire, stereoscopic or similar effects, is void for want of novelty where the same effects have been produced upon other materials by the use of similar designs. New York, etc., Packing Co. v. New Jersey, etc., Rubber Co., 137 U. S. 445, 34 L. Ed. 741.

32. *Combinations*.—Office Specialty Mfg. Co. v. Fenton Metallic Mfg. Co., 174 U. S. 492, 43 L. Ed. 1058; Knapp v. Morss, 150 U. S. 221, 37 L. Ed. 1059; Busell Trimmer Co. v. Stevens, 137 U. S. 423, 34 L. Ed. 719; McCormick v. Talcott, 20 How. 402, 15 L. Ed. 930; Stephenson v. Brooklyn, etc., R. Co., 114 U. S. 149, 29 L. Ed. 58. For additional cases, see post, "Combinations," V, C, 1, b, (7).

33. LeRoy v. Tatham, 22 How. 132, 139, 16 L. Ed. 366.

34. *Anticipation defeats patent*.—Yale Lock Mfg. Co. v. Sargent, 117 U. S. 536, 554, 29 L. Ed. 954; Stimpson v. Woodman, 10 Wall. 117, 121, 19 L. Ed. 866; Olin v. Timken, 155 U. S. 141, 39 L. Ed. 100; Gates Iron Works v. Fraser, 153 U. S. 332, 38 L. Ed. 734; The Telephone Cases, 126 U. S. 1, 31 L. Ed. 863; Flower v. Detroit, 127 U. S. 563, 571, 32 L. Ed. 175; Thompson v. Hall, 130 U. S. 117, 32 L. Ed. 876; Hailes v. Albany Stove Co., 123 U. S. 582, 31 L. Ed. 284; Miller v. Foree, 116 U. S. 22, 29 L. Ed. 552; Forncrook v. Root, 127 U. S. 176, 180, 32 L. Ed. 97.

35. *Prior patent*.—Rev. Stat., § 4886; Collar Co. v. Van Dusen, 23 Wall. 530, 531, 23 L. Ed. 128; Dunbar v. Myers, 94 U. S. 187, 196, 24 L. Ed. 34; Roemer v. Simon, 95 U. S. 214, 218, 24 L. Ed. 384; Adams v. Bellaire Stamping Co., 141 U. S. 539, 35 L. Ed. 849; Cochrane v. Deener, 94 U. S. 780, 791, 24 L. Ed. 139; DuBois v. Kirk, 158 U. S. 58, 39 L. Ed. 895; Tucker v. Spalding, 13 Wall. 453, 20 L. Ed. 515; O'Reilly v. Morse, 15 How. 62, 14 L. Ed.

601; Belding Mfg. Co. v. Challenge Corn Planter Co., 152 U. S. 100, 38 L. Ed. 370; Brigham v. Coffin, 149 U. S. 557, 37 L. Ed. 845; The Barbed Wire Patent, 143 U. S. 275, 36 L. Ed. 154; National Hat Pouncing Machine Co. v. Hedden, 148 U. S. 482, 37 L. Ed. 529; Krementz v. The S. Cottle Co., 148 U. S. 556, 37 L. Ed. 558; Pattee Plow Co. v. Kingman, 129 U. S. 294, 32 L. Ed. 700; Florsheim v. Schilling, 137 U. S. 64, 69, 34 L. Ed. 574; Miller v. Eagle Mfg. Co., 151 U. S. 186, 38 L. Ed. 121; Garratt v. Seibert, 98 U. S. 75, 25 L. Ed. 84.

36. *Two patents for same invention*.—The Suffolk Co. v. Hayden, 3 Wall. 315, 18 L. Ed. 76; Miller v. Eagle Mfg. Co., 151 U. S. 186, 197, 38 L. Ed. 121; Underwood v. Gerber, 149 U. S. 224, 37 L. Ed. 710; McCreary v. Pennsylvania Canal Co., 141 U. S. 459, 35 L. Ed. 817; James v. Campbell, 104 U. S. 356, 370, 26 L. Ed. 786; Boyd v. Janesville Hay Tool Co., 158 U. S. 260, 39 L. Ed. 973; The Barbed Wire Patent, 143 U. S. 275, 36 L. Ed. 154.

A single element or function of a patented invention cannot be made a subject of a separate and subsequent patent. Miller v. Eagle Mfg. Co., 151 U. S. 186, 38 L. Ed. 121; Roberts v. Ryer, 91 U. S. 150, 23 L. Ed. 267; Stow v. Chicago, 104 U. S. 547, 26 L. Ed. 816.

37. *To same parties*.—Miller v. Eagle Mfg. Co., 151 U. S. 186, 197, 38 L. Ed. 121; Busell Trimmer Co. v. Stevens, 137 U. S. 423, 34 L. Ed. 719.

When a patentee anticipates himself, he cannot, in the nature of things, give validity to the second patent. Miller v. Eagle Mfg. Co., 151 U. S. 186, 197, 38 L. Ed. 121.

A patentee cannot include in a subsequent patent any invention embraced or described in a prior one granted to himself, any more than he could an invention embraced or described in a prior patent granted to a third person. Indeed, not so well; because he might get a patent for an invention before patented to a third person in this country, if he could show that he was the first and original inventor, and if he should have an interference declared. James v. Campbell, 104 U. S. 356, 382, 26

its character than the specific claims contained in the prior patent.<sup>38</sup> But a second patent, covering matter described in the prior patent essentially distinct and separable from the invention covered thereby and claims made thereunder, may be sustained.<sup>39</sup> If two or more patents for the same invention are issued, the one last issued is void.<sup>40</sup>

(b) *Prior Foreign Patent.*—A prior foreign patent is an anticipation as well as a prior domestic patent.<sup>41</sup> But a foreign patent, in order to invalidate an American patent, must antedate the American invention and it is not sufficient that it antedates the American patent.<sup>42</sup> The fact that an invention is patented in a foreign country by the inventor does not prevent the issuance of an American patent, but only limits its duration.<sup>43</sup>

(c) *Subsequent Patent Must Be Included within Former Specification.*—In or-

L. Ed. 786; *Miller v. Eagle Mfg. Co.*, 151 U. S. 186, 38 L. Ed. 121.

Where the increased lifting effect of a spring device, an essential element of a patent for an improvement in cultivators, is clearly shown in a prior patent to the same person and is anticipated by a patent for an improved coupling for cultivators, the patent is invalid. *Miller v. Eagle Mfg. Co.*, 151 U. S. 186, 200, 38 L. Ed. 121.

**38. Second patent with broader claim.**—*Miller v. Eagle Mfg. Co.*, 151 U. S. 186, 38 L. Ed. 121.

**39. Second patent for distinct and separable matter.**—*Miller v. Eagle Mfg. Co.*, 151 U. S. 186, 38 L. Ed. 121.

It must distinctly appear that the invention covered by the later patent was a separate invention, distinctly different and independent from that covered by the first patent; in other words, it must be something substantially different from that comprehended in the first patent. It must consist in something more than a mere distinction of the breadth or scope of the claims of each patent. If the case comes within the first or second of the above classes, the second patent is absolutely void. *Miller v. Eagle Mfg. Co.*, 151 U. S. 186, 193, 38 L. Ed. 121.

An inventor may make a new improvement on his own invention of a patentable character, for which he may obtain a separate patent. *Miller v. Eagle Mfg. Co.*, 151 U. S. 186, 199, 38 L. Ed. 121; *O'Reilly v. Morse*, 15 How. 62, 14 L. Ed. 601.

And a single invention may include both the machine and the manufacture it creates, and in such cases, if the inventions are really separable, the inventor may be entitled to a monopoly of each. *Miller v. Eagle Mfg. Co.*, 151 U. S. 186, 199, 38 L. Ed. 121; *Plummer v. Sargent*, 120 U. S. 442, 30 L. Ed. 737.

**40. Last of several patents void.**—*Miller v. Eagle Mfg. Co.*, 151 U. S. 186, 197, 38 L. Ed. 121; *McCreary v. Pennsylvania Canal Co.*, 141 U. S. 459, 467, 35 L. Ed. 817; *Underwood v. Gerber*, 149 U. S. 224, 37 L. Ed. 710; *The Suffolk Co. v. Hayden*, 3 Wall. 315, 18 L. Ed. 76.

Thus in *The Suffolk Co. v. Hayden*, 3 Wall. 315, 18 L. Ed. 76, it was held that where two patents, showing the same in-

vention or device, were issued to the same party, the later one was void, although the application for it was first filed, thereby deciding that it is the issue date and not the filing date which determines priority to patents issued to the same inventor on the same machine. *Miller v. Eagle Mfg. Co.*, 151 U. S. 186, 197, 38 L. Ed. 121.

In *Underwood v. Gerber*, 149 U. S. 224, 37 L. Ed. 710, it was ruled that where a patentee obtained two patents on the same day, upon applications filed on the same day, they could not be treated as one patent with two claims, and that the complainant in suing upon the second, or the one having the latest number, could not use the first, or the one with the earlier number, to help sustain the action. *Miller v. Eagle Mfg. Co.*, 151 U. S. 186, 198, 38 L. Ed. 121.

**41. Prior foreign patent.**—*Pope Mfg. Co. v. Gormully, etc.*, *Mfg. Co.*, No. 2, 144 U. S. 238, 36 L. Ed. 420; *Hoff v. Iron Clad Mfg. Co.*, 139 U. S. 326, 328, 35 L. Ed. 179; *Florsheim v. Schilling*, 137 U. S. 64, 34 L. Ed. 574; *Brown v. District of Columbia*, 130 U. S. 87, 32 L. Ed. 863; *Siemens v. Sellers*, 123 U. S. 276, 31 L. Ed. 153; *Imhaeuser v. Buerk*, 101 U. S. 647, 25 L. Ed. 945; *Bates v. Coe*, 98 U. S. 31, 33, 25 L. Ed. 68; *Dunbar v. Myers*, 94 U. S. 187, 191, 24 L. Ed. 34; *Cawood Patent*, 94 U. S. 695, 703, 24 L. Ed. 238.

**42. Foreign patent must antedate invention.**—*Cochrane v. Deener*, 94 U. S. 780, 791, 24 L. Ed. 139; *Elizabeth v. Pavement Co.*, 97 U. S. 126, 24 L. Ed. 1000; *Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 486, 498, 23 L. Ed. 952.

A foreign patent or publication describing an invention, unless published anterior to the making of the invention or discovery secured by letters patent issued by the United States, is no defense to a suit upon them. *Elizabeth v. Pavement Co.*, 97 U. S. 126, 24 L. Ed. 1000.

One who completes his invention and makes a working model of it before a foreign patent is obtained therefor has priority. *Deering v. Winona Harvester Works*, 155 U. S. 286, 39 L. Ed. 153.

**43. Prior patent in foreign country by inventor.**—*Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 18, 39 L. Ed. 601.



der for one patent to anticipate another, the specification in the first must be sufficient to enable a mechanic skilled in mechanical arts to construct and carry into practical use the second device.<sup>44</sup>

(2) *Prior Description in Printed Publication*—(a) *General Rule*.—A patent for a thing which has been described in some printed publication prior to the supposed invention or discovery thereof, or more than two years prior to the application for patent, is invalid, and will not sustain a suit for infringement.<sup>45</sup>

(b) *Time of Publication*.—A foreign publication describing an invention, unless published anterior to the making of the invention or discovery secured by letters patent issued by the United States, is no defense to a suit upon them.<sup>46</sup>

(c) *Requisites of Description*.—A description in a prior publication, in order to defeat a patent, must contain and exhibit a substantial representation of the patented improvement in such full, clear, and exact terms, as to enable any person skilled in the art or science to which it appertains, to make, construct, and practice the invention patented. It must be an account of a complete and operative invention, capable of being put into practical operation.<sup>47</sup> Where the

**44. Sufficiency of specification of prior patent.**—Cawood Patent, 94 U. S. 695, 703, 24 L. Ed. 238.

**45. Prior description in printed publication.**—Rev. Stat., § 4920; *Sewall v. Jones*, 91 U. S. 171, 179, 23 L. Ed. 275; *Silsby v. Foote*, 14 How. 218, 14 L. Ed. 394; *Imhaeuser v. Buerk*, 101 U. S. 647, 660, 25 L. Ed. 945; *Teese v. Huntingdon*, 23 How. 2, 7, 16 L. Ed. 479; *Rosenwasser v. Spieth*, 129 U. S. 47, 32 L. Ed. 628; *O'Reilly v. Morse*, 15 How. 62, 14 L. Ed. 601; *Seymour v. McCormick*, 19 How. 96, 15 L. Ed. 557; *Evans v. Eaton*, 3 Wheat. 454, 4 L. Ed. 433; *Roemer v. Simon*, 95 U. S. 214, 24 L. Ed. 384; *Downton v. Yeager Milling Co.*, 108 U. S. 466, 27 L. Ed. 789; *Eames v. Andrews*, 122 U. S. 40, 30 L. Ed. 1064; *Bates v. Coe*, 98 U. S. 31, 48, 25 L. Ed. 68; *Parks v. Booth*, 102 U. S. 96, 104, 26 L. Ed. 54; *Gill v. Wells*, 22 Wall. 1, 22 L. Ed. 699; *Clark Thread Co. v. Willimantic Linen Co.*, 140 U. S. 481, 35 L. Ed. 521; *Pickering v. McCullough*, 104 U. S. 310, 26 L. Ed. 749; *Elizabeth v. Pavement Co.*, 97 U. S. 126, 24 L. Ed. 1000; *Seymour v. Osborne*, 11 Wall. 516, 555, 20 L. Ed. 33; *Collar Co. v. Van Dusen*, 23 Wall. 530, 563, 23 L. Ed. 128; *Dunbar v. Myers*, 94 U. S. 187, 196, 24 L. Ed. 34; *French v. Carter*, 137 U. S. 239, 34 L. Ed. 664; *Cohn v. United States Corset Co.*, 93 U. S. 366, 23 L. Ed. 907; *Gandy v. Main Belting Co.*, 143 U. S. 587, 36 L. Ed. 272; *Hurlbut v. Schillinger*, 130 U. S. 456, 32 L. Ed. 1011.

Letters-patent No. 137, 893, issued April 15, 1873, to Moritz Cohn, for an improvement in corsets, are invalid, the invention claimed by him having been clearly anticipated and described in the English provisional specification of John Henry Johnson, deposited in the patent office Jan. 20, 1854, and officially published in England in that year. *Cohn v. United States Corset Co.*, 93 U. S. 366, 23 L. Ed. 907.

Where a patent was granted for an improvement in percolators in which the novelties suggested were in having one end of the percolator open, serving both to receive the drug and to discharge the

extract; in turning the percolator bottom up to put in the drug, and bottom down to let the extract drip out; in having a perforated or porous diaphragm to hold the drug in place; and in regulating the pressure of the liquid by means of a tube from the reservoir to the small opening in the covered end of the percolator, it was held that, as the plaintiff's contrivance had been anticipated in a German publication half a century before, it was unnecessary to decide whether, if new, it would have been patentable. *Rosenwasser v. Spieth*, 129 U. S. 47, 50, 32 L. Ed. 628.

**46. Time of publication.**—*Elizabeth v. Pavement Co.*, 97 U. S. 126, 24 L. Ed. 1000; *Clark Thread Co. v. Willimantic Linen Co.*, 140 U. S. 481, 486, 35 L. Ed. 521; *Cochrane v. Deener*, 94 U. S. 780, 24 L. Ed. 139.

A foreign patent, or other foreign printed publication describing an invention, is no defense to a suit upon a patent of the United States, unless published anterior to the making of the invention or discovery secured by the latter, provided that the American patentee, at the time of making application for his patent, believed himself to be the first inventor or discoverer of the thing patented. He is obliged to make oath to such belief when he applies for his patent; and it will be presumed that such was his belief, until the contrary is proven. *Elizabeth v. Pavement Co.*, 97 U. S. 126, 130, 24 L. Ed. 1000.

The law is that any person sued for infringement of an American patent may show in defense that the invention claimed was patented or described in some printed publication (not before the American patent was granted—nor before the application for it was filed, but) before the patentee's supposed invention or discovery thereof. Rev. Stat., § 4920. *Clark Thread Co. v. Willimantic Linen Co.*, 140 U. S. 481, 486, 35 L. Ed. 521.

**47. Requisites of description.**—*Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33; *Eames v. Andrews*, 122 U. S. 40, 66, 30 L.



patent is for a manufacture, a sufficiently certain and clear description of the thing patented is required, not of the steps necessarily antecedent to its production.<sup>48</sup>

(3) *Public Use or Sale*—(a) *Public Use or Sale in This Country*—aa. *General Rule*.—In order for an invention to be patentable, it must be one not known or used by others in this country.<sup>49</sup>

bb. *Duration of Use*.—The public use of a device for which a patent is obtained, two years before the patent is applied for, will invalidate the patent.<sup>50</sup>

cc. *Nature and Extent of Use*.—Where the thing has been publicly used for that time, it is not necessary to show that it was so used by more than one person.<sup>51</sup>

(b) *In Foreign Country*.—Public use or sale in a foreign country is not effectual to defeat an American patent,<sup>52</sup> provided the patentee is the first in-

Ed. 1064; *Seabury v. Am Ende*, 152 U. S. 561, 38 L. Ed. 553; *Florsheim v. Schilling*, 137 U. S. 64, 34 L. Ed. 574; *Tilghman v. Proctor*, 102 U. S. 707, 26 L. Ed. 279; *Cohn v. United States Corset Co.*, 93 U. S. 366, 23 L. Ed. 907; *Downton v. Yeager Milling Co.*, 108 U. S. 466, 471, 27 L. Ed. 789.

48. *Cohn v. United States Corset Co.*, 93 U. S. 366, 23 L. Ed. 907.

49. *Prior use*.—Rev. Stat., § 4886; *Coffin v. Ogden*, 18 Wall. 120, 21 L. Ed. 821; *Collar Co. v. Van Dusen*, 23 Wall. 530, 23 L. Ed. 128; *Sewall v. Jones*, 91 U. S. 171, 179, 23 L. Ed. 275; *Roemer v. Simon*, 95 U. S. 214, 218, 24 L. Ed. 384; *Dunbar v. Myers*, 94 U. S. 187, 198, 24 L. Ed. 34; *Klein v. Russell*, 19 Wall. 433, 434, 22 L. Ed. 116; *Brown v. Davis*, 116 U. S. 237, 29 L. Ed. 659; *Dalton v. Jennings*, 93 U. S. 271, 23 L. Ed. 925; *Anderson v. Miller*, 129 U. S. 70, 32 L. Ed. 635; *Jones v. Morehead*, 1 Wall. 155, 17 L. Ed. 662; *Kirk v. United States*, 163 U. S. 49, 55, 41 L. Ed. 66. See post, "Public Use or Sale before Obtaining Patent," V, E.

Proof of the state of the art is admissible in equity cases, without any averment in the answer touching the subject, and in actions at law, without giving the notice required when evidence is offered to invalidate the patent. It consists of proof of what was old and in general use at the time of the alleged invention; and may be admitted to show what was then old, or to distinguish what is new, or, to aid the court in the construction of the patent. *Dunbar v. Myers*, 94 U. S. 187, 198, 24 L. Ed. 34.

Letters-patent No. 124, 340, issued to John Dalton, March 5, 1872, for "an alleged new and useful improvement in ladies' hair nets," are void, because his specification and claim precisely and accurately describe various fabrics which had been made and were in public use for a long time previous to his application. *Dalton v. Jennings*, 93 U. S. 271, 23 L. Ed. 925.

Letters-patent No. 56, 801, issued July 31, 1866, to William Roemer, for an improvement in traveling bags, cannot be sustained, as the thing patented was, be-

fore his alleged invention, known and extensively used by others in this country. *Roemer v. Simon*, 95 U. S. 214, 24 L. Ed. 384.

50. *Two years prior use*.—*Kirk v. United States*, 163 U. S. 49, 55, 41 L. Ed. 66; *Brown v. Davis*, 116 U. S. 237, 29 L. Ed. 659; *Anderson v. Miller*, 129 U. S. 70, 32 L. Ed. 635. See, also, *Klein v. Russell*, 19 Wall. 433, 434, 22 L. Ed. 116.

No infringement of a patent is shown, where articles identical with those alleged to infringe had been manufactured for more than two years prior to the application for the patent. *Anderson v. Miller*, 129 U. S. 70, 73, 32 L. Ed. 635.

A patent is anticipated by the sale or public use of a machine which fully embodied the idea of the patent more than two years previous to the issuance of the patent. *Brown v. Davis*, 116 U. S. 237, 29 L. Ed. 659.

51. *Nature and extent of use*.—*Brush v. Condit*, 132 U. S. 39, 33 L. Ed. 251.

A patent for an improvement in electric lamps was anticipated by a device which was a perfected invention and not merely an abandoned experiment, although only one such device was ever made and that put in use only for a short time. *Brush v. Condit*, 132 U. S. 39, 48, 33 L. Ed. 251.

52. *Use or sale in foreign country*.—Rev. Stat., §§ 4886, 4923; *Roemer v. Simon*, 95 U. S. 214, 218, 24 L. Ed. 384; *Gandy v. Main Belting Co.*, 143 U. S. 587, 592, 36 L. Ed. 272; *Sewall v. Jones*, 91 U. S. 171, 23 L. Ed. 275; *Hurlbut v. Schilling*, 130 U. S. 456, 32 L. Ed. 1011; *Elizabeth v. Pavement Co.*, 97 U. S. 126, 24 L. Ed. 1000; *Shaw v. Cooper*, 7 Pet. 292, 8 L. Ed. 689.

The right of the patentee to his invention should not be denied by reason of the fact that he had made use of it, or put it on sale abroad, more than two years before the application, provided it were not so used or sold in this country. *Gandy v. Main Belting Co.*, 143 U. S. 587, 593, 36 L. Ed. 272.

Proof of prior use in a foreign country will not supersede a patent granted here, unless the alleged invention was patented

ventor thereof.<sup>53</sup>

(4) *Prior Invention Patented Subsequently*—(a) *Prior Domestic Invention*.—A domestic patent may be defeated by a prior domestic discovery or invention which has been subsequently patented.<sup>54</sup> But in order for this result to obtain, the invention or discovery relied on as an anticipation must have been actually prior in point of time.<sup>55</sup> An invention dates from the time the inventor completes it in his mind, although he delays for some time to bring it out.<sup>56</sup> An invention relating to machinery may be exhibited as well in a drawing as in a model, so as to lay the foundation of a claim to priority, if sufficiently plain to enable those skilled in the art to understand it.<sup>57</sup>

(b) *Prior Foreign Invention*.—A previous discovery in a foreign country does not render a patent void, unless such discovery or some substantial part of it had been before patented or described in a printed publication.<sup>58</sup>

c. *What Constitutes Anticipation*—(1) *Definition*.—In the patent law, a thing which would infringe a patent if later, anticipates it if earlier.<sup>59</sup>

(2) *Identity*.—In order for a patent to be anticipated by a prior device, invention or printed publication, the two things must be substantially identical in principle.<sup>60</sup> But it is by no means essential that they be absolutely identical, as it is well settled that the substantial equivalent of a thing is, in the sense of the patent law, the same as the thing itself and that two devices which perform the same function in substantially the same way, and accomplish substantially the same result, are therefore the same, though they may differ in name or form.<sup>61</sup> A machine or device intended to accomplish the same purpose as that for which a patent is obtained, but which makes use of substantially different

in some foreign country. Proof of such foreign manufacture and use, if known to the applicant for a patent, may be evidence tending to show that he is not the inventor of the alleged new improvement; but it is not sufficient to supersede the patent if he did not borrow his supposed invention from that source, unless the foreign inventor obtained a patent for his improvement, or the same was described in some printed publication. *Roemer v. Simon*, 95 U. S. 214, 218, 24 L. Ed. 384.

**53. Domestic patentee must be first inventor.**—*Sewall v. Jones*, 91 U. S. 171, 23 L. Ed. 275; *Roemer v. Simon*, 95 U. S. 214, 24 L. Ed. 384.

But the patentee must be the inventor, and must not merely have obtained a patent for a device which was in use in a foreign country, and which he did not invent. *Sewall v. Jones*, 91 U. S. 171, 23 L. Ed. 275; *Roemer v. Simon*, 95 U. S. 214, 24 L. Ed. 384.

**54. Prior domestic invention or discovery.**—*Loom Co. v. Higgins*, 105 U. S. 580, 26 L. Ed. 1177; *O'Reilly v. Morse*, 15 How. 62, 109, 14 L. Ed. 601.

**55. Invention must be prior.**—*Loom Co. v. Higgins*, 105 U. S. 580, 26 L. Ed. 1177; *O'Reilly v. Morse*, 15 How. 62, 109, 14 L. Ed. 601.

**56. Date of invention.**—*O'Reilly v. Morse*, 15 How. 62, 109, 14 L. Ed. 601; *Loom Co. v. Higgins*, 105 U. S. 580, 592, 26 L. Ed. 1177.

**57. Necessity for models of prior invention.**—*Loom Co. v. Higgins*, 105 U. S. 580, 26 L. Ed. 1177.

**58. Previous discovery in foreign coun-**

**try.**—*O'Reilly v. Morse*, 15 How. 62, 14 L. Ed. 601.

**59. Anticipation defined.**—*Peters v. Active Mfg. Co.*, 129 U. S. 530, 32 L. Ed. 738; *Thatcher Heating Co. v. Burtis*, 121 U. S. 286, 295, 30 L. Ed. 942; *Grant v. Walter*, 148 U. S. 547, 554, 37 L. Ed. 552; *Gordon v. Warder*, 150 U. S. 47, 37 L. Ed. 992; *Knapp v. Morss*, 150 U. S. 221, 37 L. Ed. 1059; *Miller v. Eagle Mfg. Co.*, 151 U. S. 186, 204, 38 L. Ed. 121.

**60. Identity of principle.**—*Machine Co. v. Murphy*, 97 U. S. 120, 24 L. Ed. 935; *Cantrell v. Wallick*, 117 U. S. 689, 29 L. Ed. 1017; *Brush v. Condit*, 132 U. S. 39, 33 L. Ed. 251.

**61. Substantial identity.**—*Machine Co. v. Murphy*, 97 U. S. 120, 24 L. Ed. 935; *Cantrell v. Wallick*, 117 U. S. 689, 29 L. Ed. 1017; *Winans v. New York, etc., R. Co.*, 21 How. 88, 16 L. Ed. 68; *Brush v. Condit*, 132 U. S. 39, 33 L. Ed. 251; *Siemens v. Sellers*, 123 U. S. 276, 31 L. Ed. 153.

*Winans'* patent for "a new and useful improvement in the construction of cars or carriages intended to travel upon railroads," was for the manner of arranging and connecting the eight wheels of a railroad carriage for the purpose of enabling burden and passenger cars to pursue a more smooth, even, and safe course over the curves and irregularities of a railroad. And it was proper to instruct the jury, that if they found, from the evidence, that before the time when *Winans* claimed to have made the discovery, carriages with eight wheels, arranged and connected substantially in the same manner and upon



means or mechanism is not an anticipation, although intended to accomplish the same result.<sup>62</sup> A patent is not anticipated by a device not designed for the same purpose, which no person looking at it or using it would understand that it was to be used in the way, and which is not shown to have been really used and operated in that way.<sup>63</sup>

(3) *Prior Accidental Production*.—A product accidentally and unwittingly produced, while the operator is engaged in pursuit of other and different results, without any knowledge by the operator of what was done, or how it was done, cannot be held to be an anticipation of a process for producing it.<sup>64</sup>

(4) *Prior Unsuccessful Devices*.—Prior unsuccessful devices which are abandoned by the inventor will not constitute an anticipation,<sup>65</sup> even though they were patented.<sup>66</sup>

(5) *Lost or Forgotten Arts or Devices*.—Where a person had made and used an article similar to the one which was afterwards patented, but had not made his discovery public, using it simply for his own private purpose, and without having tested it so as to discover its usefulness, and it had then been finally forgotten or abandoned, such prior invention and use did not preclude a subsequent inventor from taking out a patent.<sup>67</sup>

(6) *Failure to Disclose Essentials*.—A device or process is not an anticipation where it fails to disclose, fully and precisely, the essential features of the latter process covered by the patent.<sup>68</sup>

(7) *Superiority in Later Devices*.—The defense of anticipation is not defeated merely because the latter device is superior in finish and workmanship, where the earlier one was complete and practicable, was actually used, and perfectly served the same purpose.<sup>69</sup> A machine is anticipated by one substan-

the same mechanical principles with those described in the patent, were known, and publically used, Winans was not entitled to recover. *Winans v. New York, etc., R. Co.*, 21 How. 88, 16 L. Ed. 68.

If a machine or device embodies the principle of a patent it anticipates it, though the patent is carried out by different means. *Brush v. Condit*, 132 U. S. 39, 33 L. Ed. 251.

62. *Identity of means or mechanism*.—*Sessions v. Romadka*, 145 U. S. 29, 43, 36 L. Ed. 609.

63. *Identity of purpose*.—*Clough v. Barker*, 106 U. S. 166, 176, 27 L. Ed. 134.

64. *Prior accidental production*.—*Tilghman v. Proctor*, 102 U. S. 707, 713, 26 L. Ed. 279.

65. *Prior unsuccessful devices*.—*Clark Thread Co. v. Willimantic Linen Co.*, 140 U. S. 481, 35 L. Ed. 521; *Smith v. Good-year Dental Vulcanite Co.*, 93 U. S. 486, 487, 23 L. Ed. 952; *Whitely v. Swayne*, 7 Wall. 685, 19 L. Ed. 199; *The Telephone Cases*, 126 U. S. 1, 31 L. Ed. 863.

An attachment, though unsuccessful as used in connection with fire box boilers, serves nevertheless as an anticipation of the same device when successfully adopted to return flue boilers. *Heald v. Rice*, 104 U. S. 737, 26 L. Ed. 910.

66. *Unsuccessful patented devices*.—*Whiteley v. Swayne*, 7 Wall. 685, 19 L. Ed. 199.

Where a patent has been granted for improvements, which, after a full and fair trial, resulted in unsuccessful experiments, and have been finally abandoned, if any other person takes up the subject of the

improvements, and is successful, he is entitled to the merit of them as an original inventor. *Whitely v. Swayne*, 7 Wall. 685, 19 L. Ed. 199.

67. *Lost or forgotten arts and devices*.—*Gayler v. Wilder*, 10 How. 477, 13 L. Ed. 504.

68. *Difference in essentials*.—*Sharp v. Stamping Co.*, 103 U. S. 250, 26 L. Ed. 445; *The Barbed Wire Patent*, 143 U. S. 275, 36 L. Ed. 154; *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33; *Cawood Patent*, 94 U. S. 695, 704, 24 L. Ed. 238; *Carnegie Steel Co. v. Cambria Iron Co.*, 185 U. S. 403, 421, 46 L. Ed. 968; *DuBois v. Kirk*, 158 U. S. 58, 39 L. Ed. 895.

A patent for a steak broiler, the essential features of which were a frying pan to catch the gravy placed upon a nonconducting substance, so as to preserve it from the heat, and a device by means of which both sides of the steak were cooked equally at the same time, was held not to be anticipated by broilers of a same or similar nature but which lacked both of these essential features. *Sharp v. Stamping Co.*, 103 U. S. 250, 26 L. Ed. 445.

A patent for fence wire consisting of a coiled barbed in combination with two twisted wires, by means of which the barb is clamped and held in position, was not anticipated by fencing wire having spools with spikes attached thereto at certain intervals, nor by a flat wire with spikes placed at certain intervals which were made fast by a blow from a hammer. *The Barbed Wire Patent*, 143 U. S. 275, 36 L. Ed. 154.

69. *Superiority in workmanship*.—*Forn-*



tially like it in principle although the latter is enlarged or strengthened. A machine remains the same in principle, although one or all of its constituents be enlarged and strengthened so as to perform heavier work.<sup>70</sup>

(8) *Necessity for Completion and Perfection of Former Devices.*—The invention or discovery relied upon as an anticipation must have been complete, and capable of producing the result sought to be accomplished.<sup>71</sup> But while a patent is not anticipated by an apparatus, manifestly only an experiment, abandoned and given up some time before,<sup>72</sup> it is not essential to anticipation that the first device should have reached the highest degree of perfection.<sup>73</sup>

(9) *Modification or Change in Prior Devices.*—It is not sufficient to constitute an anticipation that the device relied upon might, by modification, be made to accomplish the function performed by the patent in question, if it were not designed by its maker, nor adapted, nor actually used, for the performance of such functions.<sup>74</sup>

(10) *Particular Kinds of Inventions*—(a) *Machines.*—In order for a machine or device to defeat a subsequent patent by anticipation, the two machines or devices must be substantially alike in principle.<sup>75</sup> A machine or mechanical

crook *v.* Root, 127 U. S. 176, 180, 32 L. Ed. 97; Magin *v.* Karle, 150 U. S. 387, 37 L. Ed. 1118.

**70. Enlarging or strengthening prior devices.**—Planing-Machine Co. *v.* Keith, 101 U. S. 479, 480, 25 L. Ed. 939.

The invention of a planing machine having a solid bed of no particular form, or specified thickness, and not requiring to be constructed in one piece, is anticipated by a machine for cutting and planing light material, having in other respects the same devices and a solid bed adequate for the purposes for which it was intended. The fact that the bed of the latter is divided by a slit running longitudinally from one end to the other, yet arranged so as to constitute one bed, makes no difference. Planing-Machine Co. *v.* Keith, 101 U. S. 479, 480, 25 L. Ed. 939.

**71. Necessity for anticipating device to be complete.**—Coffin *v.* Ogden, 18 Wall. 120, 21 L. Ed. 821; Brush *v.* Condit, 132 U. S. 39, 33 L. Ed. 251.

If the thing were embryonic or inchoate; if it rested in speculation or experiment; if the process pursued for its development had failed to reach the point of consummation, it cannot avail to defeat a patent founded upon a discovery or invention which was completed, while in the other case there was only progress, however near that progress may have approximated to the end in view. The law requires not conjecture, but certainty. If the question relate to a machine, the conception must have been clothed in substantial forms which demonstrate at once its practical efficacy and utility. Coffin *v.* Ogden, 18 Wall. 120, 21 L. Ed. 821.

**72. Experiment no anticipation.**—New Process Fermentation Co. *v.* Maus, 122 U. S. 413, 430, 30 L. Ed. 1193; Coffin *v.* Ogden, 18 Wall. 120, 21 L. Ed. 821; Brush *v.* Condit, 132 U. S. 39, 33 L. Ed. 251.

**73. Highest degree of perfection not required.**—The Telephone Cases, 126 U. S. 1, 31 L. Ed. 863; Brush *v.* Condit, 132 U. S. 39, 33 L. Ed. 251.

Although the remains of old experiments should only with hesitancy be permitted to destroy the pecuniary value of a patent for a useful and successful invention, a patent must be held to have been anticipated, where the case is that of the public, well-known, practical use in ordinary work, with as much success as was reasonable to expect at that stage, in the development of the art, of the exact invention which was subsequently made by the patentee. Brush *v.* Condit, 132 U. S. 39, 48, 33 L. Ed. 251.

**74. Machine capable of being changed so as to perform same service.**—Topliff *v.* Topliff, 145 U. S. 156, 161, 36 L. Ed. 658; Sessions *v.* Romadka, 145 U. S. 29, 43, 36 L. Ed. 609; Potts *v.* Creager, 155 U. S. 597, 39 L. Ed. 275.

In a patent for a clay disintegrator, a claim for a cylinder containing a series of steel scraping bars, fitted into, and adjustably secured in, longitudinal grooves in the periphery of the cylinder, is not anticipated by a cylinder with cutting knives on its periphery for grinding apples, nor by other machines in which the rotary cylinders armed with knives, could not possibly be used as clay disintegrators without changes which would involve more or less invention. Potts *v.* Creager, 155 U. S. 597, 39 L. Ed. 275.

**75. Machines.**—Hobbs *v.* Beach, 180 U. S. 383, 45 L. Ed. 586; Busch *v.* Jones, 184 U. S. 598, 604, 46 L. Ed. 707; Potts *v.* Creager, 155 U. S. 597, 608, 39 L. Ed. 275; DuBois *v.* Kirk, 158 U. S. 58, 39 L. Ed. 895; The Roller Mill Patent, 156 U. S. 261, 271, 39 L. Ed. 417. See ante, "Machines," V, C, 1, b, (2).

A patent for a machine for attaching gummed paper or muslin slips to the corners of paper boxes is not anticipated by a machine for stitching wire or attaching metallic stays, nor by machines for pressing strips of glued paper upon the edge of circular boxes at the junction of the bottom and sides so as to form a union of the ends with the cylindrical side of the

patent is anticipated by a prior device of like construction and capable of performing the same function.<sup>76</sup>

(b) *Manufactures*.—A patent for a product or manufacture is anticipated by a substantially similar product,<sup>77</sup> although produced by a different process.<sup>78</sup>

(c) *Processes*.—A process patent can be anticipated only by a process<sup>79</sup> and not by mechanism which might with slight alterations be adapted to carry out the process,<sup>80</sup> and in order for one to anticipate another the two must be sub-

box, where the operation is done partly by hand, nor by an addressing machine in which the strip of paper, with the address printed thereon is run through the machine, the address is cut off in slips, and automatically affixed to the newspapers, envelopes or other articles addressed by a descending knife or platen, although few changes are necessary in order to make the latter machine do the work of the former. *Hobbs v. Beach*, 180 U. S. 383, 45 L. Ed. 586.

In *Busch v. Jones*, 184 U. S. 598, 604, 46 L. Ed. 707, it is held that a press for removing type indentations, the pressure being retained by cords and continued in the bundle, was not anticipated by hay presses, cotton presses and others used for applying pressure to masses of matter to compact them into bundles, the pressure being retained by bands of some kind.

The plaintiff's patent for an apparatus for steaming tobacco consisted in substituting a wooden vessel for holding the tobacco while being resweated in place of a metallic one. The defendant used the cases, boxes or packages in which the leaves were originally packed by the producer and steamed the tobacco while in them. It was held that if the defendant's plan was not an equivalent of the plaintiff's, there was no infringement, and that if it was, the plaintiff's patent was anticipated, since prior to its issuance it had been the practice to subject the tobacco to steam while in hogsheads or cases in which it had been originally packed. *Sutter v. Robinson*, 119 U. S. 530, 30 L. Ed. 492.

A device for relieving the pressure upon dams by means of an open sluice so arranged relatively to the dam that the water, not needed to support the leaves, escapes, is not anticipated by a patent for a gate opened and closed by a float placed not in the forebay, but in the stream, and connected by a rock and pinion which operates to vary automatically the height of the dam, since it seems to have a different object from the alleged infringing device and employs quite a different means. *DuBois v. Kirk*, 158 U. S. 58, 65, 39 L. Ed. 895.

**76. Machine patents.**—*Carnegie Steel Co. v. Cambria Iron Co.*, 185 U. S. 403, 424, 46 L. Ed. 968, citing *Risdon*, etc., *Locomotive Works v. Medart*, 158 U. S. 68, 39 L. Ed. 899; *Corning v. Burden*, 15 How. 252, 14 L. Ed. 683.

**77. Substantially similarity of products.**—*Cochrane v. Badische*, etc., *Soda Fa-*

*brik*, 111 U. S. 293, 28 L. Ed. 433; *The Wood-Paper Patent*, 23 How. 566, 23 L. Ed. 31; *Pope Mfg. Co. v. Gormully*, etc., *Mfg. Co.*, No. 2, 144 U. S. 238, 246, 36 L. Ed. 420; *Myers v. Groom Shovel Co.*, 141 U. S. 674, 35 L. Ed. 898; *Giles v. Hey-singer*, 150 U. S. 627, 37 L. Ed. 1204. See ante, "Manufactures," V, C, 1, b, (3).

A patent for an improvement in hair crimpers consisting of a strip of soft non-elastic metal, covered with a fibrous coating cemented thereto, so that when cut into proper lengths for use the ends will not fray out, is anticipated by the double cover process, which consists in covering the plain strip of metal with cotton, immersing in dextrine and covering with silk, whereby core, cotton cover and silk cover are cemented together. *Giles v. Heysinger*, 150 U. S. 627, 37 L. Ed. 1204.

A patent for improvement in handle sockets for shovels, etc., formed by riveting two straps of iron connecting with the blade to the handle, the handle not extending below the socket created by the union of the straps, is anticipated by a patent in which the handle is secured to the blade by means of two straps which approach each other at their ends next to the blade and form a union, or practical union, and make a socket or ferrule within which the handle is encased. *Myers v. Groom Shovel Co.*, 141 U. S. 674, 35 L. Ed. 898.

A patent for a handle bar to a bicycle which consists of a single piece of metal, bracket shaped, running through a lug which is fastened to the bicycle head, the handle being retained in place by sleeve nuts, which screw into the threaded portion of the lug, is anticipated by "a cross hollow bracket open at the ends and top" on which screw collars are fastened which engage with the bicycle head. *Pope Mfg. Co. v. Gormully*, etc., *Mfg. Co.*, No. 2, 144 U. S. 238, 246, 36 L. Ed. 420.

**78. Old product produced by new process.**—*Cochrane v. Badische*, etc., *Soda Fabrik*, 111 U. S. 293, 28 L. Ed. 433; *The Wood-Paper Patent*, 23 How. 566, 23 L. Ed. 31.

**79. Process patents.**—In general.—*Carnegie Steel Co. v. Cambria Iron Co.*, 185 U. S. 403, 422, 46 L. Ed. 968; *New Process Fermentation Co. v. Maus*, 122 U. S. 413, 30 L. Ed. 1193; *Ansonia*, etc., *Copper Co. v. Electrical Supply Co.*, 144 U. S. 11, 36 L. Ed. 327. See ante, "Processes," V, C, 1, b, (4).

**80. Mechanism adapted to carrying out process.**—*Carnegie Steel Co. v. Cambria*



stantially identical in principle,<sup>81</sup> though it is by no means essential that they be carried into effect in the same way.<sup>82</sup>

(d) *Combinations*.—Where the thing patented is an entirety, consisting of a single device or combination of old elements incapable of division or separate use, anticipation cannot be shown by alleging or proving that a part of the entire invention is found in one prior patent, printed publication, or machine, and another part in another prior exhibit, and still another part in a third exhibit, and from the three or any greater number of such exhibits draw the conclusion that the patentee is not the original and first inventor of the patented improvement.<sup>83</sup> But where the combination, as well as all of its elements have

Iron Co., 185 U. S. 403, 424, 46 L. Ed. 968.

A process patent is not anticipated by mechanism which might with slight alterations have been adapted to carry out that process, unless, at least, such use of it would have occurred to one whose duty it was to take practical use of the mechanism described. *Carnegie Steel Co. v. Cambria Iron Co.*, 185 U. S. 403, 424, 46 L. Ed. 968.

**81. Substantial identity of principle.**—*Ansonia, etc., Copper Co. v. Electrical Supply Co.*, 144 U. S. 11, 36 L. Ed. 327; *Carnegie Steel Co. v. Cambria Iron Co.*, 185 U. S. 403, 46 L. Ed. 968; *New Process Fermentation Co. v. Maus*, 122 U. S. 413, 430, 30 L. Ed. 1193; *Mowry v. Whitney*, 14 Wall. 620, 642, 20 L. Ed. 860.

A process primarily designed to secure uniformity of product in molten pig iron through equalization of the chemical composition of successive charges, by means of a covered reservoir between the blast furnaces and the converters in which should always be maintained a sufficient quantity of molten metal to absorb all the variations of the product of the blast furnace received into it and thus to unify the metals discharged into the converters, is not anticipated by patents which contemplate a reservoir between the blast furnaces and the converters used for storage and for such incidental steps toward uniformity as the necessary mixing of different products would lead to, where no provision is made for the retention of a considerable quantity of metal in the reservoir as a necessary prerequisite to uniformity of product. Nor is this process for unifying the products of blast furnaces anticipated by the foundry practice of running metal from cupola furnaces to a reservoir ladle, kept half full, where the maintenance of a permanent pool, the essence of the blast furnace process, has nothing to do with the foundry process. *Carnegie Steel Co. v. Cambria Iron Co.*, 185 U. S. 403, 46 L. Ed. 968.

An improved process for making beer, which results in the forcing down of its sediment so as to clarify the beer, is not anticipated by a process designed to accelerate the fermentation of mash, which accomplishes exactly the opposite result, i. e., the agitation and dissemination of the sediment through the fluid. *New Process Fermentation Co. v. Maus*, 122 U.

S. 413, 429, 30 L. Ed. 1193.

A foreign patent for the protection of land or submarine telegraph cables, by the use of paint, as a waterproof covering for a braided wire, does not anticipate a patent for insulating wires by means of alternate layers of braid and paint where there is nothing to indicate that the paint, as used by them, was applied in the manner indicated by the patent, or that it made the covering non-combustible, or was intended at all for that purpose. *Ansonia, etc., Copper Co. v. Electrical Supply Co.*, 144 U. S. 11, 15, 36 L. Ed. 327.

**82. Process carried into effect in different way.**—*Crescent Brewing Co. v. Gottfried*, 128 U. S. 158, 32 L. Ed. 390; *Dreyfus v. Searle*, 124 U. S. 60, 31 L. Ed. 352; *United States Repair, etc., Co. v. Assyrian Asphalt Co.*, 183 U. S. 591, 46 L. Ed. 342.

The claim for a process of heating the interior of casks or barrels for the purpose of pitching them so as to prevent the seepage of their contents, which consists, in substance, of a furnace and the blower to blow the hot air into the casks, is anticipated by an apparatus which has the same essential features but in which the furnace and fuel are situated inside of the cask instead of outside of it. *Crescent Brewing Co. v. Gottfried*, 128 U. S. 158, 32 L. Ed. 390.

A claim for a process patent for heating wine from the inside of the cask is void for want of novelty where the process of heating it from the outside was old, and the new process accomplished no new result. *Dreyfus v. Searle*, 124 U. S. 60, 31 L. Ed. 352.

A patent method of repairing asphalt roadways is invalid by reason of anticipation when the similarity, if not identity, of the conflicting patents is manifest in all respects, save that in the prior device the old material is removed and in the other it is reduced to its original state and mixed with new material. This agitation and mixing of old and new material not, however, being necessary to the method. *United States Repair, etc., Co. v. Assyrian Asphalt Co.*, 183 U. S. 591, 46 L. Ed. 342.

**83. Combinations.**—*Rates v. Coe*, 98 U. S. 31, 48, 25 L. Ed. 68; *Imhaeuser v. Buerk*, 101 U. S. 647, 660, 25 L. Ed. 945; *Adams v. Bellaire Stamping Co.*, 141 U. S. 539, 542, 35 L. Ed. 849; *The Telephone Cases*,



been anticipated, the patent is invalid.<sup>84</sup>

d. *Necessity for Knowledge of Anticipation.*—In order for prior use and sale,<sup>85</sup> or prior description in a printed publication,<sup>86</sup> to amount to anticipation and defeat a subsequent patent, it is not necessary to show that the patentee had knowledge thereof.

e. *Estoppel to Show Anticipation.*—A defendant in an infringement suit is not estopped to show want of patentable novelty by the fact that he had ineffectually sought to procure a patent for the same thing,<sup>87</sup> or because he conceived an idea from the examination of the plaintiff's device.<sup>88</sup>

3. EVIDENCE.—a. *Judicial Notice.*—As to judicial notice on questions of novelty and anticipation, see the title JUDICIAL NOTICE, vol. 7, p. 672.

b. *Presumptions and Burden of Proof.*—See post, "Presumptions and Burden of Proof," XIII, B, 5, c.

c. *Admissibility.*—(1) *Prior Patents.*—Prior patents themselves are admissible as evidence of want of novelty.<sup>89</sup>

(2) *Prior Printed Publications.*—The printed publication may be received in evidence.<sup>90</sup> But it is not admissible for the purpose of proving any other fact.

126 U. S. 1, 572, 31 L. Ed. 863; *Hobbs v. Beach*, 180 U. S. 383, 45 L. Ed. 586; *LeRoy v. Tatham*, 14 How. 156, 14 L. Ed. 367; *Parks v. Booth*, 102 U. S. 96, 104, 26 L. Ed. 54; *Gill v. Wells*, 22 Wall. 1, 24, 22 L. Ed. 699; *Seabury v. Am Ende*, 152 U. S. 561, 568, 38 L. Ed. 553. See ante, "Combinations," V, C, 1, b, (7).

A patent for a combination accomplishing a new and useful result is not anticipated because the parts are old. *The Telephone Cases*, 126 U. S. 1, 572, 31 L. Ed. 563.

A patent for a telephone of which a magnet forms a part is not anticipated by the magnet. *The Telephone Cases*, 126 U. S. 1, 572, 31 L. Ed. 563.

The introduction into a novel machine of a device which is only partly novel does not affect the novelty of the whole invention. *Hobbs v. Beach*, 180 U. S. 383, 395, 45 L. Ed. 586.

Where the evidence does not disclose that any one prior to the patentee accomplished what he has described and claimed, the fact that others had done something quite similar, and had used separately or in different combinations, the ingredients of his claim, does not show anticipation. *Seabury v. Am Ende*, 152 U. S. 561, 568, 38 L. Ed. 553.

84. *Dane v. Chicago Mfg. Co.*, 131 U. S. appx. cxxvi, 23 L. Ed. 82.

A patent for combining with the ordinary combination wheels, and the other working parts of a combination lock which has no sliding lock bolt, a bolt turning on a pivot or bearing, which is so isolated or removed from contact with the said wheels, as to receive any pressure or strain which may be applied through the separate bolt work of a safe door, and cut off the communication between the bolt work of the door and the wheels or fence lever of the lock, so that the position of the slots in the wheels cannot be determined for picking the lock, as in the use of the ordinary sliding lock bolt, which extends back so as to connect with

the wheels, is open to objection of want of novelty. *Yale Lock Mfg. Co. v. Sargent*, 117 U. S. 536, 545, 29 L. Ed. 954.

85. *Knowledge of prior use.*—*Evans v. Eaton*, 3 Wheat. 454, 4 L. Ed. 433.

86. *Knowledge of prior publication.*—*Evans v. Eaton*, 3 Wheat. 454, 4 L. Ed. 433; *Sewall v. Jones*, 91 U. S. 171, 179, 23 L. Ed. 275.

87. *Estoppel to show want of novelty.*—*Haughey v. Lee*, 151 U. S. 282, 285, 38 L. Ed. 162.

The defense of want of patentable invention in a patent operates not merely to exonerate the defendant, but to relieve the public from an asserted monopoly, and the court cannot be prevented from so declaring by the fact that the defendant had ineffectually sought to secure the monopoly for himself. *Haughey v. Lee*, 151 U. S. 282, 285, 38 L. Ed. 162.

Whether or not there is any inconsistency in trying, at one time, to get a patent for a supposed invention, and in afterwards alleging, as against a rival successful in obtaining a patent, that there is no novelty in the invention, it certainly cannot be said to constitute an estoppel. *Haughey v. Lee*, 151 U. S. 282, 285, 38 L. Ed. 162.

88. *Hoff v. Iron Clad Mfg. Co.*, 139 U. S. 326, 35 L. Ed. 179.

89. *Prior patents.*—*Tucker v. Spalding*, 13 Wall. 453, 20 L. Ed. 515. See, also, *Atlantic Works v. Brady*, 107 U. S. 192, 27 L. Ed. 438.

It is no ground for rejecting the prior patent that it does not profess to do the same things that the second patent does. *Tucker v. Spalding*, 13 Wall. 453, 20 L. Ed. 515.

90. *Publication as evidence.*—*Seymour v. McCormick*, 19 How. 96, 15 L. Ed. 557; *French v. Carter*, 137 U. S. 239, 34 L. Ed. 664.

In a suit in equity to recover damages for the infringement of a patented device for roofing vaults, a French publication with plates was put in evidence in order

except that of the description of the said improvement.<sup>91</sup>

(3) *Prior Use*.—Evidence of what is old and in general use is admissible in an action on a patent for the purpose of showing anticipation,<sup>92</sup> provided proper notice thereof has been given by the defendant, as required by statute.<sup>93</sup>

(4) *Priority between Several Inventions*.—The date of a prior patent is evidence of the date of the invention.<sup>91</sup> But evidence is admissible to show that the second patentee is the first inventor. Hence, after the defendant has introduced in evidence earlier patents, it is proper for the plaintiff to show that, prior to the date of any of them, he had reduced the invention covered by his first claim to practice, in a working form.<sup>95</sup>

(5) *Expert Evidence*.—The evidence of experts may be received for the purpose of showing whether or not there is a difference between the machine sued on and the one claimed to be an anticipation.<sup>96</sup>

d. *Weight and Sufficiency*—(1) *General Rule*.—In order to make out the defense of anticipation, the evidence must be clear and convincing.<sup>97</sup>

(2) *Oral Testimony*.—Oral testimony, unsupported by patents or exhibits,

to show that the plaintiff was not the inventor of the device. It was held that the foreign publication was competent as evidence in regard to the state of the art, and as a foundation for the inquiry whether it required invention to pass from the French structure to the patented structure. *French v. Carter*, 137 U. S. 239, 245, 34 L. Ed. 664.

91. *What may be proved by publication*.—*Seymour v. McCormick*, 19 How. 96, 15 L. Ed. 557.

92. *Evidence of use*.—*Brown v. Piper*, 91 U. S. 37, 23 L. Ed. 200; *Piper v. Moon*, 91 U. S. 44, 23 L. Ed. 202; *Klein v. Russell*, 19 Wall. 433, 22 L. Ed. 116.

Evidence of what is old and in general use at the time of an alleged invention is admissible in actions at law under the general issue, and in equity cases, without any averment in the answer touching the same. *Brown v. Piper*, 91 U. S. 37, 23 L. Ed. 200; *Piper v. Moon*, 91 U. S. 44, 23 L. Ed. 202.

Where, on a question of novelty in a patented process, a witness has stated that, after the patent, he was using a particular process which he had been using for twenty years before (a process which the defendant affirmed to be the same as the one patented), it is allowable to ask the witness whether the patentee had not forbid him to use what he was then using; the purpose of the question being to show that the patentee had forbid him, and that the witness then disclaimed using the patented process, and said that he had "a way of his own" which he was using. *Klein v. Russell*, 19 Wall. 433, 22 L. Ed. 116.

93. *Notice of defenses*.—*Railroad Co. v. Dubois*, 12 Wall. 47, 20 L. Ed. 265.

The novelty of a patented invention cannot be assailed by any other evidence than that of which the plaintiff has received notice. Hence the state of the art, at the time of the alleged invention, though proper to be considered by the court in construing the patent, in the absence of notice, has no legitimate bearing upon the

question whether the patentee was the first inventor. *Railroad Co. v. Dubois*, 12 Wall. 47, 20 L. Ed. 265.

As to notice of defenses, see post, "Notice of Defenses," XIII, B, 4, b, (4).

94. *Date of patent as evidence of date of invention*.—*Atlantic Works v. Brady*, 107 U. S. 192, 202, 27 L. Ed. 438.

95. *Evidence of priority of invention*.—*St. Paul Plow Works v. Starling*, 140 U. S. 184, 198, 35 L. Ed. 404; *Elizabeth v. Pavement Co.*, 97 U. S. 126, 24 L. Ed. 1000; *Loom Co. v. Higgins*, 105 U. S. 580, 26 L. Ed. 1177.

96. *Expert evidence*.—*Tucker v. Spalding*, 13 Wall. 453, 20 L. Ed. 515.

97. *Evidence must be clear and convincing*.—*Coffin v. Ogden*, 18 Wall. 120, 21 L. Ed. 821; *Woodworth v. Wilson*, 4 How. 712, 11 L. Ed. 1171; *Deering v. Winona Harvester Works*, 155 U. S. 286, 39 L. Ed. 153; *The Barbed Wire Patent*, 143 U. S. 275, 36 L. Ed. 154; *Cantrell v. Wallick*, 117 U. S. 689, 29 L. Ed. 1017; *Morgan v. Daniels*, 153 U. S. 120, 125, 38 L. Ed. 657.

When, in a patent case, a person claims as an original inventor and the defense is a prior invention by the defendant, if the defendant prove that the instrument which he alleges was invented by him was complete and capable of working, that it was known to at least five persons, and probably to many others, that it was put in use, tested, and successful, he brings the case within the established severe tests required by law to sustain the defense set up. *Coffin v. Ogden*, 18 Wall. 120, 21 L. Ed. 821.

Where the question decided in the patent office is one between contesting parties as to priority of invention, the decision there made must be accepted as controlling upon that question of fact in any subsequent suit between the same parties, unless the contrary is established by testimony which in character and amount carries through conviction. *Morean v. Daniels*, 153 U. S. 120, 125, 38 L. Ed. 657.

tending to show prior use of a device regularly patented, is, in the nature of the case, open to grave suspicion, and will not be held sufficient for the purpose unless anticipation is shown beyond a reasonable doubt.<sup>98</sup>

(3) *Admissions*.—An admission that devices of the same general nature as the patentee's were in use previous to his application for a patent, is not an admission that they were the same as his.<sup>99</sup>

(4) *General Use as Evidence of Novelty*.—While the fact that a patented device has gone into general use is by no means conclusive of its novelty,<sup>1</sup> yet where the question of novelty is in doubt, the fact that the device has gone into general use and displaced other devices employed for a similar purpose, is sufficient to turn the scale in favor of the invention.<sup>2</sup>

(5) *Evidence of Interested Parties*.—The testimony of one interested in the result of the suit cannot be allowed to prevail against a course of conduct utterly at variance with it.<sup>3</sup>

(6) *Decision of Patent Office*.—The decision of the patent office that an in-

**98. Parol evidence.**—The Barbed Wire Patent, 143 U. S. 275, 36 L. Ed. 154; *Deering v. Winona Harvester Works*, 155 U. S. 286, 300, 39 L. Ed. 153. See the title PAROL EVIDENCE, ante, p. 12.

Granting the witnesses to be of the highest character, and never so conscientious in their desire to tell only the truth, the possibility of their being mistaken as to the exact device used, which, though bearing a general resemblance to the one patented, may differ from it in the very particular which makes it patentable, are such as to render oral testimony peculiarly untrustworthy; particularly so if the testimony be taken after the lapse of years from the time the alleged anticipating device was used. If there be added to this a personal bias, or an incentive to color the testimony in the interest of the party calling the witness, to say nothing of down-right perjury, its value is, of course, still more seriously impaired. This case is an apt illustration of the wisdom of the rule requiring such anticipations to be proven by evidence so cogent as to leave no reasonable doubt in the mind of the court, that the transaction occurred substantially as stated. *Deering v. Winona Harvester Works*, 155 U. S. 286, 301, 39 L. Ed. 153.

Where five witnesses admitted to be credible were examined by the respondents, whose testimony clearly showed that the thing patented had been previously known and used very extensively in this country by the person named in the answer and by many others, it was held that the evidence of anticipation was sufficient. *Roemer v. Simon*, 95 U. S. 214, 217, 24 L. Ed. 384.

**99. Admissions.**—*Turrill v. Michigan Southern, etc., R. Co.*, 1 Wall. 491, 17 L. Ed. 668. See the title DECLARATIONS AND ADMISSIONS, vol. 5, p. 214.

**1. General use not conclusive of novelty.**—*Lovell Mfg. Co. v. Cary*, 147 U. S. 623, 635, 37 L. Ed. 307; *McClain v. Ortmyer*, 141 U. S. 419, 35 L. Ed. 800; *Grant v. Walter*, 148 U. S. 547, 556, 37 L. Ed. 552; *Duer v. Corbin Cabinet Lock Co.*, 149 U. S.

216, 37 L. Ed. 707; *Olin v. Timken*, 155 U. S. 141, 155, 39 L. Ed. 100.

"While the patented article may have been popular and met with large sales, that fact is not important when the alleged invention is without patentable novelty. *Duer v. Corbin Cabinet Lock Co.*, 149 U. S. 216, 37 L. Ed. 707." *Olin v. Timken*, 155 U. S. 141, 155, 39 L. Ed. 100.

**2. Doubts resolved in favor of novelty where device has gone into general use.**—*Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 486, 23 L. Ed. 952; *Magowan v. New York, etc., Packing Co.*, 141 U. S. 332, 35 L. Ed. 781; *Potts v. Creager*, 155 U. S. 597, 609, 39 L. Ed. 275; *Topliff v. Topliff*, 145 U. S. 156, 164, 36 L. Ed. 658; *Consolidated Safety-Valve Co. v. Crosby Steam Gauge Valve Co.*, 113 U. S. 157, 28 L. Ed. 939; *Lovell Mfg. Co. v. Cary*, 147 U. S. 623, 635, 37 L. Ed. 307; *McClain v. Ortmyer*, 141 U. S. 419, 35 L. Ed. 800; *Sessions v. Romadka*, 145 U. S. 29, 44, 36 L. Ed. 609; *Loom Co. v. Higgins*, 105 U. S. 580, 26 L. Ed. 1177; *Adams v. Bellaire Stamping Co.*, 141 U. S. 539, 35 L. Ed. 849.

The fact that known safety valves were not used, and the speedy and extensive adoption of the patentee's valve, are facts in harmony with the evidence that his valve contains just what the prior valves lack, and go to show novelty. *Consolidated Safety-Valve Co. v. Crosby Steam Gauge Valve Co.*, 113 U. S. 157, 179, 28 L. Ed. 939.

Where the patentees seem to have been the first to invent a practical trunk fastener to take the place of the old fashioned strap and buckle, and that, improved upon, it has completely taken the place of the earlier devices, the court will be inclined to resolve a doubt as to its novelty in favor of the patentee. *Sessions v. Romadka*, 145 U. S. 29, 44, 36 L. Ed. 609.

**3. Evidence of interested parties.**—*Atlantic Works v. Brady*, 107 U. S. 192, 203, 27 L. Ed. 438. See the title EVIDENCE, vol. 5, p. 1004; WITNESSES.



vention involves novelty is not conclusive.<sup>4</sup>

(7) *Failure to Claim as Evidence*.—See post, "Failure to Claim as Disclaimer or Dedication," VII, B, 6, b.

4. PROVINCE OF COURT AND JURY.—As a general rule, the question of novelty or anticipation is one of fact for the jury,<sup>5</sup> but if, upon the state of the art as shown to exist by the prior patents, and upon a comparison of the older devices with those described in the patent in suit, it should appear that the patented claims are not novel, it becomes the duty of the court to so instruct the jury.<sup>6</sup>

**D. Utility**—1. NECESSITY FOR UTILITY.—Inventions, in order that they may be the proper subjects of letters-patent, must not only be new but they must be useful.<sup>7</sup>

2. WHAT CONSTITUTES.—Utility, in the sense of the patent law, does not require such general utility as to supersede all other inventions that can accomplish the same object.<sup>8</sup> But where it appears that a patented device is not capable of being used to effect the object proposed,<sup>9</sup> or that the performance of such service with it is attended with imminent danger,<sup>10</sup> the patent is void for want of utility.

4. **Decision of patent office not conclusive**.—*Reckendorfer v. Faber*, 92 U. S. 347, 351, 23 L. Ed. 719.

5. **Province of court and jury**.—*Stimpson v. Woodman*, 10 Wall. 117, 125, 19 L. Ed. 866; *New York, etc., Packing Co. v. New Jersey, etc., Rubber Co.*, 137 U. S. 445, 34 L. Ed. 741; *Battin v. Taggart*, 17 How. 74, 15 L. Ed. 37; *Tucker v. Spalding*, 13 Wall. 453, 20 L. Ed. 515; *Bischoff v. Wethered*, 9 Wall. 812, 19 L. Ed. 829; *St. Paul Plow Works v. Starling*, 140 U. S. 184, 35 L. Ed. 404; *Haines v. McLaughlin*, 135 U. S. 584, 34 L. Ed. 290; *Keyes v. Grant*, 118 U. S. 25, 30 L. Ed. 54; *Turrill v. Michigan Southern, etc., R. Co.*, 1 Wall. 491, 17 L. Ed. 668; *Busch v. Jones*, 184 U. S. 598, 604, 46 L. Ed. 707; *Coupe v. Royer*, 155 U. S. 565, 579, 39 L. Ed. 263.

Where an old machine is set up as a defense to a patent infringement suit, and there are differences between the two, and experts differ as to the anticipation, or as to the invention claimed for the patented device, the question is one for the jury. *Keyes v. Grant*, 118 U. S. 25, 30 L. Ed. 54.

In an action at law, where a patent of prior date is offered in evidence as covering the invention described in the plaintiff's patent, on a charge of infringement the question of the identity of the two instruments or machines, must be left to the jury, if there is so much resemblance as raises the question at all. *Tucker v. Spalding*, 13 Wall. 453, 20 L. Ed. 515.

**Whether the prior publication** sufficiently describes the invention to defeat the patent is a question of fact for the jury. *Keyes v. Grant*, 118 U. S. 25, 30 L. Ed. 54.

6. *Powder Co. v. Powder Works*, 98 U. S. 126, 25 L. Ed. 77; *Heald v. Rice*, 104 U. S. 737, 749, 26 L. Ed. 910; *Fond Du-Lac County v. May*, 137 U. S. 395, 34 L. Ed. 714; *Market St. Cable R. Co. v. Rowley*, 155 U. S. 621, 625, 39 L. Ed. 284;

*Miller v. Eagle Mfg. Co.*, 151 U. S. 186, 196, 38 L. Ed. 121.

The question whether an improvement is patentable or not is, in an equity suit, one for the court. *Dunbar v. Myers*, 94 U. S. 187, 196, 24 L. Ed. 34.

7. **Necessity for utility**.—*Mitchell v. Tilghman*, 19 Wall. 287, 396, 22 L. Ed. 125; *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33; *Lehnbeuter v. Holthaus*, 105 U. S. 94, 26 L. Ed. 939; *Gandy v. Main Belting Co.*, 143 U. S. 587, 36 L. Ed. 272; *McClain v. Ortmyer*, 141 U. S. 419, 35 L. Ed. 800; *Grant v. Walter*, 148 U. S. 547, 556, 37 L. Ed. 552; *Lovell Mfg. Co. v. Cary*, 147 U. S. 623, 635, 37 L. Ed. 307; *Magowan v. New York, etc., Packing Co.*, 141 U. S. 332, 35 L. Ed. 781; *Duer v. Corbin Cabinet Lock Co.*, 149 U. S. 216, 37 L. Ed. 707; *DuBois v. Kirk*, 158 U. S. 58, 39 L. Ed. 895; *Western Electric Co. v. LaRue*, 139 U. S. 601, 608, 35 L. Ed. 294; *Stimpson v. Woodman*, 10 Wall. 117, 19 L. Ed. 866.

8. **Need not supersede old devices**.—*Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33.

9. **Inability to perform proposed service**.—*Mitchell v. Tilghman*, 19 Wall. 287, 396, 22 L. Ed. 125; *Coupe v. Royer*, 155 U. S. 565, 574, 39 L. Ed. 263; *Klein v. Russell*, 19 Wall. 433, 434, 22 L. Ed. 116.

A patented machine that will not do what it is intended to do could not sustain an action against one who was shown to use a successful and operative machine. *Coupe v. Royer*, 155 U. S. 565, 574, 39 L. Ed. 263.

10. **Use of device attended with danger**.—*Mitchell v. Tilghman*, 19 Wall. 287, 396, 22 L. Ed. 125.

"Cases arise also, even where the means described will accomplish the described result, when it cannot be held that the invention is useful if it appears that the operator, in using the described means, is constantly exposed to imminent danger,

3. EVIDENCE OF UTILITY—*a. Presumptions and Burden of Proof.*—The patent raises a *prima facie* presumption as to the utility of the invention, and the burden of proving want of utility is on the defendant.<sup>11</sup>

*b. General Use as Evidence.*—The fact that the patented article has gone into general use is evidence of its utility.<sup>12</sup> But while this is sufficient to establish utility in a doubtful case,<sup>13</sup> it is not conclusive in all cases.<sup>14</sup>

*c. Infringement as Evidence.*—The fact that a patent has been infringed,<sup>15</sup> or that in a suit for infringement a judgment for damages has been consented to,<sup>16</sup> is sufficient evidence of utility, at least as against the defendants.

4. PROVINCE OF COURT AND JURY.—Utility in most cases is a question of fact, as

either from the explosive tendency of the substance to be used or from the liability of the vessel to burst, which is required to be employed as means of accomplishing the patented result. Where the patentee finds it necessary to employ any such dangerous means to accomplish the described end, it cannot be held that his invention is useful, within the meaning of the patent law, even though it appears that the operator, when no such disaster happens, may be able to work out the described result by the described means, as it is quite clear that congress, in making provision to secure to inventors the exclusive right to their discoveries, never intended to promote any such as were in their nature constantly dangerous to the operator in employing the described means to accomplish the described result.” *Mitchell v. Tilghman*, 19 Wall. 287, 396, 22 L. Ed. 125.

11. *Presumption and burden of proof.*—*Lehnbeuter v. Holthaus*, 105 U. S. 94, 26 L. Ed. 939; *Gandy v. Main Belting Co.*, 143 U. S. 587, 36 L. Ed. 272; *Reckendorfer v. Faber*, 92 U. S. 347, 23 L. Ed. 719; *Dashiell v. Grosvenor*, 162 U. S. 425, 40 L. Ed. 1025; *Pickering v. McCullough*, 104 U. S. 310, 26 L. Ed. 749; *DuBois v. Kirk*, 158 U. S. 58, 39 L. Ed. 895.

12. *General use evidence of utility.*—*McClain v. Ortmyer*, 141 U. S. 419, 35 L. Ed. 800; *Grant v. Walter*, 148 U. S. 547, 556, 37 L. Ed. 552; *Lovell Mfg. Co. v. Cary*, 147 U. S. 623, 635, 37 L. Ed. 307; *Gandy v. Main Belting Co.*, 143 U. S. 587, 36 L. Ed. 272; *Magowan v. New York, etc., Packing Co.*, 141 U. S. 332, 35 L. Ed. 781; *Blake v. Robertson*, 94 U. S. 728, 24 L. Ed. 245.

13. *Weight in doubtful cases.*—*McClain v. Ortmyer*, 141 U. S. 419, 35 L. Ed. 800; *Lovell Mfg. Co. v. Cary*, 147 U. S. 623, 635, 37 L. Ed. 307; *Gandy v. Main Belting Co.*, 143 U. S. 587, 598, 36 L. Ed. 272; *Magowan v. New York, etc., Packing Co.*, 141 U. S. 332, 35 L. Ed. 781.

“While some of the testimony would seem to indicate that there is no great advantage in this method of construction, we think the fact that it has been largely adopted by manufacturers and that all the modern improved belting ordered or made by Gandy and in general use both in this country and in Europe, is made in this way, is, for the purposes of this case, suffi-

cient evidence of its utility.” *Gandy v. Main Belting Co.*, 143 U. S. 587, 36 L. Ed. 272.

14. *General use not conclusive.*—*McClain v. Ortmyer*, 141 U. S. 419, 425, 35 L. Ed. 800; *Grant v. Walter*, 148 U. S. 547, 556, 37 L. Ed. 552; *Lovell Mfg. Co. v. Cary*, 147 U. S. 623, 635, 37 L. Ed. 307; *Duer v. Corbin Cabinet Lock Co.*, 149 U. S. 216, 37 L. Ed. 707; *Blake v. Robertson*, 94 U. S. 728, 24 L. Ed. 245.

If the generality of sales were made the test of patentability, it would result that a person by securing a patent upon some trifling variation from previously known methods might, by energy in pushing sales or by superiority in finishing or decorating his goods, drive competitors out of the market and secure a practical monopoly, without in fact having made the slightest contribution of value to the useful arts. *McClain v. Ortmyer*, 141 U. S. 419, 428, 35 L. Ed. 800.

That the extent to which a patented device has gone into use is an unsafe criterion even of its actual utility, is evident from the fact that the general introduction of manufactured articles is as often effected by extensive and judicious advertising, activity in putting the goods upon the market and large commissions to dealers, as by the intrinsic merit of the articles themselves. *McClain v. Ortmyer*, 141 U. S. 419, 428, 35 L. Ed. 800; *Lovell Mfg. Co. v. Cary*, 147 U. S. 623, 635, 37 L. Ed. 307.

Popularity of an article is an unsafe criterion for determining its patentability and this was especially true where the popularity of the device is not due to a patentable feature. *Duer v. Corbin Cabinet Lock Co.*, 149 U. S. 216, 37 L. Ed. 707.

15. *Infringement as evidence of utility.*—*Lehnbeuter v. Holthaus*, 105 U. S. 94, 96, 26 L. Ed. 939; *Gandy v. Main Belting Co.*, 143 U. S. 587, 36 L. Ed. 272; *DuBois v. Kirk*, 158 U. S. 58, 39 L. Ed. 895.

One who has made a continuous use of an invention cannot deny its patentability on the ground of want of utility. *DuBois v. Kirk*, 158 U. S. 58, 65, 39 L. Ed. 895; *Lehnbeuter v. Holthaus*, 105 U. S. 94, 26 L. Ed. 939.

16. *Consent to judgment for damages.*—*Western Electric Co. v. LaRue*, 139 U. S. 601, 608, 35 L. Ed. 294.



it usually depends upon the evidence resulting from actual experiment.<sup>17</sup>

**E. Public Use or Sale before Obtaining Patent**—1. **GENERAL RULE.**—The public sale or use of an invention by the inventor more than two years before applying for a patent, is sufficient, if known, to prevent the issuance of a patent, or to invalidate a patent afterwards issued.<sup>18</sup>

2. **WHAT CONSTITUTES**—a. *Nature and Extent of Use.*—Whether the use of an invention is public or private, does not necessarily depend upon the number of persons to whom its use is known.<sup>19</sup> A single instance of sale or use is sufficient.<sup>20</sup> If an inventor, having made his device, gives or sells it to another, to be used by the donee or vendee, without limitation, or restriction, or injunction of secrecy, and it is so used, such use is public, within the meaning of the statute, even though the use, and knowledge of the use, may be confined to one person.<sup>21</sup> Where the patentee publicly performs an operation covered by his patent in a dozen different cities throughout the country, and teaches it to other members of the profession, who adopt it as a recognized feature of their practice, this will constitute a public use.<sup>22</sup>

b. *Visibility of Use.*—Some inventions are by their very character only capable of being used where they cannot be seen or observed by the public eye. Nevertheless, if its inventor sells a machine of which his invention forms a part, and allows it to be used without restriction of any kind, the use is a public one.<sup>23</sup> Thus, the fact that after the construction of a mechanical device, the mechanism is hidden from view, does not make a use of the device a private one.<sup>24</sup>

c. *Use for Purposes of Profit.*—The ultimate object of the patent laws being

**17. Utility a question of fact.**—*Mitchell v. Tilghman*, 19 Wall. 287, 396, 22 L. Ed. 125; *Stimpson v. Woodman*, 10 Wall. 117, 19 L. Ed. 866.

**18. Use or sale before obtaining patent.**—*Egbert v. Lippmann*, 104 U. S. 333, 26 L. Ed. 755; *Root v. Third Ave. R. Co.*, 146 U. S. 210, 227, 36 L. Ed. 946; *International Tooth Crown Co. v. Gaylord*, 140 U. S. 55, 35 L. Ed. 347; *Consolidated Fruit-Jar Co. v. Wright*, 94 U. S. 92, 24 L. Ed. 68; *Manning v. Cape Ann Isinglass, etc., Co.*, 108 U. S. 462, 27 L. Ed. 793; *Gates Iron Works v. Fraser*, 153 U. S. 332, 38 L. Ed. 734.

**19. Number of persons knowing of use immaterial.**—*Egbert v. Lippmann*, 104 U. S. 333, 26 L. Ed. 755; *Root v. Third Ave. R. Co.*, 146 U. S. 210, 227, 36 L. Ed. 946.

**20. Single instance of sale or use.**—*International Tooth Crown Co. v. Gaylord*, 140 U. S. 55, 35 L. Ed. 347; *Consolidated Fruit-Jar Co. v. Wright*, 94 U. S. 92, 24 L. Ed. 68; *Egbert v. Lippmann*, 104 U. S. 333, 26 L. Ed. 755; *Root v. Third Ave. R. Co.*, 146 U. S. 210, 227, 36 L. Ed. 946; *Manning v. Cape Ann Isinglass, etc., Co.*, 108 U. S. 462, 27 L. Ed. 793; *Coffin v. Ogden*, 18 Wall. 120, 21 L. Ed. 821; *McClung v. Kingsland*, 1 How. 202, 11 L. Ed. 102.

To constitute the public use of an invention, it is not necessary that more than one of the patented articles should be publicly used. The use of a great number may tend to strengthen the proof but one well-defined case of such use is just as effectual to annul the patent as many. *Egbert v. Lippmann*, 104 U. S. 333, 336, 26 L. Ed. 755. See, also, *McClung v. Kingsland*, 1 How. 202, 11 L. Ed. 102;

*Consolidated Fruit-Jar Co. v. Wright*, 94 U. S. 92, 24 L. Ed. 68; *Pitts v. Hall*, 2 Blatchf. 229.

**21.** *Egbert v. Lippmann*, 104 U. S. 333, 26 L. Ed. 755; *Root v. Third Ave. R. Co.*, 146 U. S. 210, 227, 36 L. Ed. 946; *Worley v. Tobacco Co.*, 104 U. S. 340, 26 L. Ed. 821.

The defense of two years public use by the consent of the inventor before he made application for letters-patent is sufficiently established by proof that on two different occasions he presented a friend with a pair of corset steels without imposing any condition or restriction as to their use, and that he slept on his rights for eleven years during which time the invention came into general use. *Egbert v. Lippmann*, 104 U. S. 333, 26 L. Ed. 755.

**22. Teaching use of invention throughout country.**—*International Tooth Crown Co. v. Gaylord*, 140 U. S. 55, 35 L. Ed. 347.

Where for more than two years before applying for a patent the patentee, a dentist, taught his invention to other dentists throughout the country, with no suggestion that it was an experiment, and for pay, his patent is void. *International Tooth Crown Co. v. Gaylord*, 140 U. S. 55, 35 L. Ed. 347.

**23. Necessity for device to be visible while in use.**—*Egbert v. Lippmann*, 104 U. S. 333, 26 L. Ed. 755.

**24. Mechanism hidden from view.**—*Hall v. Macneale*, 107 U. S. 90, 27 L. Ed. 367; *Root v. Third Ave. R. Co.*, 146 U. S. 210, 227, 36 L. Ed. 946; *Coffin v. Ogden*, 18 Wall. 120, 21 L. Ed. 821; *Brush v. Condit*, 132 U. S. 39, 49, 33 L. Ed. 251; *Smith, etc.*



to benefit the public by the use of the invention after the temporary monopoly shall have expired, one who conceals his invention, and used it for his own profit, is not entitled to favor if another person should find out and use the invention.<sup>25</sup>

d. *Use for Purposes of Experiment*—(1) *General Rule*.—The use of an invention by the inventor himself, or by another person under his direction, by way of experiment, and in order to bring the invention to perfection, is not such a public use as under the statute defeats the right to a patent.<sup>26</sup>

(2) *Good Faith of Experiments*.—In order for a use to be experimental, the inventor must have been engaged, in good faith, in testing the working of the invention afterwards patented.<sup>27</sup> The use of an invention cannot be claimed as an experimental use, when the invention was complete and capable of producing the results sought to be accomplished and the device was sold as an article of trade with no actual attempt at experimental use.<sup>28</sup>

(3) *Place of Making Experiments*.—The fact that the test is made in public

*Mfg. Co. v. Sprague*, 123 U. S. 249, 31 L. Ed. 141.

The use of solid conical bolts in safes exhibited and sold more than two years prior to the application for a patent was a public use, within the meaning of §§ 7 and 15 of the act of 1836. *Hall v. Macneale*, 107 U. S. 90, 27 L. Ed. 367.

Where an invention for a safe was complete, and was capable of producing the results sought to be accomplished and the construction, arrangement, purpose, mode of operation and use of the mechanism involved were necessarily known to the workmen who put it into the safes, the fact that the mechanism was hidden from view after the safes were completed, and it required a destruction of them to bring it into view, did not make the use of it a secret one. This was no more concealment than was inseparable from any legitimate use of it. *Hall v. Macneale*, 107 U. S. 90, 96, 27 L. Ed. 367. See, also, *Root v. Third Ave. R. Co.*, 146 U. S. 210, 227, 36 L. Ed. 946.

25. *Use by inventor for purpose of profit*.—*Kendall v. Winsor*, 21 How. 322, 36 L. Ed. 165; *Root v. Third Ave. R. Co.*, 146 U. S. 210, 225, 36 L. Ed. 946.

Any attempt to use it for a profit, and not by way of experiment, for a longer period than two years before the application, would deprive the inventor of his right to a patent. *Root v. Third Ave. R. Co.*, 146 U. S. 210, 225, 36 L. Ed. 946.

26. *Use for purpose of experiment*.—*Agawam Co. v. Jordan*, 7 Wall. 583, 19 L. Ed. 177; *Shaw v. Cooper*, 7 Pet. 292, 8 L. Ed. 689; *Elizabeth v. Pavement Co.*, 97 U. S. 126, 24 L. Ed. 1000; *Egbert v. Lippmann*, 104 U. S. 333, 26 L. Ed. 755; *Smith, etc., Mfg. Co. v. Sprague*, 123 U. S. 249, 257, 31 L. Ed. 141; *Hall v. Macneale*, 107 U. S. 90, 27 L. Ed. 367; *Kendall v. Winsor*, 21 How. 322, 16 L. Ed. 165; *Beedle v. Bennett*, 122 U. S. 71, 30 L. Ed. 1074; *Pennock v. Dialogue*, 2 Pet. 1, 7 L. Ed. 327; *Root v. Third Ave. R. Co.*, 146 U. S. 210, 225, 36 L. Ed. 946; *International Tooth Crown Co. v. Gaylord*, 140 U. S.

55, 35 L. Ed. 347; *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33.

The use of an invention by the inventor, or by persons under his direction, if made in good faith, solely in order to test its qualities, remedy its defects, and bring it to perfection, is not, although others thereby derive a knowledge of it, a public use of it, within the meaning of the patent law, and does not preclude him from obtaining letters-patent therefor. *Elizabeth v. Pavement Co.*, 97 U. S. 126, 24 L. Ed. 1000.

The thing implied as excepted out of the prohibition of the statute is a use which may be properly characterized as substantially for purposes of experiment. Where the substantial use is not for that purpose, but is otherwise public, and for more than two years prior to the application, it comes within the prohibition. *Smith, etc., Mfg. Co. v. Sprague*, 123 U. S. 249, 31 L. Ed. 141.

Samuel Nicholson having, in 1847, invented a new and useful improvement in wooden pavements, and filed in the patent office a caveat of his invention, put down in 1854, as an experiment, his wooden pavement on a street in Boston, where it was exposed to public view and travelled over for several years, and it proving successful, he, Aug. 7, 1854, obtained letters-patent therefor. Held, that there had been no public use or sale of the invention. *Elizabeth v. Pavement Co.*, 97 U. S. 126, 24 L. Ed. 1000.

Experimental tests made by an inventor of a driven well four years before applying for a patent do not defeat the validity of the patent. *Beedle v. Bennett*, 122 U. S. 71, 30 L. Ed. 1074.

27. *Good faith of experiments*.—*Root v. Third Ave. R. Co.*, 146 U. S. 210, 225, 36 L. Ed. 946; *Elizabeth v. Pavement Co.*, 97 U. S. 126, 24 L. Ed. 1000.

28. *Invention perfected before use*.—*Hall v. Macneale*, 107 U. S. 90, 27 L. Ed. 367; *Smith, etc., Mfg. Co. v. Sprague*, 123 U. S. 249, 31 L. Ed. 141; *Root v. Third Ave. R. Co.*, 146 U. S. 210, 225, 36 L. Ed.

does not make the use a public one, nor defeat the right to a patent.<sup>29</sup> Thus when the subject of invention is a machine, it may be tested and tried in a building, either with or without closed doors.<sup>30</sup> And a machine may be used in the premises of another, and the use may enure to the benefit of the owner of the establishment.<sup>31</sup>

(4) *Effect Where Profits Are Derived from Use.*—The fact that during the period of experiment the inventor incidentally derives a profit from the use of the invention does not afford any presumption of abandonment.<sup>32</sup> But where the use is mainly for the purposes of trade and profit, and the experiment is merely incidental to that, the principle and not the incident must give character to the use.<sup>33</sup>

(5) *Effect Where Public Derives Benefit from Use.*—Whilst the supposed machine is in such experimental use, the public may be incidentally deriving a benefit from it. If it be a grist mill, or a carding machine, customers from the surrounding country may enjoy the use of it by having their grain made into flour, or their wool into rolls, and still it will not be in public use, within the meaning of the law.<sup>34</sup>

(6) *Duration of Durability Test.*—While a patentee may have a right to test the durability of his invention as one of the elements of its success, it is manifest that his experiments to that end should extend no farther, either in time or in the number of cases in which it is used, than is reasonably necessary for that purpose.<sup>35</sup>

(7) *Evidence of Experimental Use.*—The evidence to show that the use was for the purpose of experiment must be full, clear and convincing.<sup>36</sup>

946; Coffin v. Ogden, 18 Wall. 120, 21 L. Ed. 821.

**29. Publicity of test.**—Elizabeth v. Pavement Co., 97 U. S. 126, 135, 24 L. Ed. 1000; Egbert v. Lippmann, 104 U. S. 333, 26 L. Ed. 755.

A use necessarily open to public view, if made in good faith solely to test the qualities of the invention, and for the purpose of experiment, is not a public use within the meaning of the statute. Egbert v. Lippmann, 104 U. S. 333, 336, 26 L. Ed. 755. See, also, Elizabeth v. Pavement Co., 97 U. S. 126, 24 L. Ed. 1000; Shaw v. Cooper, 7 Pet. 292, 8 L. Ed. 689.

**30. Within or without closed doors.**—Elizabeth v. Pavement Co., 97 U. S. 126, 135, 24 L. Ed. 1000.

**31. Use in another's shops or on another's premises.**—Elizabeth v. Pavement Co., 97 U. S. 126, 135, 24 L. Ed. 1000.

**32. Making profit during experimental stage.**—Root v. Third Ave. R. Co., 146 U. S. 210, 226, 36 L. Ed. 946; Smith, etc., Mfg. Co. v. Sprague, 123 U. S. 249, 31 L. Ed. 141; International Tooth Crown Co. v. Gaylord, 140 U. S. 55, 35 L. Ed. 347.

**33. Use mainly for profit.**—Smith, etc., Mfg. Co. v. Sprague, 123 U. S. 249, 31 L. Ed. 141; Root v. Third Ave. R. Co., 146 U. S. 210, 225, 36 L. Ed. 946; International Tooth Crown Co. v. Gaylord, 140 U. S. 55, 35 L. Ed. 347.

**34. Effect where public derives benefit from use.**—Elizabeth v. Pavement Co., 97 U. S. 126, 135, 24 L. Ed. 1000.

**35. Duration of durability test.**—International Tooth Crown Co. v. Gaylord, 140 U. S. 55, 63, 35 L. Ed. 347; Elizabeth v. Pavement Co., 97 U. S. 126, 24 L. Ed.

1000; Root v. Third Ave. R. Co., 146 U. S. 210, 36 L. Ed. 946. See Beedle v. Bennett, 122 U. S. 71, 30 L. Ed. 1074 (delay of five years after first experiment).

If durability is one of the qualities to be attained, a long period, perhaps years, may be necessary to enable the inventor to discover whether his purpose is accomplished. And though, during all that period, he may not find that any changes are necessary, yet he may be justly said to be using his machine only by way of experiment; and no one would say that such a use, pursued with a bona fide intent of testing the qualities of the machine, would be a public use, within the meaning of the statute. So long as he does not voluntarily allow others to make it and use it, and so long as it is not on sale for general use, he keeps the invention under his own control, and does not lose his title to a patent. Elizabeth v. Pavement Co., 97 U. S. 126, 135, 24 L. Ed. 1000.

The plaintiff invented a new mode of constructing cable railways in 1876, constructed a road in 1878, and was superintendent of it until 1882, when he applied for and obtained a patent for his invention. No part of the structure was made at his expense, and he made no examination of it to see how it stood the wear and tear, but he claimed that he had experimented with it for the purpose of seeing whether it was durable. It was held that the use defeated his right to obtain the patent. Root v. Third Ave. R. Co., 146 U. S. 210, 36 L. Ed. 946.

**36. Evidence of experimental character of use.**—Smith, etc., Mfg. Co. v. Sprague, 123 U. S. 249, 31 L. Ed. 141; Root v. Third

3. DURATION OF USE.—A patent is invalid on account of sale and public use, more than two years before the application therefor was filed in the patent office,<sup>37</sup> but not where the only sale or use was within that time.<sup>38</sup>

4. SALE OR USE IN FOREIGN COUNTRY.—See ante, "In Foreign Country," V, C, 2, b, (3), (b).

5. EFFECT OF REJECTION OF APPLICATION.—Filing a second petition for a patent, after the first has been rejected, does not sever the second application from the first nor deprive the applicant of any advantage he would have enjoyed had the patent been granted without a renewal of the application.<sup>39</sup>

6. ASSIGNMENT OF INTEREST TO PRIOR USER.—The inventor cannot relieve himself of the consequences of the prior public use of his patented invention, by assigning an interest in his invention or patent to the person by whom the invention was thus used.<sup>40</sup>

Ave. R. Co., 146 U. S. 210, 36 L. Ed. 946.

In considering the evidence as to the alleged prior use for more than two years of an invention, which, if established, will have the effect of invalidating the patent, and where the defense is met only by the allegation that the use was not a public use in the sense of the statute, because it was for the purpose of perfecting an incomplete invention by tests and experiments, the proof on the part of the patentee, the period covered by the use having been clearly established, should be full, unequivocal, and convincing. *Smith, etc., Mfg. Co. v. Sprague*, 123 U. S. 249, 264, 31 L. Ed. 141.

37. Duration of use.—Rev. Stat., § 4920; *Agawam Co. v. Jordan*, 7 Wall. 583, 19 L. Ed. 177; *McClurg v. Kingsland*, 1 How. 202, 209, 11 L. Ed. 102; *Stimpson v. West Chester R. Co.*, 4 How. 380, 11 L. Ed. 1020; *Bates v. Coe*, 98 U. S. 31, 32, 25 L. Ed. 68; *Parks v. Booth*, 102 U. S. 96, 105, 26 L. Ed. 54; *Teese v. Huntingdon*, 23 How. 2, 7, 16 L. Ed. 479; *Planing-Machine Co. v. Keith*, 101 U. S. 479, 480, 25 L. Ed. 939; *Anderson v. Miller*, 129 U. S. 70, 32 L. Ed. 635; *Gandy v. Main Belting Co.*, 143 U. S. 587, 36 L. Ed. 272; *Collar Co. v. Van Dusen*, 23 Wall. 530, 531, 23 L. Ed. 128; *Dunbar v. Myers*, 94 U. S. 187, 196, 24 L. Ed. 34; *Roemer v. Simon*, 95 U. S. 214, 218, 24 L. Ed. 384; *Dalton v. Jennings*, 93 U. S. 271, 23 L. Ed. 925; *Manning v. Cape Ann Isinglass, etc., Co.*, 108 U. S. 462, 465, 27 L. Ed. 793; *Elizabeth v. Pavement Co.*, 97 U. S. 126, 24 L. Ed. 1000; *Egbert v. Lippmann*, 104 U. S. 333, 26 L. Ed. 755; *Consolidated Fruit-Jar Co. v. Wright*, 94 U. S. 92, 24 L. Ed. 68; *Worley v. Tobacco Co.*, 104 U. S. 340, 26 L. Ed. 821.

The true meaning of the words of the patent law, "not known or used before the application," is, not known or used by the public, before the application. *Pennock v. Dialogue*, 2 Pet. 1, 7 L. Ed. 327; *Shaw v. Cooper*, 7 Pet. 292, 8 L. Ed. 689.

The knowledge or use spoken of in the act of congress of 1793, could have referred to the public only; for the provision would be nugatory, if it were applied to the inventor himself; he must necessarily have a perfect knowledge of

the thing invented, and of its use, before he can describe it, as by law he is required to do, preparatory to the emanation of a patent. *Shaw v. Cooper*, 7 Pet. 292, 8 L. Ed. 689.

The patent law favors meritorious inventors by conditionally conferring upon them for a limited period exclusive rights to their inventions. But it requires them to be vigilant and active in complying with the statutory conditions. It is not unmindful of possibly intervening rights of the public. The invention must not have been in public use or on sale more than two years before the application for a patent is made, and all applications must be completed and prepared for examination within two years after the petition is filed, unless it be shown to the satisfaction of the commissioner that the delay was unavoidable. All this shows the intention of congress to require diligence in prosecuting the claims to an exclusive right. *Planing-Machine Co. v. Keith*, 101 U. S. 479, 485, 25 L. Ed. 939; *Consolidated Fruit-Jar Co. v. Wright*, 94 U. S. 92, 94, 24 L. Ed. 68; *Manning v. Cape Ann Isinglass, etc., Co.*, 108 U. S. 462, 27 L. Ed. 793; *Smith, etc., Mfg. Co. v. Sprague*, 123 U. S. 249, 255, 31 L. Ed. 141.

38. Use or sale within two years of application.—*Haines v. McLaughlin*, 135 U. S. 584, 596, 34 L. Ed. 290; *Roemer v. Simon*, 95 U. S. 214, 218, 24 L. Ed. 384; *Bates v. Coe*, 98 U. S. 31, 32, 25 L. Ed. 68; *Worley v. Tobacco Co.*, 104 U. S. 340, 26 L. Ed. 821; *Manning v. Cape Ann Isinglass, etc., Co.*, 108 U. S. 462, 27 L. Ed. 793.

If an inventor applies for his patent within two years from the time that he first exhibits his completed invention in public, no amount of public use within that two years either by the inventor or others will work any forfeiture of his right to a patent or constitute any evidence of abandonment. *Haines v. McLaughlin*, 135 U. S. 584, 596, 34 L. Ed. 290.

39. Effect of rejection of application.—*Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 486, 500, 23 L. Ed. 952.

40. Assignment of interest to person using invention as curing delay.—*Worley v. Tobacco Co.*, 104 U. S. 340, 26 L. Ed. 821.



**F. Abandonment of Invention**—1. **GENERAL RULE**.—One who makes an invention and then abandons it, is not entitled to a patent.<sup>41</sup>

2. **TIME OF ABANDONMENT**.—There may be an abandonment of an invention to the public, as well after an application has been rejected or withdrawn, as before any application is made.<sup>42</sup>

3. **WHAT CONSTITUTES**—a. *In General*.—Abandonment of an invention to the public may be evidenced either by express words or conduct inconsistent with an intention to retain the right to claim a patent.<sup>43</sup>

b. *Public Use or Sale*—(1) *By Inventor*.—The public use or sale of an invention, by the inventor, more than two years before his application for a patent is filed, defeats his right to a patent,<sup>44</sup> but use or sale within two years of the application is no evidence of abandonment.<sup>45</sup>

(2) *By Third Persons*—(a) *In General*.—If an inventor makes his discovery public, looks on and permits others freely to use it, without objection or assertion of claim to the invention, of which the public might take notice, he abandons the inchoate right to the exclusive use of the invention, to which a patent would have entitled him, had it been applied for, before such use,<sup>46</sup>

41. **Abandonment**.—Gayler v. Wilder, 10 How. 477, 13 L. Ed. 504; Whitely v. Swayne, 7 Wall. 685, 19 L. Ed. 199; Consolidated Fruit-Jar Co. v. Wright, 94 U. S. 92, 24 L. Ed. 68; Pennock v. Dialogue, 2 Pet. 1, 7 L. Ed. 327; Gill v. United States, 160 U. S. 426, 40 L. Ed. 480; The Corn-Planter Patent, 23 Wall. 181, 23 L. Ed. 161; Coffin v. Ogden, 18 Wall. 120, 21 L. Ed. 821; Deering v. Winona Harvester Works, 155 U. S. 286, 302, 39 L. Ed. 153; United States, etc., Cartridge Co. v. Whitney Arms Co., 118 U. S. 22, 30 L. Ed. 53; Planing-Machine Co. v. Keith, 101 U. S. 479, 25 L. Ed. 939; Seymour v. Osborne, 11 Wall. 516, 20 L. Ed. 33; Hartshorn v. Saginaw Barrel Co., 119 U. S. 664, 30 L. Ed. 539; Shaw v. Cooper, 7 Pet. 292, 321, 8 L. Ed. 689; Kendall v. Winsor, 21 How. 322, 16 L. Ed. 165; McClurg v. Kingsland, 1 How. 202, 11 L. Ed. 102; Smith v. Good-year Dental Vulcanite Co., 93 U. S. 486, 23 L. Ed. 952.

42. **Abandonment after application**.—United States, etc., Cartridge Co. v. Whitney Arms Co., 118 U. S. 22, 30 L. Ed. 53; Planing-Machine Co. v. Keith, 101 U. S. 479, 25 L. Ed. 939.

An inventor must comply with the statutory conditions. He cannot without cause hold his application pending during a long period of years, leaving the public uncertain whether he intends ever to prosecute it. Planing-Machine Co. v. Keith, 101 U. S. 479, 25 L. Ed. 939.

43. **What constitutes abandonment**.—Planing-Machine Co. v. Keith, 101 U. S. 479, 484, 25 L. Ed. 939; Kendall v. Winsor, 21 How. 322, 16 L. Ed. 165; Shaw v. Cooper, 7 Pet. 292, 8 L. Ed. 689; United States, etc., Cartridge Co. v. Whitney Arms Co., 118 U. S. 22, 24, 30 L. Ed. 53.

It is not a bar to an action for an infringement of a patent, that before making his application to the patent office, the patentee had explained his invention orally to several persons, without making a drawing, model, or written specification

thereof. Railroad Co. v. Dubois, 12 Wall. 47, 20 L. Ed. 265.

44. **Public use or sale by inventor**.—Pennock v. Dialogue, 2 Pet. 1, 7 L. Ed. 327; Parks v. Booth, 102 U. S. 96, 105, 26 L. Ed. 54; Roemer v. Simon, 95 U. S. 218, 24 L. Ed. 384; Bates v. Coe, 98 U. S. 31, 32, 25 L. Ed. 68; Consolidated Fruit-Jar Co. v. Wright, 94 U. S. 92, 94, 24 L. Ed. 68.

If an inventor should be permitted to hold back from the knowledge of the public the secrets of his invention, if he should, for a long period of years, retain the monopoly, and make and sell his invention, publicly, and thus gather the whole profits of it, relying upon his superior skill and knowledge of the structure, and then, and then only, when the danger of competition should force him to procure the exclusive right, he should be allowed to take out a patent, and thus exclude the public from any further use than what should be derived under it during his fourteen years; it would materially retard the progress of science and the useful arts; and give a premium to those who should be least prompt to communicate their discoveries. Pennock v. Dialogue, 2 Pet. 1, 7 L. Ed. 327.

A strict construction of the act of congress, as regards the public use of an invention, before it is patented, is not only required by its letter and spirit, but also by sound policy. Shaw v. Cooper, 7 Pet. 292, 8 L. Ed. 689.

45. **Use or sale within two years no evidence of abandonment**.—Parks v. Booth, 102 U. S. 96, 105, 26 L. Ed. 54; Haines v. McLaughlin, 135 U. S. 584, 596, 34 L. Ed. 290; Bates v. Coe, 98 U. S. 31, 32, 25 L. Ed. 68; Consolidated Fruit-Jar Co. v. Wright, 94 U. S. 92, 94, 24 L. Ed. 68.

46. **Permitting public use of invention**.—Pennock v. Dialogue, 2 Pet. 1, 14, 7 L. Ed. 327; Elizabeth v. Pavement Co., 97 U. S. 126, 24 L. Ed. 1000; Egbert v. Lippmann, 104 U. S. 333, 337, 26 L. Ed. 755;

although his intention was not to abandon it.<sup>47</sup> And it makes no difference in the principle, that the article so publicly used, and afterwards patented, was made by a particular individual who did so by the private permission of the inventor.<sup>48</sup> But the public use or sale of an invention by a third person, within two years of the application for a patent, is no evidence of abandonment.<sup>49</sup>

(b) *Consent of Inventor*.—Under early statutes, the public use or sale of an invention by third persons more than two years before the application for a patent did not defeat the right to a patent unless the use and sale were with the consent and allowance of the inventor.<sup>50</sup> But consent and allowance of the inventor or applicant to the use is no longer required.<sup>51</sup>

(3) *Duration of Use*.—While abandonment is not necessarily shown by showing the public use and sale of the invention within two years of the application for a patent, the conduct of the inventor may be such as to evince an

*Shaw v. Cooper*, 7 Pet. 292, 8 L. Ed. 689; *Grant v. Raymond*, 6 Pet. 218, 248, 8 L. Ed. 376; *Shaw v. Cooper*, 7 Pet. 292, 313, 8 L. Ed. 689; *McClurg v. Kingsland*, 1 How. 202, 206, 11 L. Ed. 102; *Consolidated Fruit-Jar Co. v. Wright*, 94 U. S. 92, 94, 24 L. Ed. 68; *Bates v. Coe*, 98 U. S. 31, 32, 25 L. Ed. 68; *Gill v. United States*, 160 U. S. 426, 430, 40 L. Ed. 480.

The true construction of the patent law is, that the first inventor cannot acquire a good title to a patent, if he suffers the thing invented to go into public use, or to be publicly sold for use, before he makes application for a patent. This involuntary act, or acquiescence in the public sale or use, is an abandonment or his right, or, rather, creates a disability to comply with the terms and conditions of the law; on which alone the secretary of state is authorized to grant him a patent. *Pennock v. Dialogue*, 2 Pet. 1, 2, 7 L. Ed. 327.

No matter by what means an invention may have been communicated to the public, before a patent is obtained, any acquiescence in the public use by the inventor will be an abandonment of the right. If the right were asserted by him who fraudulently obtained it, perhaps no lapse of time could give it validity; but the public stand in an entirely different relation to the inventor. His right would be secured, by giving public notice that he was the inventor of the thing used, and that he should apply for a patent. *Shaw v. Cooper*, 7 Pet. 292, 8 L. Ed. 689.

47. The question of abandonment to the public does not depend on the intention of the inventor; whatever may be the intention, if he suffer his invention to go into public use, through any means whatsoever, without an immediate assertion of his right, he is not entitled to patent; nor will a patent obtained under such circumstances protect his right. *Shaw v. Cooper*, 7 Pet. 292, 8 L. Ed. 689.

48. *Pennock v. Dialogue*, 2 Pet. 1, 14, 7 L. Ed. 327; *McClurg v. Kingsland*, 1 How. 202, 206, 11 L. Ed. 102; *Egbert v. Lippmann*, 104 U. S. 333, 26 L. Ed. 755.

49. Use or sale within two years of application.—*Hames v. McLaughlin*, 135 U. S. 584, 596, 34 L. Ed. 290.

50. Consent and allowance of use formerly required.—*Bates v. Coe*, 98 U. S. 31, 46, 25 L. Ed. 68; *Andrews v. Hovey*, 123 U. S. 267, 275, 31 L. Ed. 169; *Shaw v. Cooper*, 7 Pet. 292, 8 L. Ed. 689; *Pennock v. Dialogue*, 2 Pet. 1, 19, 7 L. Ed. 327; *Kendall v. Winsor*, 21 How. 322, 331, 16 L. Ed. 165; *Seymour v. Osborne*, 11 Wall. 516, 547, 20 L. Ed. 33; *Hall v. Macneale*, 107 U. S. 90, 27 L. Ed. 367.

The acquiescence of an inventor in the public use of his invention, could in no case be presumed, where he had no knowledge of such use; but knowledge might be presumed from the circumstances of the case. This was, in general, a fact for the jury; and if the inventor did not, immediately after notice, assert his right, it was such evidence of acquiescence in the public use, as for ever afterwards to prevent him from asserting it. After his right was perfected by a patent, no presumption arose against it, from a subsequent use by the public. *Shaw v. Cooper*, 7 Pet. 292, 8 L. Ed. 689.

Knowledge of invention obtained by fraud.—Where a knowledge of the invention is surreptitiously obtained and communicated to the public, this does not affect the right of the inventor, and no presumption of abandonment of the right to the public by the inventor arises, though an acquiescence by the inventor will lay the foundation for such a presumption. *Shaw v. Cooper*, 7 Pet. 292, 8 L. Ed. 689.

If a person should surreptitiously obtain knowledge of the invention, and use it, he would have no right to continue to use it after the inventor should have obtained a patent. *Kendall v. Winsor*, 21 How. 322, 16 L. Ed. 165.

51. Knowledge of use.—*Andrews v. Hovey*, 123 U. S. 267, 31 L. Ed. 169; *Manning v. Cape Ann Isinglass, etc., Co.*, 108 U. S. 462, 465, 27 L. Ed. 793; *Bates v. Coe*, 98 U. S. 31, 25 L. Ed. 68; *Egbert v. Lippmann*, 104 U. S. 333, 26 L. Ed. 755.



abandonment,<sup>52</sup> as where he consents to the use of the invention by a third person.<sup>53</sup> If the invention is in public use or on sale for more than two years prior to the application for a patent, it will be conclusive evidence of abandonment and the patent will be void whether the inventor consented to the use or not.<sup>54</sup>

c. *Failure to Perfect Invention*.—One who has made an invention but failed to perfect it, and has abandoned it after unsuccessful experiments, is not entitled to a patent.<sup>55</sup>

d. *Destruction of Invention*.—Desertion of an invention consisting of a machine, never patented, may be proved by showing that the inventor, after he had constructed it, and before he had reduced it to practice, broke it up as something requiring more thought and experiment, and laid the parts aside as incomplete, provided it appears that those acts were done without any definite intention of resuming his experiments, and of restoring the machine with a view to apply for letters-patent.<sup>56</sup>

e. *Failure to Renew Rejected or Withdrawn Application*.—An inventor whose application for a patent has been rejected<sup>57</sup> or has been withdrawn<sup>58</sup> and who, without substantial reason or excuse, omits for many years to take any step to reinstate or renew it, must be held to have acquiesced in its rejection, and to have abandoned any intention of further prosecuting his claim. But if an applicant for a patent choose to withdraw his application for a patent, intending,

**52. Use and sale within two years of applying for patent.**—*Elizabeth v. Pavement Co.*, 97 U. S. 126, 24 L. Ed. 1000; *Egbert v. Lippmann*, 104 U. S. 333, 26 L. Ed. 755.

**53.** *Andrews v. Hovey*, 124 U. S. 694, 719, 31 L. Ed. 557.

**54. Use for more than two years before application.**—*Elizabeth v. Pavement Co.*, 97 U. S. 126, 24 L. Ed. 1000; *Egbert v. Lippmann*, 104 U. S. 333, 26 L. Ed. 755; *Planing-Machine Co. v. Keith*, 101 U. S. 479, 485, 25 L. Ed. 939; *Consolidated Fruit-Jar Co. v. Wright*, 94 U. S. 92, 94, 24 L. Ed. 68.

**55. Failure to perfect invention.**—*The Corn-Planter Patent*, 23 Wall. 181, 211, 23 L. Ed. 161; *Coffin v. Ogden*, 18 Wall. 120, 124, 21 L. Ed. 821; *Deering v. Winona Harvester Works*, 155 U. S. 286, 302, 39 L. Ed. 153; *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33; *Whitely v. Swayne*, 7 Wall. 685, 19 L. Ed. 199.

Where a person had made and used an article similar to the one which was afterwards patented, but had not made his discovery public, using it simply for his own private purpose, and without having tested it so as to discover its usefulness, and it had then been finally forgotten or abandoned, such prior invention and use did not preclude a subsequent inventor from taking out a patent. *Gayler v. Wilder*, 10 How. 477, 13 L. Ed. 504.

Where a patent has been granted for improvements, which, after a full and fair trial, resulted in unsuccessful experiments, and have been finally abandoned, if any other person takes up the subject of the improvements, and is successful, he is entitled to the merit of them as an original inventor. *Whitely v. Swayne*, 7 Wall. 685, 19 L. Ed. 199.

**56. Destruction of device.**—*Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33.

**57. Failure to renew application after rejection.**—*United States, etc., Cartridge Co. v. Whitney Arms Co.*, 118 U. S. 22, 25, 30 L. Ed. 53; *Planing-Machine Co. v. Keith*, 101 U. S. 479, 25 L. Ed. 939.

An inventor cannot without cause hold his application pending during a long period of years, leaving the public uncertain whether he intends ever to prosecute it, and keeping the field of his invention closed against other inventors. It is not unfair to him, after his application for a patent has been rejected, and after he has for many years taken no steps to reinstate it, to renew it, or to appeal, that it should be concluded he has acquiesced in the rejection and abandoned any intention of prosecuting his claim further. Such a conclusion is in accordance with common observation. Especially is this so when, during those years of his inaction, he saw his invention go into common use, and neither uttered a word of complain or remonstrance, nor was stimulated by it to a fresh attempt to obtain a patent. *Planing-Machine Co. v. Keith*, 101 U. S. 479, 485, 25 L. Ed. 939.

When in reliance upon his supine inaction the public has made use of the result of his ingenuity, and has accommodated its business and its machinery to the improvement, it is not unjust to him to hold that he shall be regarded as having assented to the appropriation, or, in other words, as having abandoned the invention. *Planing-Machine Co. v. Keith*, 101 U. S. 479, 485, 25 L. Ed. 939.

**Inaction, delay and silence** for more than sixteen years were held to show abandonment. *Planing-Machine Co. v. Keith*, 101 U. S. 479, 25 L. Ed. 939.

**58. Failure to renew application after withdrawal.**—*United States, etc., Cartridge Co. v. Whitney Arms Co.*, 118 U. S. 22, 30 L. Ed. 53. See, also, *Smith v. Good-*



at the time of such withdrawal, to file a new petition, and he accordingly does so, the two petitions are to be considered as parts of the same transaction, and both as constituting one continuous application.<sup>59</sup>

f. *Failure to Patent Secret Invention.*—Inventors may, if they can, keep their inventions secret, and, if they do, no neglect to petition for a patent will forfeit their right to apply to the commissioner for that purpose. Mere delay is not a good defense.<sup>60</sup>

g. *Failure to Claim All Features of Invention.*—See post, "Failure to Claim as Disclaimer or Dedication," VII, B, 6, b.

h. *Acquiescence in Another's Claim to Priority.*—The acquiescence by a prior inventor in the claim of a second inventor to priority for ten years amounts to an abandonment of his claim.<sup>61</sup> But it is not a bar to an infringement suit that prior to the application of the plaintiff for a patent, the defendant had devised and perfected the same thing, and described it in the presence of the patentee, without his making claim to it.<sup>62</sup>

i. *Province of Court and Jury.*—As a general rule whether the acts or acquiescence of the party furnish, in the given case, satisfactory proof of an abandonment, or dedication of the invention to the public, is a question of fact.<sup>63</sup> But when all the facts are given, there does not seem any reason why the court may not state the legal conclusion deducible from them.<sup>64</sup>

4. EVIDENCE—*a. Grant of Patent as Evidence.*—The action of the commis-

year Dental Vulcanite Co., 93 U. S. 486, 23 L. Ed. 952.

An inventor who withdraws his application, and makes no effort to renew it for eight years, during which time the subject matter of the invention has been incorporated into the substance of many other subsequent inventions, cannot then file a new application and obtain a patent, which, to support the novelty of the invention, shall relate back to the first application. *United States, etc., Cartridge Co. v. Whitney Arms Co.*, 118 U. S. 22, 30 L. Ed. 53.

The rule in the patent office, which, previous to the revised patent act of July 8, 1870, provided that "an application rejected, or not prosecuted, within two years after its rejection or withdrawal, should be conclusively presumed to have been abandoned," being at most only a rule of practice adopted by that office and not always enforced, was no bar to a movement by an inventor to have his application reinstated after its withdrawal. He might have filed a new one or applied for a re-examination or appealed; and the existence of the rule is not an adequate excuse for conduct which the court considered as manifesting an abandonment of his invention. *Planing-Machine Co. v. Keith*, 101 U. S. 479, 480, 25 L. Ed. 939.

59. When substituted and withdrawn petition considered as one application.—*Godfrey v. Eames*, 1 Wall. 317, 17 L. Ed. 684.

The question of the continuity of the application is a question to be submitted to the jury. *Godfrey v. Eames*, 1 Wall. 317, 17 L. Ed. 684.

60. Failure to procure patent for secret invention.—*Bates v. Coe*, 98 U. S. 31, 32, 25 L. Ed. 68; *Parks v. Booth*, 102

U. S. 96, 105, 26 L. Ed. 54. See *Kendall v. Winsor*, 21 How. 322, 329, 16 L. Ed. 165.

61. Acquiescence in claim of another to priority.—*Hartshorn v. Saginaw Barrel Co.*, 119 U. S. 664, 30 L. Ed. 539.

62. *Railroad Co. v. Dubois*, 12 Wall. 47, 20 L. Ed. 265.

63. Province of court and jury.—*Pennock v. Dialogue*, 2 Pet. 1, 7 L. Ed. 327; *Kendall v. Winsor*, 21 How. 322, 16 L. Ed. 165; *Shaw v. Cooper*, 7 Pet. 292, 8 L. Ed. 689; *Battin v. Taggart*, 17 How. 74, 15 L. Ed. 37.

Whether or not an inventor intended to delay applying for a patent until he had perfected his invention or negligently to postpone his claims to a patent, as, for instance, by acquiescing with full knowledge in the use of his invention by others, are questions which ought properly to be left to the jury. *Kendall v. Winsor*, 21 How. 322, 16 L. Ed. 165.

The real interest of an inventor with respect to an assertion or surrender of his rights under the constitution and laws of the United States, whether it be sought in his declarations or acts, or in forbearance or neglect to speak or act, is an inquiry or conclusion of fact, and peculiarly within the province of the jury, guided by legal evidence submitted to them at the trial. *Kendall v. Winsor*, 21 How. 322, 16 L. Ed. 165.

"The acquiescence of an inventor in the public use of his invention, can in no case be presumed, where he has no knowledge of such use. But this knowledge may be presumed from the circumstances of the case. This will, in general, be a fact for the jury." *Shaw v. Cooper*, 7 Pet. 292, 8 L. Ed. 689.

64. *Pennock v. Dialogue*, 2 Pet. 1, 16, 7 L. Ed. 327.

sioner of patents in granting letters-patent does not conclude the question whether there was not an abandonment. A person charged with infringing them may show that before they were issued the patentee had abandoned his invention.<sup>65</sup>

b. *Rebuttal of Presumption of Abandonment from Lapse of Time.*—The circumstances may be sufficient to rebut any presumption as to abandonment which otherwise arise from the lapse of time.<sup>66</sup>

5. OPERATION AND EFFECT.—An inventor who has once abandoned his invention to the public, cannot resume his right to it at his pleasure.<sup>67</sup>

## VI. Proceedings to Obtain Patent.

**A. Application**—1. SPECIFICATION OR DESCRIPTION OF INVENTION—*a. Object of Description.*—The object of the description of the invention in the specification is to apprise the public of what the patentee claims as his own, the courts of what they are called upon to construe, and competing manufacturers and dealers of exactly what they are bound to avoid.<sup>68</sup>

b. *Necessity and Sufficiency of Description*—(1) *General Rule.*—The inventor must file in the patent office a written description of his invention, and of the manner and process of making, constructing, compounding, and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same.<sup>69</sup> The specification is ad-

**65. Grant of patent not conclusive on question of abandonment.**—Planing-Machine Co. v. Keith, 101 U. S. 479, 25 L. Ed. 939; United States, etc., Cartridge Co. v. Whitney Arms Co., 118 U. S. 22, 30 L. Ed. 53.

**66. Circumstances rebutting presumption of abandonment.**—Beedle v. Bennet, 122 U. S. 71, 30 L. Ed. 1074; Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 486, 501, 23 L. Ed. 952.

Where an inventor who had publicly demonstrated in a satisfactory manner the success of his invention, delayed four years before taking out a patent, it was held that, under the circumstances, any presumption which otherwise might have arisen of an intention on his part to abandon and dedicate to the use of the public his invention, was rebutted and that he did not thereby forfeit his right to a patent. Beedle v. Bennett, 122 U. S. 71, 76, 30 L. Ed. 1074.

**67. Abandonment not revoked.**—Pennock v. Dialogue, 2 Pet. 1, 7 L. Ed. 327; Shaw v. Cooper, 7 Pet. 292, 317, 8 L. Ed. 689; Grant v. Raymond, 6 Pet. 218, 8 L. Ed. 376; Gill v. United States, 160 U. S. 426, 430, 40 L. Ed. 480; Consolidated Fruit-Jar Co. v. Wright, 94 U. S. 92, 96, 24 L. Ed. 68.

**68. Object of description.**—The Incandescent Lamp Patent, 159 U. S. 465, 474, 40 L. Ed. 221; Grant v. Raymond, 6 Pet. 218, 247, 8 L. Ed. 376.

The description in the specification is for the purpose of warning an innocent purchaser, or other person, using the machine, of his infringement, and at the same time, of taking from an inventor the means of practicing upon the credulity or fears of other persons, by pretending that his invention was different from its os-

tensible objects. Brooks v. Fiske, 15 How. 212, 214, 14 L. Ed. 665; Evans v. Eaton, 7 Wheat. 356, 434, 5 L. Ed. 472.

"Accurate description of the invention is required by law, for several important purposes: 1. That the government may know what is granted, and what will become public property when the term of the monopoly expires. 2. That licensed persons desiring to practice the invention may know during the term how to make, construct, and use the invention. 3. That other inventors may know what part of the field of invention is unoccupied. Gill v. Wells, 22 Wall. 1, 27, 22 L. Ed. 699." Bates v. Coe, 98 U. S. 31, 39, 25 L. Ed. 68.

**69. Description of invention.**—Rev. Stat., § 4888; Mowry v. Whitney, 14 Wall. 620, 20 L. Ed. 860; Wilson v. Rousseau, 4 How. 646, 11 L. Ed. 1141; Wood v. Underhill, 5 How. 1, 12 L. Ed. 23; Hogg v. Emerson, 6 How. 437, 485, 12 L. Ed. 505; The Incandescent Lamp Patent, 159 U. S. 465, 475, 40 L. Ed. 221; O'Reilly v. Morse, 15 How. 62, 120, 14 L. Ed. 601; Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 437, 46 L. Ed. 968; Bene v. Jeantet, 199 U. S. 683, 32 L. Ed. 803; Howard v. Detroit Stove Works, 150 U. S. 164, 37 L. Ed. 1039; Grant v. Raymond, 6 Pet. 218, 247, 8 L. Ed. 376; Evans v. Eaton, 7 Wheat. 356, 5 L. Ed. 472; Tyler v. Boston, 7 Wall. 327, 19 L. Ed. 93; Consolidated Safety-Valve Co. v. Crosby Steam Gauge Valve Co., 113 U. S. 157, 177, 28 L. Ed. 939; Carlton v. Bokee, 17 Wall. 463, 21 L. Ed. 517; Woodworth v. Wilson, 4 How. 712, 11 L. Ed. 1171; Seymour v. Osborne, 11 Wall. 516, 540, 20 L. Ed. 33; Seabury v. Am Ende, 152 U. S. 561, 566, 38 L. Ed. 553; Ball, etc., Fastener Co. v. Kraftzer, 150 U. S. 111, 37 L. Ed. 1019; Loom Co. v. Higgins,

dressed to those skilled in the art and is sufficient if comprehensible by them.<sup>70</sup> As a general rule, in order to render the patent void, a defect in the specification need not have arisen from design.<sup>71</sup> But excess of description does not injure the patent, unless the addition be fraudulent.<sup>72</sup>

(2) *Certainty and Conciseness.*—The specification must be certain and concise,<sup>73</sup> and where owing to its ambiguity or needless multiplication of nebulous claims, the public is likely to be deceived or misled, the patent is void.<sup>74</sup>

(3) *Machines.*—Inventors of machines are required, before they secure a patent, to deliver a written description of the improvement, and of the manner and process of making, constructing, and using the same, in such full, clear, and exact terms as to enable one skilled in the art or science to make, construct,

105 U. S. 580, 26 L. Ed. 1177; Gage v. Herring, 107 U. S. 640, 27 L. Ed. 601; Mitchell v. Tilghman, 19 Wall. 287, 396, 22 L. Ed. 125; Brooks v. Fiske, 15 How. 212, 14 L. Ed. 665; Western Electric Mfg. Co. v. Ansonia Brass, etc., Co., 114 U. S. 447, 452, 29 L. Ed. 210; LeRoy v. Tatham, 22 How. 132, 136, 16 L. Ed. 366; Lawther v. Hamilton, 124 U. S. 1, 9, 31 L. Ed. 325; Merrill v. Yeomans, 94 U. S. 568, 570, 24 L. Ed. 235; Bates v. Coe, 98 U. S. 31, 34, 25 L. Ed. 68; Dobson v. Dornan, 118 U. S. 10, 14, 30 L. Ed. 63; Cohn v. United States Corset Co., 93 U. S. 366, 378, 23 L. Ed. 907.

It does not make any difference whether the effect is produced by mechanical principles or by chemical agency or by the application of discoveries in natural science, as in either case the requirement of the act of congress is imperative that the patentee must describe the method, process, or means he employs in full, clear, and exact terms, and the end which the invention accomplished. Mitchell v. Tilghman, 19 Wall. 287, 396, 22 L. Ed. 125; O'Reilly v. Morse, 15 How. 62, 119, 14 L. Ed. 601; Risdon, etc., Locomotive Works v. Medart, 158 U. S. 68, 74, 39 L. Ed. 899.

The law requires that the specification "should set forth the principle and the several modes in which he has contemplated the application of that principle, or character by which it may be distinguished from other inventions, and shall particularly point out the part, improvement, or combination which he claims as his own invention or discovery." Burr v. Duryee, 1 Wall. 531, 570, 17 L. Ed. 650.

70. *Addressed to those skilled in art.*—Mowry v. Whitney, 14 Wall. 620, 20 L. Ed. 860; Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 437, 46 L. Ed. 968; Loom Co. v. Higgins, 105 U. S. 580, 26 L. Ed. 1177; Seabury v. Am Ende, 152 U. S. 561, 567, 38 L. Ed. 553; Ives v. Hamilton, 92 U. S. 426, 23 L. Ed. 494.

The description in a patent for an improvement is sufficient if a practical mechanic, acquainted with the construction of the old machine in which the improvement is made, can, with the patent and diagram before him, adopt such im-

provement. Ives v. Hamilton, 92 U. S. 426, 23 L. Ed. 494.

The specification is to be addressed to those skilled in the art, and is to be comprehensible by them. It may be sufficient, though the unskilled may not be able to gather from it how to use the invention. And it is evident that the definiteness of a specification must vary with the nature of its subject. Addressed as it is to those skilled in the art, it may leave something to their skill in applying the invention, but it should not mislead them. Mowry v. Whitney, 14 Wall. 620, 644, 20 L. Ed. 860.

The specification of a patent is not addressed to lawyers, or even to the public generally, but to persons skilled in the art, and any description which is sufficient to apprise them in the language of the art of the definite feature of the invention, and to serve as a warning to others of what the patent claims as a monopoly, is sufficiently definite to sustain the patent. The patentee may assume that what was already known in the art was known to them, and, as observed by Mr. Justice Bradley, in Loom Co. v. Higgins, 105 U. S. 580, 586, 26 L. Ed. 1177. "He may begin at the point where his invention begins, and describe what he has made, that is new, and what it replaces of the old. That which is common and well known is as if it were written out in the patent and delineated in the drawings." Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 437, 46 L. Ed. 968.

71. *Defect need not arise from design.*—Grant v. Raymond, 6 Pet. 218, 8 L. Ed. 376.

72. *Excess in description.*—Sewall v. Jones, 91 U. S. 171, 186, 23 L. Ed. 275.

73. *Certainty and conciseness.*—The Incandescent Lamp Patent, 159 U. S. 465, 474, 40 L. Ed. 221; Carlton v. Bokee, 17 Wall. 463, 472, 21 L. Ed. 517.

74. *Ambiguity and duplicity.*—Carlton v. Bokee, 17 Wall. 463, 21 L. Ed. 517.

A description so vague and uncertain that no one can tell, except by independent experiments, how to construct the patented device, renders the patent void. The Incandescent Lamp Patent, 159 U. S. 465, 474, 40 L. Ed. 221.



and use the invention.<sup>75</sup> They must state the principle of the machine and the best mode of applying it, so as to distinguish it from other inventions.<sup>76</sup>

(4) *Processes*.—One who claims a patent for a process must specifically describe the process.<sup>77</sup> It is not sufficient to merely describe one or more qualities of the product and ask the court to infer the process from that.<sup>78</sup> But while the description of the process should be accurate, it is sufficient if not misleading to those skilled in the art.<sup>79</sup> Where the means of carrying out a process are not obvious to ordinary mechanics skilled in the art, his specification should describe some mode of carrying it out which will produce a useful result,<sup>80</sup> though it is not necessary to describe all modes of carrying out the

**75. Patent for machine.**—Parks v. Booth, 102 U. S. 96, 101, 26 L. Ed. 54.

**76. Stating principle of machine and best mode of applying it.**—Rev. Stat., § 4888; Loom Co. v. Higgins, 105 U. S. 580, 26 L. Ed. 1177.

An invention relating to machinery may be exhibited either in a drawing or in a model, so as to lay the foundation of a claim to priority, if it be sufficiently plain to enable those skilled in the art to understand it. Loom Co. v. Higgins, 105 U. S. 580, 594, 26 L. Ed. 1177.

**77. Necessity of describing process.**—Western Electric Mfg. Co. v. Ansonia Brass, etc., Co., 114 U. S. 447, 452, 29 L. Ed. 210; Klein v. Russell, 19 Wall. 433, 434, 22 L. Ed. 116; Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 46 L. Ed. 968; Merrill v. Yeomans, 94 U. S. 568, 573, 24 L. Ed. 235.

A claim for a process of mixing molten iron, in which neither the size of the reservoir nor the amount of metal to be left therein is specified, but which states that the reservoir may be of any convenient size so constructed that a considerable quantity of metal may always be left remaining and unpoured, sufficiently sets forth the idea of a receptacle the main object of which is to preserve therein a large and constant quantity of molten iron as a basis for a gradual unification of the product of several blast furnaces. Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 436, 46 L. Ed. 968.

**78. Process not inferred from description of product.**—Western Electric Mfg. Co. v. Ansonia Brass, etc., Co., 114 U. S. 447, 452, 29 L. Ed. 210.

Thus where neither the specification nor claim of a patent mentioned, as a part of the process, the cooling of the wax or paraffine coating before compressing it upon a wire, but the patentee contended that it must be considered a part of the process, because the polished appearance of the surface of the covering described in the specification was the result of allowing the paraffine or wax to cool before compressing it upon the wire, it was held that the specification was not sufficient. Western Electric Mfg. Co. v. Ansonia Brass, etc., Co., 114 U. S. 447, 452, 29 L. Ed. 210.

**79. Description capable of being understood by skilled persons.**—Klein v. Russell, 19 Wall. 433, 434, 22 L. Ed. 116;

Mowry v. Whitney, 14 Wall. 620, 20 L. Ed. 860.

If the mode of doing it, or the apparatus in or by which it may be done, is sufficiently obvious to suggest itself to a person skilled in the particular art, it is enough, in the patent, to point out the process to be performed, without giving supererogatory directions as to the apparatus or method to be employed. If the mode of applying the process is not obvious, then a description of a particular mode by which it may be applied is sufficient. Tilghman v. Proctor, 102 U. S. 707, 728, 26 L. Ed. 279.

Where only vague and uncertain directions could be given as to the degree of foreign heat to be applied in any particular case, there, when a patentee in his specification, establishes a maximum and a minimum, the ascertainment of the proper intermediate degree may be left to the skill and judgment of the operator practicing the process. Mowry v. Whitney, 14 Wall. 620, 20 L. Ed. 860.

Where a specification in describing the mode of treating articles with a patented process (a liquid) said that "it is desirable to heat the latter to or near the boiling point," and there was testimony that if applied while in that state to the articles to be treated it would greatly injure them, as also that if it was suffered to cool before being applied it possessed virtue, a request which asked the court to charge that the proper construction of the patent is that if the liquid applied at such a temperature is injurious and pernicious, the patent is void for want of utility, is rightly modified by a change which makes the charge say to the jury that the proper construction is that the liquid should be applied at or near the boiling point under the common knowledge of persons skilled in the art of treating the articles to be affected and to procure the desired results, and in reference to the fact whether such knowledge would make them wait until it was partially cooled before its application; and that if the application of the liquid at such a temperature as is required by the specification, under this qualification, was injurious and pernicious, then that the patent was void for want of utility. Klein v. Russell, 19 Wall. 433, 434, 22 L. Ed. 116.

**80. Mode of carrying out process.**—Morley Sewing Machine Co. v. Lancaster,

process.<sup>81</sup> Where a patentee claims a machine, he cannot have, in addition, a patent for a process produced by its use, without a claim for that also.<sup>82</sup> Thus a claim for a process cannot be sustained when it is impossible to consider the claim for a process as describing anything but the operation and effect of the machine, the novel features of which are covered by other claims of the patentee.<sup>83</sup>

(5) *Composition of Matter*.—When a patent is claimed for a composition of matter or for a discovery of a new substance by means of chemical combinations of known materials, it should state the component parts of the new manufacture claimed, with clearness and precision, and not leave the person attempting to use the discovery to find it out by experiment.<sup>84</sup> But if persons skilled in the art could hardly go astray, the description is sufficient, although it does not state the proportions of the several ingredients.<sup>85</sup>

(6) *Improvements*.—When the patent is for an improvement, the nature and extent of the improvement must be stated in the specification.<sup>86</sup> Thus where

129 U. S. 263, 32 L. Ed. 715; *Tilghman v. Proctor*, 102 U. S. 707, 26 L. Ed. 279.

**81. All modes of carrying out process need not be stated.**—*Tilghman v. Proctor*, 102 U. S. 707, 728, 26 L. Ed. 279; *Morley Sewing Machine Co. v. Lancaster*, 129 U. S. 263, 279, 32 L. Ed. 715.

**82. Claim for process.**—*Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 557, 42 L. Ed. 1136.

It is not necessary to determine whether a process involving the operation of a piece of mechanism is patentable where no claim is made for an independent process, but only for the machine producing it. *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 557, 42 L. Ed. 1136.

**83.** *Busch v. Jones*, 184 U. S. 598, 46 L. Ed. 707.

The claim of a patent process of dry pressing or removing type indentations from printed sheets, which consists of subjecting a collection of such sheets to pressure without the use of fuller boards and while under such pressure tying them into a compact bundle with end-boards, then removing them immediately from the press and allowing them to remain tied sufficiently long to fix and complete dry pressing, cannot be considered as describing anything but the operation and effect of the press the novel features of which press are covered by other claims of the patentee. *Busch v. Jones*, 184 U. S. 598, 607, 46 L. Ed. 707.

**84. Patent for composition of matter.**—*Tyler v. Boston*, 7 Wall. 327, 19 L. Ed. 93; *Wood v. Underhill*, 5 How. 1, 12 L. Ed. 23; *The Incandescent Lamp Patent*, 159 U. S. 465, 475, 40 L. Ed. 221; *Seabury v. Am Ende*, 152 U. S. 561, 38 L. Ed. 553. See, also, *Bene v. Jeantet*, 129 U. S. 683, 32 L. Ed. 803; *Howard v. Detroit Stove Works*, 150 U. S. 164, 167, 37 L. Ed. 1039; *Cochrane v. Badische, etc.*, *Soda Fabrik*, 111 U. S. 293, 28 L. Ed. 433.

Every patent for a product or composition of matter must identify it so that it can be recognized aside from the description of the process for making it, or else

nothing can be held to infringe the patent which is not made by that process. *Cochrane v. Badische, etc.*, *Soda Fabrik*, 111 U. S. 293, 310, 28 L. Ed. 433.

If the patent be for a new composition of matter, and no relative proportions of the ingredients are given, or they are stated so ambiguously and vaguely that no one could use the invention without first ascertaining, by experiment, the exact proportion required to produce the result, it would be the duty of the court to declare the patent void. *Wood v. Underhill*, 5 How. 1, 12 L. Ed. 23.

When the specification of a new composition of matter gives only the names of the substances which are to be mixed together, without stating any relative proportion, undoubtedly it would be the duty of the court to declare the patent void. And the same rule would prevail where it was apparent that the proportions were stated ambiguously and vaguely. For in such cases it would be evident, on the face of the specification, that no one could use the invention without first ascertaining by experiment, the exact proportion of the different ingredients required to produce the result intended to be obtained. And if, from the nature and character of the ingredients to be used, they are not susceptible of such exact description, the inventor is not entitled to a patent. *Wood v. Underhill*, 5 How. 1, 5, 12 L. Ed. 23; *The Incandescent Lamp Patent*, 159 U. S. 465, 474, 40 L. Ed. 221.

**85. Where description sufficient to apprise persons skilled in art of composition.**—*Seabury v. Am Ende*, 152 U. S. 561, 38 L. Ed. 553.

**86. Patent for improvement.**—*Evans v. Eaton*, 7 Wheat. 356, 5 L. Ed. 472; *Seymour v. Osborne*, 11 Wall. 516, 541, 20 L. Ed. 33; *Preston v. Manard*, 116 U. S. 661, 29 L. Ed. 736; *Howard v. Detroit Stove Works*, 150 U. S. 164, 37 L. Ed. 1039.

It is not sufficient that the nature of the improvement be made out and shown at the trial, or established by comparing the machines specified in the patent with



the novel feature of a patent for an improvement in stoves consists of a fire pot with a flange upon the grate rests, the specification should describe the width of the flange.<sup>87</sup>

(7) *Part of Machine*.—Where an invention embraces only one or more parts of a machine, the parts claimed must be specified and pointed out, so that constructors, other inventors, and the public may know what the invention is and what is withdrawn from general use.<sup>88</sup> The patentee need not describe the machine to which his invention is to be attached or of which it forms a part, but may begin at the point where his invention begins, and describe what is new and what it replaces of the old.<sup>89</sup>

(8) *Combinations*.—Where the ingredients are old and the invention consists entirely in the combination, the requirement of the patent act that the invention shall be fully and exactly described applies with as much force as to any other class.<sup>90</sup> A combination is sufficiently described, if the devices of which it is composed are specifically named, their mode of operation given, and the new and useful result to be accomplished is pointed out, so that those skilled in the art and the public may know the extent and nature of the claim and what the parts are which co-operate to do the work claimed for the invention.<sup>91</sup>

(9) *Designs*.—In case of design patents the commissioner may dispense with models or designs when the design can be sufficiently represented by drawings or photographs.<sup>92</sup>

(10) *Failure to Describe All Elements*.—The omission to mention in the specification something which contributes only to the degree of benefit, providing the apparatus would work beneficially and be worth adopting without it,

former machines in use. *Evans v. Eaton*, 7 Wheat. 356, 5 L. Ed. 472.

87. *Howard v. Detroit Stove Works*, 150 U. S. 164, 37 L. Ed. 1039.

88. *Patent for part of machine*.—*Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33; *Parks v. Booth*, 102 U. S. 96, 101, 26 L. Ed. 54.

Where an invention does not embrace an entire machine, the part should be specified and pointed out, as ex. gr. the coulter of the plough, or the divider or sweep rake of a reaping machine, so that another party may construct the plough or reaping machine, provided he does not use the part specified. *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33; *Parks v. Booth*, 102 U. S. 96, 101, 26 L. Ed. 54.

89. *Necessity of describing machine to which invention is attached*.—*Loom Co. v. Higgins*, 105 U. S. 580, 585, 26 L. Ed. 1177; *Carnegie Steel Co. v. Cambria Iron Co.*, 185 U. S. 403, 437, 46 L. Ed. 968.

If a mechanical engineer invents an improvement on any of the appendages of a steam engine, such as the valve gear, the condenser, the steam chest, the walking beam, the parallel motion, or what not, he is not obliged, in order to make himself understood, to describe the engine, nor the particular appendage to which the improvement refers, nor its mode of connection with the principal machine. These are already familiar to others skilled in that kind of machinery. He may begin at the point where his invention begins, and describe what he has made that is new, and what it replaces of the old. That which is common and well known is as if

it were written out in the patent and delineated in the drawings. *Loom Co. v. Higgins*, 105 U. S. 580, 585, 26 L. Ed. 1177.

90. *Combinations*.—*Gill v. Wells*, 22 Wall. 1, 25, 22 L. Ed. 699; *Parks v. Booth*, 102 U. S. 96, 102, 26 L. Ed. 54; *Merrill v. Yeomans*, 94 U. S. 568, 570, 24 L. Ed. 235.

Where the invention is a new combination of old devices, he is bound to describe with particularity all these old devices, and then the new mode of combining them, for which he desires a patent, *Merrill v. Yeomans*, 94 U. S. 568, 570, 24 L. Ed. 235.

Where the patented invention embraces both a new device or element and a new combination of old devices embodied in the same apparatus or machine, particular description of the improvement is required in such a case, as the property of the patentee consists not only in the new device, but also in the new combination. *Parks v. Booth*, 102 U. S. 96, 102, 26 L. Ed. 54.

91. *Sufficiency of description of combination*.—*Seymour v. Osborne*, 11 Wall. 516, 542, 20 L. Ed. 33; *Bates v. Coc*, 98 U. S. 31, 39, 25 L. Ed. 68; *Parks v. Booth*, 102 U. S. 96, 26 L. Ed. 54.

92. *Designs*.—*Dobson v. Dornan*, 118 U. S. 10, 14, 30 L. Ed. 63.

Where a design is better represented by a photographic illustration than it could be by any description, and a description would probably not be intelligible without the illustration, a photograph is a sufficient specification. *Dobson v. Dornan*, 118 U. S. 10, 14, 30 L. Ed. 63.



is not fatal, while the omission of what is known to be necessary to the enjoyment of the invention is fatal.<sup>93</sup>

(11) *Sufficiency of Description a Question of Fact.*—The sufficiency of the description is a question of fact.<sup>94</sup>

(12) *Effect of Want or Insufficiency of Specification.*—The patent, when issued, is proof that the commissioner has seen that the proper specification has been filed before its issuance, and his decision on the point cannot be questioned except in the manner allowed by the law.<sup>95</sup>

c. *Fraudulent or Deceptive Specifications.*—The defendant may prove under a general issue, provided he has given previous notice thereof as required by statute, that for the purpose of deceiving the public the description and specification filed by the patentee in the patent office was made to contain less than the whole truth relative to his invention or discovery, or more than is necessary to produce the desired effect.<sup>96</sup>

d. *Construction and Operation.*—(1) *Construction.*—Specifications are to be construed liberally, in accordance with the design of the constitution and the patent laws of the United States, to promote the progress of the useful arts, and allow inventors to retain to their own use, not any thing which is matter of common right, but what they themselves have created.<sup>97</sup> The reasonable presumption is that, having a just right to cover and protect his whole invention, he intended to do so.<sup>98</sup>

(2) *Effect of Recommendation of Certain Methods.*—When a patentee recommends in his specifications a particular method, he does not thereby constitute it a portion of his patent.<sup>99</sup>

(3) *Invention as Limited by Description.*—(a) *General Rule.*—As a general rule, the scope of an invention is limited by the description thereof in the specification. A patentee cannot deny the materiality of a part of his description.<sup>1</sup>

**93. Failure to describe all elements.**—*Sewall v. Jones*, 91 U. S. 171, 185, 23 L. Ed. 275.

**94. Sufficiency of description a question for jury.**—*Wood v. Underhill*, 5 How. 1, 12 L. Ed. 23; *Battin v. Taggart*, 17 How. 74, 15 L. Ed. 37.

Where a patent was obtained for a new improvement in the mode of making brick, tile, and other clay ware, and the process described in the specification was, to mix pulverized anthracite coal with the clay before moulding it, in the proportion of three-fourths of a bushel of coal dust to one thousand brick, some clay requiring one-eighth more, and some not exceeding half a bushel, this degree of vagueness and uncertainty was not sufficient to justify the court below in declaring the patent void. *Wood v. Underhill*, 5 How. 1, 12 L. Ed. 23.

**95. Patent as evidence of sufficiency of specification.**—*Loom Co. v. Higgins*, 105 U. S. 580, 588, 26 L. Ed. 1177.

**96. Deceptive specification.**—Rev. Stat., § 4920; *Grant v. Raymond*, 6 Pet. 218, 8 L. Ed. 376; *Loom Co. v. Higgins*, 105 U. S. 580, 26 L. Ed. 1177.

In order for the defect to avoid the patent it must have been made for the purpose of deceiving the public. *Grant v. Raymond*, 6 Pet. 218, 8 L. Ed. 376. See, also, *Loom Co. v. Higgins*, 105 U. S. 580, 26 L. Ed. 1177.

**97. Specifications liberally construed.**—*Grant v. Raymond*, 6 Pet. 218, 8 L. Ed.

376; *Winans v. Denmead*, 15 How. 330, 341, 14 L. Ed. 717.

**98.** *Winans v. Denmead*, 15 How. 330, 341, 14 L. Ed. 717.

**99. Effect of recommendation of certain methods.**—*Sewall v. Jones*, 91 U. S. 171, 23 L. Ed. 275.

**1. Invention limited by description.**—*Roemer v. Peddie*, 132 U. S. 313, 33 L. Ed. 382; *Vance v. Campbell*, 1 Black 427, 17 L. Ed. 168; *Water-Meter Co. v. Desper*, 101 U. S. 332, 25 L. Ed. 1024; *Gage v. Herring*, 107 U. S. 640, 27 L. Ed. 601; *Gould v. Rees*, 15 How. 187, 21 L. Ed. 39; *Wright v. Yuengling*, 155 U. S. 47, 52, 39 L. Ed. 64; *Ball, etc., Fastener Co. v. Kraltzer*, 150 U. S. 111, 116, 37 L. Ed. 1019.

What patentee has described in the specification and declared to be an essential feature of his invention, and made an element of his claims, cannot be shown by him to be immaterial, and a device which dispenses with it cannot be shown to be an infringement, though it accomplish the same purpose in, perhaps, an equally effective manner. *Vance v. Campbell*, 1 Black 427, 17 L. Ed. 168; *Water-Meter Co. v. Desper*, 101 U. S. 332, 25 L. Ed. 1024; *Gage v. Herring*, 107 U. S. 640, 648, 27 L. Ed. 601; *Gould v. Rees*, 15 Wall. 187, 21 L. Ed. 39; *Brown v. Davis*, 116 U. S. 237, 249, 29 L. Ed. 659; *Wright v. Yuengling*, 155 U. S. 47, 52, 39 L. Ed. 64.

Where no allusion is made in the specifications to a feature subsequently claimed as an advantage, it would indicate that the

(b) *Limitations or Restrictions in Specification.*—When a patentee, on the rejection of his application, inserts in his specification, in consequence, limitations and restrictions for the purpose of obtaining his patent, he cannot after he has obtained it, claim that it shall be construed as it would have been construed if such limitations and restrictions were not contained in it.<sup>2</sup>

2. *MODELS.*—In all cases which admit of representation by models, the applicant, if required by the commissioner, must furnish a model of convenient size to exhibit advantageously the several parts of his invention or discovery.<sup>3</sup>

3. *DRAWINGS.*—Where the nature of the case admits of drawings, the applicant must furnish one copy signed by the inventor or his attorney in fact, and attested by two witnesses, which shall be filed in the patent office.<sup>4</sup> Within what time drawings ought to be replaced, after the destruction of the patent office by fire, so as to avoid the imputation of negligence or of a design to mislead the public, is a question for the jury.<sup>5</sup>

4. *CLAIM*—a. *Necessity and Sufficiency*—(1) *General Rule.*—The inventor is required to particularly point out and distinctly claim the part, improvement, or combination, which he claims as his invention or discovery.<sup>6</sup>

(2) *Combinations.*—If a patentee claiming a patent for a combination specifies any element as entering into the combination, either directly by the language of the claim, or by such a reference to the descriptive part of the specification as carries such element into the claim, he makes such element material to the combination, and the court cannot declare it to be immaterial. It is his province to make his own claim, and his privilege to restrict it. If it be a claim to a combination, and be restricted to specified elements, all must be regarded as material, leaving open only the question whether an omitted part is supplied by an equivalent device or instrumentality.<sup>7</sup>

advantage was not originally within the contemplation of the patentee. *Ball, etc., Fastener Co. v. Kraltzer*, 150 U. S. 111, 116, 37 L. Ed. 1019.

2. *Effect of limitations or restrictions in specification.*—*Roemer v. Peddie*, 132 U. S. 313, 316, 33 L. Ed. 382; *Leggett v. Avery*, 101 U. S. 256, 25 L. Ed. 865; *Good-year Dental Vulcanite Co. v. Davis*, 102 U. S. 222, 228, 26 L. Ed. 149; *Fay v. Cordesman*, 109 U. S. 408, 27 L. Ed. 979; *Mahn v. Harwood*, 112 U. S. 354, 359, 28 L. Ed. 665; *Union Metallic Cartridge Co. v. United States Cartridge Co.*, 112 U. S. 624, 644, 28 L. Ed. 828; *Sargent v. Hall Safe, etc., Co.*, 114 U. S. 63, 29 L. Ed. 67; *Shepard v. Carrigan*, 116 U. S. 593, 597, 29 L. Ed. 723; *White v. Dunbar*, 119 U. S. 47, 30 L. Ed. 303; *Sutter v. Robinson*, 119 U. S. 530, 30 L. Ed. 492; *Bragg v. Fitch*, 121 U. S. 478, 30 L. Ed. 1008; *Snow v. Lake Shore, etc., R. Co.*, 121 U. S. 617, 30 L. Ed. 1004; *Crawford v. Heysinger*, 123 U. S. 589, 606, 607, 31 L. Ed. 269.

As the patentee, after the rejection of his application, inserted in his specification a statement that his invention related to a new construction of lock case, whereby it was made "to dispense with an extended bottom plate," he cannot now contend that his specification and claims are to be interpreted so as to cover a construction which has an extended bottom plate. *Roemer v. Peddie*, 132 U. S. 313, 316, 33 L. Ed. 382.

3. *Models.*—Rev. Stat., § 4891; *Seymour v. Osborne*, 11 Wall. 516, 540, 20 L. Ed.

33; *Parks v. Booth*, 102 U. S. 96, 102, 26 L. Ed. 54.

4. *Drawings.*—Rev. Stat., § 4889; *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33; *Loom Co. v. Higgins*, 105 U. S. 580, 26 L. Ed. 1177; *O'Reilly v. Morse*, 15 How. 62, 14 L. Ed. 601; *Hogg v. Emerson*, 11 How. 587, 13 L. Ed. 824. See, also, *Wilson v. Rousseau*, 4 How. 646, 11 L. Ed. 1141; *Parks v. Booth*, 102 U. S. 96, 101, 26 L. Ed. 54.

5. *Replacing destroyed drawings.*—*Hogg v. Emerson*, 11 How. 587, 13 L. Ed. 824.

6. *Claim.*—Rev. Stat., § 4888; *Seymour v. Osborne*, 11 Wall. 516, 540, 20 L. Ed. 33; *The Corn-Planter Patent*, 23 Wall. 181, 224, 23 L. Ed. 161.

The language of the act of 1836, under which these patents were drawn, is that before any inventor shall receive a patent for his invention or discovery he shall deliver a description thereof, and of the manner and process of making, constructing, using, and compounding the same, in such full, clear, and exact terms as to enable a person skilled in the art to reproduce it; and the act directs that the inventor shall "particularly specify and point out the part, improvement, or combination which he claims as his own invention or discovery." This, of course, involves an elimination of what he claims as new from what he admits to be old. *The Corn-Planter Patent*, 23 Wall. 181, 224, 23 L. Ed. 161.

7. *Combinations.*—*Water-Meter Co. v. Desper*, 101 U. S. 332, 25 L. Ed. 1024;

(3) *Composition of Matter*.—A claim for a compound is not void because the specification does not prescribe exact and unvarying proportions in the ingredients of a compound; some of the ingredients being, for example, coloring matter, which the specification says may "be omitted or modified as desired."<sup>8</sup>

(4) *Omission of Immaterial Matters*.—Although additional elements are necessary to render a new and patentable device operative, it does not necessarily follow that the omission of these elements invalidates the claim, or that the precise elements described in the patent as rendering it operative must be read into the claim, for in such case any appropriate means for making it operative will be understood.<sup>9</sup>

b. *Effect of One Void Claim on Residue*.—One void claim, if made by inadvertence and in good faith, will not vitiate the entire patent.<sup>10</sup>

c. *Construction of Claim*.—See post, "Construction and Operation," VII, B.

5. **AMENDMENT**.—It is perfectly competent for a patentee apprised by prior litigation of the weak points in his former specification and claims to restate and amend them.<sup>11</sup> But the claim cannot be broadened by amendment so as to cover intervening devices.<sup>12</sup> Authority given by an inventor to his attorney to

*Gage v. Herring*, 107 U. S. 640, 27 L. Ed. 601; *Sargent v. Hall Safe, etc., Co.*, 114 U. S. 63, 86, 29 L. Ed. 67; *Fay v. Cordesman*, 109 U. S. 408, 420, 27 L. Ed. 979.

8. **Sufficiency of claim for compound**.—*Klein v. Russell*, 19 Wall. 433, 434, 22 L. Ed. 116.

9. **Elements implied when omitted from claim**.—*Deering v. Winona Harvester Works*, 155 U. S. 286, 302, 39 L. Ed. 153; *Loom Co. v. Higgins*, 105 U. S. 580, 584, 26 L. Ed. 1177. See, also, *Eames v. Andrews*, 122 U. S. 40, 30 L. Ed. 1064.

If this was not so, an infringer might take the most important part of a new invention and, by changing the method of adapting it to the machine to which it is an improvement, avoid the charge of infringement. *Deering v. Winona Harvester Works*, 155 U. S. 286, 39 L. Ed. 153.

10. **Effect of one void claim on residue**.—*Carlton v. Bokee*, 17 Wall. 463, 21 L. Ed. 517.

11. **Right to amend**.—*Hobbs v. Beach*, 180 U. S. 383, 396, 45 L. Ed. 586; *Godfrey v. Eames*, 1 Wall. 317, 17 L. Ed. 684; *Railway v. Sayles*, 97 U. S. 554, 24 L. Ed. 1053. See, also, *Topliff v. Topliff*, 145 U. S. 156, 36 L. Ed. 658; *Grant v. Walter*, 148 U. S. 547, 554, 37 L. Ed. 552; *James v. Campbell*, 104 U. S. 356, 26 L. Ed. 786.

The act of 1836 gives the applicant a right to change his specification after receiving the suggestions of the commissioner. Doubtless this right exists and may be exercised independently of such suggestions, at any time before the commissioner has given his formal judgment upon the application; and the inventor may "persist in his application for a patent, with or without any alteration of his specification." A change in the specification as filed in the first instance, or the subsequent filing of a new one, whereby a patent is first sought for the substance of the invention as originally claimed, or a part of it, cannot in any wise affect the sufficiency of the original application or the legal consequences flowing from it.

To produce that result the new or amended specification must be intended to serve as the basis of a patent for a distinct and different invention, and one not contemplated by the specification, as submitted at the outset. *Godfrey v. Eames*, 1 Wall. 317, 324, 17 L. Ed. 684.

In *Godfrey v. Eames*, 1 Wall. 317, 17 L. Ed. 684, the first application was actually withdrawn, and a new petition was presented at the time of the withdrawal, with a different description of the invention; but as the thing patented under the second might have been engrafted as an amendment of the first, it was ruled that all the proceedings constituted one application. This court said: "If a party choose to withdraw his application for a patent, and pay the forfeit, intending at the time of such withdrawal to file a new petition, and he accordingly does so, the two petitions are to be considered parts of the same transaction, and both as constituting one continuous application." *Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 486, 500, 23 L. Ed. 952.

12. **Claim not to be broadened by amendment so as to cover intervening devices**.—*Hobbs v. Beach*, 180 U. S. 383, 45 L. Ed. 586; *Railway Co. v. Sayles*, 97 U. S. 554, 24 L. Ed. 1053.

The law does not permit enlargements of an original specification any more than it does where letters-patent already granted are reissued. It regards with jealousy and disfavor any attempt to enlarge the scope of an application once filed, or of letters-patent once granted, the effect of which would be to enable the patentee to appropriate other inventions made prior to such alteration, or improvements which have gone into public use. *Railway Co. v. Sayles*, 97 U. S. 554, 555, 24 L. Ed. 1053.

The original application for a patent made by Thompson and Bachelder was filed in the patent office in June, 1847. Having been rejected, it remained there unaltered until 1852, when it was con-



amend his claim, ends by the death of the testator.<sup>13</sup> Material amendments to a claim made after the death of the inventor should be sworn to by his executor or administrator.<sup>14</sup>

6. OATH OF APPLICANT.—The applicant is required to make oath or affirmation that he does verily believe that he is the original and first inventor of the improvement for which he solicits a patent, and that he does not know that the same was ever before known or used, also stating of what country he is a citizen.<sup>15</sup> The oath must be made by the inventor himself or of his executor or administrator, and can be made by no one else.<sup>16</sup> Where the application has been made in the lifetime of the inventor, and remains in effect unchanged,

siderably amended, and letters-patent No. 9109 were, July 6, 1852, granted thereon to Tanner, as assignee. Held, that no material alterations introduced by such amendments could avail as against parties who had introduced other brakes prior thereto. *Railway Co. v. Sayles*, 97 U. S. 554, 24 L. Ed. 1053.

In *Railway Co. v. Sayles*, 97 U. S. 554, 563, 24 L. Ed. 1053, application for patent was made in June, 1847, and rejected. The application remained unaltered until 1852, when it was amended, and a patent granted with considerable modifications. In the meantime other devices were introduced, including that used by the defendant. It was with reference to this state of facts that the court observed: "If the amended application and model, filed by Tanner five years later, embodied any material addition to or variance from the original—anything new that was not comprised in that—such addition or variance cannot be sustained on the original application. The law does not permit such enlargements of an original specification, which would interfere with other inventors who have entered the field in the meantime, any more than it does in the case of reissues of patents previously granted. Courts should regard with jealousy and disfavor any attempts to enlarge the scope of an application once filed, or of a patent once granted, the effect of which would be to enable the patentee to appropriate other inventions made prior to such alteration, or to appropriate that which has, in the meantime, gone into public use." *Hobbs v. Beach*, 180 U. S. 383, 396, 45 L. Ed. 586.

13. Termination of authority of attorney to amend claim.—*Eagleton Mfg. Co. v. West, etc.*, Mfg. Co., 111 U. S. 490, 28 L. Ed. 493.

14. Material amendments in claim made after inventor's death.—*Eagleton Mfg. Co. v. West, etc.*, Mfg. Co., 111 U. S. 490, 28 L. Ed. 493.

Amendments to applications for a patent made after the death of the inventor, which are not mere amplifications of what had been in the original application, but which introduced new elements into the claim, must be sworn to by the administrator of the inventor. *Eagleton Mfg. Co. v. West, etc.*, Mfg. Co., 111 U. S. 490, 28 L. Ed. 493.

Where the application was for japanned furniture springs, and after the death of the inventor a new application was filed for japanned furniture springs by means of which the steel therein was tempered and strengthened, the new application should be sworn to by the inventor's administrator. *Eagleton Mfg. Co. v. West, etc.*, Mfg. Co., 111 U. S. 490, 28 L. Ed. 493.

15. Contents of oath.—Rev. Stat., § 4892; *Seymour v. Osborne*, 11 Wall. 516, 540, 20 L. Ed. 33.

16. Who may make oath.—*Kennedy v. Hazelton*, 128 U. S. 667, 672, 32 L. Ed. 576; *De La Vergne, etc.*, Machine Co. v. Featherstone, 147 U. S. 209, 229, 37 L. Ed. 138.

The patent law makes it essential to the validity of a patent, that it shall be granted on the application, supported by the oath, of the original and first inventor (or of his executor or administrator), whether the patent is issued to him or to his assignee. A patent which is not supported by the oath of the inventor, but applied for by one who is not the inventor, is unauthorized by law, and void, and, whether taken out in the name of the applicant or of any assignee of his, confers no rights as against the public. Rev. Stat., §§ 4886, 4888, 4892, 4895, 4920. *Kennedy v. Hazelton*, 128 U. S. 667, 672, 32 L. Ed. 576.

The defendant agreed in writing to assign to the plaintiff any patents that he might obtain for improvements in steam boilers. He did invent such an improvement, and with intent to evade his agreement and to defraud the plaintiff, procured a patent for this invention to be obtained upon the application under oath of a third person as the inventor, and to be issued to him as assignee of that person, and has made profits by manufacturing and selling boilers embodying the improvement so patented. The plaintiff seeks by bill in equity to compel the defendant to assign the patent to him, and to account for the profits received under it. Held, that patent is void because not supported by oath of first inventor and relief denied. *Kennedy v. Hazelton*, 128 U. S. 667, 671, 32 L. Ed. 576.

Where the patent, upon the plaintiff's own showing, conferred no title or right upon the defendant because the applica-

there is no necessity for a new application or oath, except, of course, in the case of a reissue.<sup>17</sup> Recitals in letters-patent in the absence of fraud are conclusive evidence that the necessary oaths were taken before the patent was granted.<sup>18</sup>

7. **JOINDER OF SEVERAL INVENTIONS.**—As a general rule it is improper to join two or more inventions in the same application.<sup>19</sup> But the general rule has no application where the several inventions are dependent and related,<sup>20</sup> and a rule of the patent office requiring a division between claims for a process and claims for an apparatus, whether they are related and dependent inventions or not, is, therefore, invalid.<sup>21</sup>

8. **DEATH OF INVENTOR PENDING APPLICATION.**—The death of the inventor pending the application for a patent does not defeat the proceedings,<sup>22</sup> and a

tion was sworn to by other than the inventor, a court of equity will not order him to assign it to the plaintiff—not only because that would be to decree a conveyance of property in which the defendant has, and can confer, no title; but also because its only possible value or use to the plaintiff would be to enable him to impose upon the public by asserting rights under a void patent. *Kennedy v. Hazelton*, 128 U. S. 667, 672, 32 L. Ed. 576.

So where the application was not sworn to by the inventor, a bill cannot be maintained for an account of profits received by the defendant from the use of the patent, because a decree for profits can only proceed upon the ground that the plaintiff is at least the equitable owner of the patent, and there can be neither legal nor equitable ownership of a void patent. *Kennedy v. Hazelton*, 128 U. S. 667, 672, 32 L. Ed. 576.

17. *De La Vergne, etc., Machine Co. v. Featherstone*, 147 U. S. 209, 225, 37 L. Ed. 138.

"In the case at bar, there was not only no amplification of the original application by the amendment, but it was within the scope of the original specification and a limitation and narrowing of the original claim, so that it was the identical invention sworn to by Boyle, and there was no more reason for requiring a new oath from his administratrix than there would have been for requiring it from Boyle himself. The attorneys who had acted for Boyle continued to act under Rankin's direction, and although it is not shown that their authority was conferred in writing by a power of attorney executed and filed in accordance with the rules of the office, that is not a fatal objection, since the attorneys had authority in fact, and their acts were subsequently ratified by Rankin and by Mrs. Boyle." *De La Vergne, etc., Machine Co. v. Featherstone*, 147 U. S. 209, 229, 37 L. Ed. 138.

**Oath to amended claim.**—See ante, "Amendment," VI, A, 5.

18. **Recitals in patent as evidence of oath.**—*Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33.

19. **Joinder of two or more inventions.**—*Steinmetz v. Allen*, 192 U. S. 543, 557, 48 L. Ed. 555; *Hogg v. Emerson*, 6 How. 437, 12 L. Ed. 505; *Hogg v. Emerson*, 11

How. 587, 13 L. Ed. 824.

Different patentable subjects united in one patent will not vitiate the patent, if they all relate to the same general matter, or are otherwise connected together. Applying this principle, Emerson's patent for "certain improvements in the steam engine, and in the mode of propelling therewith either vessels on the water or carriages on the land," decided not to cover more ground than one patent ought to cover, and to be sufficiently clear and certain. *Hogg v. Emerson*, 6 How. 437, 12 L. Ed. 505.

20. **Joinder of dependent and related inventions.**—*Steinmetz v. Allen*, 192 U. S. 543, 557, 48 L. Ed. 555; *Hogg v. Emerson*, 6 How. 437, 12 L. Ed. 505; *Hogg v. Emerson*, 11 How. 587, 13 L. Ed. 824.

21. **Validity of rule of patent office requiring division of claims for machine and process.**—*Steinmetz v. Allen*, 192 U. S. 543, 48 L. Ed. 555; *Ex parte Frasch*, 192 U. S. 566, 567, 48 L. Ed. 564.

The language of § 4886, Rev. Stat., providing for the issuance of patents, does not preclude the joinder of two or more inventions in the same application and as construed gives the right to join inventions in one application in cases where the inventions are related. Although the determination of when a given invention shall be embraced in one or more patents is largely left to the discretion of the patent office, the right cannot be denied by a hard and fixed rule of the patent office which prevents such joinder in all cases. Such a rule is not the exercise of discretion; it is a determination not to hear. *Steinmetz v. Allen*, 192 U. S. 543, 561, 48 L. Ed. 555.

22. **Death pending application.**—*De La Vergne, etc., Machine Co. v. Featherstone*, 147 U. S. 209, 37 L. Ed. 138.

"Under § 4896, when the inventor dies before the patent is granted, the right of applying for and obtaining the patent devolves upon his executor or administrator in trust for his heirs at law or legatees, and doubt has been suggested as to the applicability of the section when the death transpires after the application has been filed, but the rulings and practice of the patent office are to the effect that in the latter contingency no new application need be made or new fee be paid, but the



patent subsequently issued to him, "his heirs or assigns" is valid and is to be construed as a grant to him, or his heirs or assigns.<sup>23</sup>

**B. Proceedings in Patent Office**—1. **EXAMINATION AS TO RIGHT TO PATENT.**—On the filing of the application and the payment of fees, the commissioner of patents causes an examination to be made of the invention or discovery, and if it appears that the claimant is justly entitled to a patent, the commissioner issues a patent therefor.<sup>54</sup> The commissioner acts on evidence, finds the facts, applies the law, and decides questions affecting not only public but private interests.<sup>25</sup> The commissioner of patents, in issuing or withholding patents, in reissues, interferences and extensions, exercises quasi judicial functions.<sup>26</sup>

2. **PROSECUTION OR ABANDONMENT OF PROCEEDINGS.**—Applications for patents must be completed and prepared for examination within two years after the filing of the application and in default thereof, or upon failure of the applicant to prosecute the same within two years after any action therein, of which notice shall have been given to the applicant, they are regarded as abandoned by the parties thereto, unless it is shown to the satisfaction of the commissioner of patents that the delay was unavoidable.<sup>27</sup> While this rule applies to bills in equity under the statute to obtain a patent, after refusal by the commissioner, or by the court on appeal,<sup>28</sup> it does not apply to appeals from the decision of the

executor or administrator may file his letters and the case be disposed of as if the applicant had not died." *De La Vergne, etc., Machine Co. v. Featherstone*, 147 U. S. 209, 223, 37 L. Ed. 138.

**23. Effect of patent issued to deceased inventor "his heirs or assigns."**—*De La Vergne, etc., Machine Co. v. Featherstone*, 147 U. S. 209, 37 L. Ed. 138.

In *De La Vergne, etc., Machine Co. v. Featherstone*, 147 U. S. 209, 222, 37 L. Ed. 138, the court says: "We do not perceive any sound reason for holding that the word 'heirs' in a patent for an invention should be regarded as a definition of the extent of the patentee's own interest in the patent. There is nothing technical in the word as used. It indicates persons who are to have the benefit in the event of death, but the absolute character of the interest of the patentee is not attributable to it. The words in the statute, 'the patentee, his heirs or assigns,' whether construed according to the rules of grammar, or to the evident intent of congress, mean 'the patentee or his heirs or assigns.' They comprehend the legal representatives, assignees in law and assignees in fact, and the phraseology raises no limitation in the sense of the strict common-law rule applied to realty."

**24. Examination in patent office.**—Rev. Stat., § 4893; *United States v. American Bell Tel. Co.*, 167 U. S. 224, 247, 42 L. Ed. 144.

**25. Judicial character of examination and proceedings.**—*United States v. Duell*, 172 U. S. 576, 586, 43 L. Ed. 559; *Butterworth v. Hoe*, 112 U. S. 50, 28 L. Ed. 656; *United States v. American Bell Tel. Co.*, 167 U. S. 224, 267, 42 L. Ed. 144.

This is true as to hearing by the commissioner of applications for extensions or reissues, or on interference between contesting claims, as well as on application for an original patent. *United States v.*

*Duell*, 172 U. S. 576, 586, 43 L. Ed. 559.

**26. United States v. American Bell Tel. Co.**, 167 U. S. 267, 42 L. Ed. 144; *Butterworth v. Hoe*, 112 U. S. 50, 28 L. Ed. 656.

This is apparent from the nature of the examinations and decisions he is required to make, and the modes provided by law, according to which, exclusively, they may be reviewed. *United States v. American Bell Tel. Co.*, 167 U. S. 224, 267, 42 L. Ed. 144; *Butterworth v. Hoe*, 112 U. S. 50, 28 L. Ed. 656.

"The questions of fact arising in this field find their answers in every department of physical science, in every branch of mechanical art; the questions of law, necessary to be applied in the settlement of this class of public and private rights, have founded a special branch of technical jurisprudence. This investigation of every claim presented involves the adjudication of disputed questions of fact, upon scientific or legal principles, and is, therefore, essentially judicial in its character, and requires the intelligent judgment of a trained body of skilled officials, expert in the various branches of science and art, learned in the history of invention, and proceeding by fixed rules to systematic conclusions." *United States v. Duell*, 172 U. S. 576, 586, 43 L. Ed. 559; *Butterworth v. Hoe*, 112 U. S. 50, 28 L. Ed. 656.

**27. Prosecution or abandonment of application.**—Rev. Stat., § 4894; *United States v. American Bell Tel. Co.*, 167 U. S. 224, 247, 42 L. Ed. 144; *Gandy v. Marble*, 122 U. S. 432, 30 L. Ed. 1223; *In re Hien*, 166 U. S. 432, 439, 41 L. Ed. 1066. See ante, "Abandonment of Invention," V. F.

**28. Bill in equity to obtain patent.**—*In re Hien*, 166 U. S. 432, 439, 41 L. Ed. 1066; *Gandy v. Marble*, 122 U. S. 432, 30 L. Ed. 1223.

The presumption of abandonment. un-



commissioner to the court of appeals of the District of Columbia, and, therefore, that court may, by rule, limit the time within which an appeal is to be taken to it from the decision of the commissioner.<sup>29</sup>

**3. PRESUMPTION AS TO REGULARITY OF ISSUANCE.**—There is a *prima facie* presumption that patents for inventions have been regularly granted, whenever they are produced under the great seal of the government, without any recitals of proofs that the prerequisites of the acts under which they have been issued have been duly observed.<sup>30</sup> But the patent creates a *prima facie* right only, and, upon all the questions involved therein, the validity of the patent is subject to examination by the courts.<sup>31</sup>

**C. Remedies of Applicant on Refusal of Patent**—**1. BILL IN EQUITY.**—Where a patent is refused by the commissioner, or by the court on appeal, the patentee may have his rights adjudicated on a bill in equity.<sup>32</sup> The remedy thus given is a proceeding in a court of the United States having original equity jurisdiction under the patent laws, according to the ordinary course of equity practice and procedure.<sup>33</sup> If the adjudication is in favor of the right of the ap-

plicant, unless it is shown that the delay in prosecuting the application for two years and more after the last prior action, of which notice was given to the applicant, was unavoidable, exists as fully in regard to that branch of the application involved in the remedy by bill in equity as in regard to any other part of the application. The jurisdiction of the application being transferred, *pro tanto*, to the court, by virtue of the bill in equity, it cannot adjudge that the applicant is entitled, according to law, to receive a patent, unless he shows to the satisfaction of the court that the delay was unavoidable, under an allegation to that effect in the bill. *Gandy v. Marble*, 122 U. S. 432, 440, 30 L. Ed. 1223.

**29. Appeals from decision of commissioner.**—*In re Hien*, 166 U. S. 432, 439, 41 L. Ed. 1066.

**30. Presumption as to regularity of issuance.**—*Philadelphia, etc., R. Co. v. Stimpson*, 14 Pet. 448, 10 L. Ed. 535; *Agawam Co. v. Jordan*, 7 Wall. 583, 19 L. Ed. 177. See, also, *Seymour v. Osborne*, 11 Wall. 516, 543, 20 L. Ed. 33; *Tilghman v. Proctor*, 102 U. S. 707, 26 L. Ed. 279.

Where a patent issued under the great seal of the United States, signed by the president, and countersigned by the secretary of state, there is a presumption of law, that all public officers, and especially such high functionaries, perform their proper official duties, until the contrary is proved. Where an act is to be done, or patent granted, upon evidence and proofs to be laid before a public officer, upon which he is to decide, the fact that he has done the act, in granting the patent, is *prima facie* evidence that the proofs have been regularly made, and were satisfactory; no other tribunal is at liberty to re-examine or controvert the sufficiency of such proofs, when the law has made the officer the proper judge of their sufficiency and competency. *Philadelphia, etc., R. Co. v. Stimpson*, 14 Pet. 448, 10 L. Ed. 535.

Application for a patent is required to

be made to the commissioner appointed under authority of law, and inasmuch as that officer is empowered to decide upon the merits of the application, his decision in granting the patent is presumed to be correct. *Mitchell v. Tilghman*, 19 Wall. 287, 390, 22 L. Ed. 125; *Agawam Co. v. Jordan*, 7 Wall. 583, 597, 19 L. Ed. 177.

**Antedating patent to agree with date of foreign patent.**—It must be presumed that the decision of the commissioner of patents, antedating a patent as of the date of a foreign patent, is correct, unless the contrary is shown. *Tilghman v. Proctor*, 102 U. S. 707, 26 L. Ed. 279.

**31. Reckendorfer v. Faber**, 92 U. S. 347, 23 L. Ed. 719.

**32. Bill in equity by patentee to obtain patent.**—Rev. Stat., § 4915; *Gandy v. Marble*, 122 U. S. 432, 30 L. Ed. 1223; *In re Hien*, 166 U. S. 432, 438, 41 L. Ed. 1066; *Butterworth v. Hoe*, 112 U. S. 50, 28 L. Ed. 656; *Hill v. Wooster*, 132 U. S. 693, 33 L. Ed. 502.

The remedy by bill in equity under § 4915, to compel the issuance of a patent, applies only when the commissioner decides to reject an application for a patent, on the ground that the applicant is not, on the merits, entitled to it. *Butterworth v. Hoe*, 112 U. S. 50, 68, 28 L. Ed. 656.

Cases in which an application for a patent has been refused either by the commissioner of patents, or by the supreme court of the district are covered by Revised Statutes, § 4915. *Butterworth v. Hoe*, 112 U. S. 50, 28 L. Ed. 656.

**Laches in prosecuting bill in equity.**—See post, "Prosecution or Abandonment of Proceedings," VI, B, 2.

**33. Nature of remedy.**—*Butterworth v. Hoe*, 112 U. S. 50, 61, 28 L. Ed. 656; *Gandy v. Marble*, 122 U. S. 432, 30 L. Ed. 1223; *In re Hien*, 166 U. S. 432, 439, 41 L. Ed. 1066.

The proceeding by bill in equity, under § 4915, Rev. Stat., on the refusal to grant an application for a patent, intends a suit according to the ordinary course of equity practice and procedure, and is not a tech-

plicant, the court may authorize the commissioner to issue the patent for the invention specified in the claim, or any part thereof.<sup>34</sup>

2. *APPEAL*.—a. *Appeal from Decision of Primary Examiner*.—Any applicant whose claim has been twice rejected, or any party to an interference, may appeal from the decision of primary examiner or the examiner in charge of interferences in such case, to the board of examiners in chief.<sup>35</sup> Mandamus to the commissioner of patents is the proper remedy for the refusal of the primary examiner to allow such appeal.<sup>36</sup> But the patent office may provide by rule that there shall be no appeal from a ruling of a primary examiner, upon motion to dissolve an interference.<sup>37</sup>

b. *Appeal from Decision of Examiner in Chief*.—If a party is dissatisfied with the decision of the board of examiners in chief, he may appeal from their decision to the commissioner in person.<sup>38</sup>

c. *Appeal from Decision of Commissioner*.—(1) *Jurisdiction*.—(a) *Courts of District of Columbia*.—The statutes provide for an appeal from the decision of the commissioner refusing a patent, or in interference cases, to the proper court in the District of Columbia.<sup>39</sup> Formerly, this appeal was to be taken to the supreme court of the district sitting in general term, but, since the creation of the court of appeals of the district, jurisdiction of such cases has been vested in that court.<sup>40</sup>

(b) *Secretary of Interior*.—The secretary of the interior has no power by law

nical appeal from the patent office, nor confined to the case as made in the record of that office, but is prepared and heard upon all competent evidence adduced and upon the whole merits, yet the proceeding is, in fact and necessarily, a part of the application for the patent. *Gandy v. Marble*, 122 U. S. 432, 439, 30 L. Ed. 1223; *Butterworth v. Hoe*, 112 U. S. 50, 61, 28 L. Ed. 656; *In re Hien*, 166 U. S. 432, 439, 41 L. Ed. 1066.

34. *Order for issuance of patent*.—*Hill v. Wooster*, 132 U. S. 693, 33 L. Ed. 502; *In re Hien*, 166 U. S. 432, 439, 41 L. Ed. 1066.

35. *Appeal from decision of primary examiner*.—Rev. Stat., § 4909; *Ex parte Frasch*, 192 U. S. 566, 48 L. Ed. 564; *Lowry v. Allen*, 203 U. S. 476, 51 L. Ed. 281; *Steinmetz v. Allen*, 192 U. S. 543, 48 L. Ed. 555; *Mahn v. Harwood*, 112 U. S. 354, 28 L. Ed. 665.

36. *Remedy where primary examiner refuses to allow appeal*.—*Ex parte Frasch*, 192 U. S. 566, 48 L. Ed. 564; *Steinmetz v. Allen*, 192 U. S. 543, 48 L. Ed. 555.

Where the primary examiner refuses to allow an appeal to the board of examiners in chief from his decision requiring a division between claims for a process and claims for an apparatus in related and dependent inventions, mandamus to the commissioner of patents, not appeal to the court of appeals of the district, is the proper remedy. *Ex parte Frasch*, 192 U. S. 566, 48 L. Ed. 564.

Mandamus will lie to compel the commissioner of patents to require the primary examiner to forward an appeal, prayed by the petitioner, to the board of examiners in chief, to review the ruling of the primary examiner requiring petitioner to can-

cel certain of his claims to his application, where the decision of the primary examiner was final, and the petitioner thereby entitled to an appeal under the patent laws to the board of examiners in chief. *Steinmetz v. Allen*, 192 U. S. 543, 48 L. Ed. 555.

37. *Appeal from decision on motion to dissolve interference*.—*Lowry v. Allen*, 203 U. S. 476, 51 L. Ed. 281.

Such a rule is not contrary to the Revised Statutes (§§ 482, 483, 4904, 4909, 4910, 4911), which provide only for appeals upon the question of priority of invention, leaving appeals on other questions to the regulation of the patent office under the grant of power contained in § 483. *Lowry v. Allen*, 203 U. S. 476, 51 L. Ed. 281.

38. *Appeal from examiner in chief to commissioner*.—Rev. Stat., § 4910.

39. *Appeal from decision of commissioner*.—Rev. Stat., § 4914; *In re Hien*, 166 U. S. 432, 439, 41 L. Ed. 1066; *United States v. Duell*, 172 U. S. 576, 587, 43 L. Ed. 559; *Butterworth v. Hoe*, 112 U. S. 50, 28 L. Ed. 656; *Shepard v. Carriean*, 116 U. S. 593, 29 L. Ed. 723; *United States v. American Bell Tel. Co.*, 167 U. S. 224, 267, 42 L. Ed. 144.

The government is not entitled to appeal, but only the applicant. *United States v. American Bell Tel. Co.*, 167 U. S. 224, 267, 42 L. Ed. 144.

*Time of taking appeal*.—See ante, "Prosecution or Abandonment of Proceedings," VI, B, 2.

40. *Jurisdiction on appeal*.—Rev. Stat., § 4914; Act of Feb. 9, 1893, ch. 74, 27 Stat. 436; *United States v. American Bell Tel. Co.*, 167 U. S. 224, 267, 42 L. Ed. 144; *In re Hien*, 166 U. S. 432, 439, 41 L. Ed. 1066.



to revise and reverse the action of the commissioner of patents, in granting or refusing a patent, or adjudging as to the priority between two patents.<sup>41</sup>

(2) *Hearing and Decision*.—The court of appeals is to hear and determine the appeal to revise the decision appealed from in a summary way “upon the evidence produced before the commissioner, at such early and convenient time as the court may appoint,” the revision being confined to the points set forth in the reasons for the appeal.<sup>42</sup>

3. *MANDAMUS*.—While mandamus will not lie to control the commissioner of patents in the exercise of his judgment and discretion in deciding whether or not a patent should issue,<sup>43</sup> it is well settled that the writ may be employed to compel the performance of such ministerial duties as preparing a patent, laying it before the secretary for his signature and countersigning it.<sup>44</sup>

## VII. Letters-Patent.

**A. Requisites and Validity**—1. *FORM AND CONTENTS*—a. *In General*.—A patent must set forth a short description or title of the invention or discovery, correctly indicating its nature and design, and referring to the specification for particulars thereof, a copy of which is annexed to the patent,<sup>45</sup> but it need not set forth the scientific theory the application of which is supposed to constitute the invention when the process and the means for working it out are set forth.<sup>46</sup> The specifications are a part of the patent.<sup>47</sup>

b. *Joinder of Several Subjects in One Patent*.—Different patentable subjects united in one patent will not vitiate the patent, if they all relate to the same general matter or are otherwise connected.<sup>48</sup> A patent may be granted for two combinations, with a claim for each,<sup>49</sup> and a design patent may issue for the

**41. Power of secretary of interior to review action of commissioner**.—*Butterworth v. Hoe*, 112 U. S. 50, 61, 28 L. Ed. 656; *United States v. Duell*, 172 U. S. 576, 587, 43 L. Ed. 559; *Orchard v. Alexander*, 157 U. S. 372, 385, 39 L. Ed. 737.

That it was intended that the commissioner of patents, in issuing or withholding patents, in reissues, interferences and extensions, should exercise quasi judicial functions, is apparent from the nature of the examinations and decisions he is required to make, and the modes provided by law, according to which, exclusively, they may be reviewed. *Butterworth v. Hoe*, 112 U. S. 50, 67, 28 L. Ed. 656.

The law gives express appeals from the decision of the commissioner of patents, or, in cases where technical appeals are not given, other modes of review by judicial process. It gives no such appeal from him to the secretary of the interior. If it exists, it is admitted it is only by an implication, which discovers an appeal in the power of direction and superintendence. That power does not necessarily, *ex vi termini*, include a technical appeal; and the principle applies that where a special proceeding is expressly ordained for a particular purpose, it is presumably exclusive. *Butterworth v. Hoe*, 112 U. S. 50, 63, 28 L. Ed. 656.

An appeal is allowed from the decision of the commissioner refusing a patent, not for the purpose of withdrawing that decision from the review of the secretary, under his power to direct and superintend, but because, without that appeal, it was intended that the decision of the com-

missioner should stand as the final judgment of the patent office, and of the executive department, of which it is a part. *Butterworth v. Hoe*, 112 U. S. 50, 61, 28 L. Ed. 656.

**42. Hearing and decision on appeal**.—*In re Hien*, 166 U. S. 432, 439, 41 L. Ed. 1066.

**43. Mandamus to control judgment or discretion of commissioner**.—*Butterworth v. Hoe*, 112 U. S. 50, 28 L. Ed. 656. See, generally, the title *MANDAMUS*, vol. 8, p. 1.

**44. Mandamus to compel signing of patent or other performance of ministerial act**.—*Butterworth v. Hoe*, 112 U. S. 50, 28 L. Ed. 656.

**45. Contents of patent**.—Act of 1836, 5 Stat. at L. 119; *Hogg v. Emerson*, 6 How. 437, 481, 12 L. Ed. 505.

**46. Failure to set forth scientific principle does not vitiate patent**.—*Eames v. Andrews*, 122 U. S. 40, 30 L. Ed. 1064.

**47. Specifications a part of patent**.—*O'Reilly v. Morse*, 15 How. 62, 118, 14 L. Ed. 601; *Hogg v. Emerson*, 6 How. 437, 481, 12 L. Ed. 505.

**Sufficiency of specification**, see ante, “Specification or Description of Invention,” VI, A, 1.

**48. Different subjects united in one patent**.—*Hogg v. Emerson*, 6 How. 437, 12 L. Ed. 505.

**49. Patent with separate claims for two combinations**.—*Stimpson v. Woodman*, 10 Wall. 117, 19 L. Ed. 866.

“Where an invention is for distinct combinations which are separable, and where it embraces two distinct improvements,



general design and for several elements thereof.<sup>50</sup>

2. **SIGNING.**—Patents must be signed by the secretary of the interior and countersigned by the commissioner of patents.<sup>51</sup> While a patent may be signed by an acting commissioner,<sup>52</sup> the omission of the signature of one of the officers before mentioned destroys its effectiveness,<sup>53</sup> though the defect may be remedied.<sup>54</sup>

3. **SEALING.**—Patents are issued under the seal of the patent office.<sup>55</sup>

4. **RECORDING.**—Patents must be recorded, together with the specifications, in the patent office in books kept for that purpose.<sup>56</sup> The rights of the patentee are perfected where the patent is properly recorded, and therefore destruction of the records by fire does not work a forfeiture of his rights.<sup>57</sup>

5. **EVIDENCE AS TO VALIDITY.**—a. *Presumptions and Burden of Proof.*—Unless a patent is materially defective in form, it is prima facie presumed to be valid,<sup>58</sup> and the burden of proof is on the defendants to show that the patent is invalid.<sup>59</sup>

b. *Weight and Sufficiency.*—In order to invalidate a patent, especially where the letters-patent are of long standing, the evidence must be clear and convincing.<sup>60</sup>

one having respect to the operative part of the machine and the other to the motive power, it is entirely competent for the commissioner to grant separate claims for the two combinations in the same patent, or he may, under existing laws, grant separate patents for each combination, if it is new and produces a new and useful result." *Stimpson v. Woodman*, 10 Wall. 117, 126, 19 L. Ed. 866.

50. **Design patent for general design and elements thereof.**—Where the patent office, in view of the question of fees, and for other reasons, grants a patent for an entire design, with a claim for that, and a claim for each one of various constituent members of it, as a separate design, there is no objection to it, leaving the novelty of the whole and of each part, and the validity of the patent, open to contestation. *Dobson v. Hartford Carpet Co.*, 114 U. S. 439, 446, 29 L. Ed. 177.

51. **Signing.**—*Marsh v. Nichols, etc., Co.*, 128 U. S. 605, 612, 32 L. Ed. 538; *United States v. American Bell Tel. Co.*, 128 U. S. 315, 331, 363, 32 L. Ed. 450.

52. **Signature by acting commissioner.**—*York, etc., R. Co. v. Winans*, 17 How. 30, 15 L. Ed. 27; *Wilson v. Rousseau*, 4 How. 646, 686, 11 L. Ed. 1141.

[Where the patent was signed by an acting commissioner of patents, it was not necessary to aver or prove that he was entitled to act in that capacity, since the court takes judicial notice of the persons who preside over the patent office. *York, etc., R. Co. v. Winans*, 17 How. 30, 15 L. Ed. 27. See, also, *Wilson v. Rousseau*, 4 How. 646, 686, 11 L. Ed. 1141.]

53. **Effect of omission of signature.**—The signatures of all the officers here named must be attached to the instrument, or it will be an uncompleted document, and therefore ineffectual to confer "the exclusive right to make, use and vend the invention or discovery throughout the United States and the territories thereof."

The omission of one signature is no more permissible than the omission of all. *Marsh v. Nichols, etc., Co.*, 128 U. S. 605, 612, 32 L. Ed. 538.

54. **Omission of signature may be corrected.**—*Marsh v. Nichols, etc., Co.*, 128 U. S. 605, 613, 32 L. Ed. 538.

Such correction must, however, be by officers in power at the time. No efficacy can be imparted by signing after the power to act for the government is revoked, even though the instrument is antedated. *Marsh v. Nichols, etc., Co.*, 128 U. S. 605, 611, 32 L. Ed. 538.

55. **Sealing.**—*Marsh v. Nichols, etc., Co.*, 128 U. S. 605, 32 L. Ed. 538; *United States v. American Bell Tel. Co.*, 128 U. S. 315, 32 L. Ed. 450.

56. **Recording.**—*Marsh v. Nichols, etc., Co.*, 128 U. S. 605, 612, 32 L. Ed. 538; *United States v. American Bell Tel. Co.*, 128 U. S. 315, 32 L. Ed. 450.

57. **Effect of destruction of records.**—*Hogg v. Emerson*, 6 How. 437, 485, 12 L. Ed. 505; *Stimpson v. West Chester R. Co.*, 4 How. 380, 11 L. Ed. 1020.

An original patent being destroyed by the burning of the patent office, and the only record of the specifications being a publication in the *Franklin Journal*, the claim is not limited by that publication, because the whole of the specifications are not set forth in it. *Stimpson v. West Chester R. Co.*, 4 How. 380, 11 L. Ed. 1020.

58. **Presumption as to validity.**—*Roemer v. Simon*, 95 U. S. 214, 24 L. Ed. 384.

59. **Burden of proof.**—*Roemer v. Simon*, 95 U. S. 214, 24 L. Ed. 384.

60. **Weight and sufficiency.**—*Agawam Co. v. Jordan*, 7 Wall. 583, 19 L. Ed. 177.

Letters-patent of long standing will not be declared invalid upon testimony largely impeached; as ex. gr., where forty persons swear that the character of the witness for truth and veracity is bad; although very numerous witnesses on the

**B. Construction and Operation**—1. **CONSTRUED ACCORDING TO TERMS.**—Patents are to be construed by plaintiff and ordinary principles,<sup>61</sup> and according to the plain import of their terms.<sup>62</sup>

2. **INTENTION OF PARTIES AS GOVERNING.**—While the construction must depend on the words of the instrument, yet where the words are ambiguous the intention of the parties is entitled to great consideration.<sup>63</sup>

3. **CONSTRUED LIBERALLY.**—Patents are entitled to receive a liberal construction in favor of patentee.<sup>64</sup>

4. **CONSTRUED TO UPHOLD PATENT.**—Where a patent may be construed in one of two ways, that construction will be adopted which will sustain the patent,<sup>65</sup>

other hand swear that they never heard his reputation in that way questioned. *Agawam Co. v. Jordan*, 7 Wall. 583, 19 L. Ed. 177.

**61. Plain and ordinary principles.**—*Hogg v. Emerson*, 6 How. 437, 485, 12 L. Ed. 505.

Patents are to be construed by plain and ordinary principles. Subtilities and technicalities, unsuited to the subject and not in keeping with the liberal spirit of the age, and likely to prove ruinous to a class of the community so inconsiderate and unskilled in business as men of genius and inventors usually are, are to be disregarded. *Hogg v. Emerson*, 6 How. 437, 485, 12 L. Ed. 505.

**62. Plain import of terms govern.**—*White v. Dunbar*, 119 U. S. 47, 52, 30 L. Ed. 303. See *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274, 278, 24 L. Ed. 344; *James v. Campbell*, 104 U. S. 356, 370, 26 L. Ed. 786; *Goodyear Dental Vulcanite Co. v. Davis*, 102 U. S. 222, 227, 26 L. Ed. 149; *Howe Machine Co. v. National Needle Co.*, 134 U. S. 388, 394, 33 L. Ed. 963.

The claim is a statutory requirement, prescribed for the very purpose of making the patentee define precisely what his invention is; and it is unjust to the public, as well as an evasion of the law, to construe it in a manner different from the plain import of its terms. *White v. Dunbar*, 119 U. S. 47, 52, 30 L. Ed. 303; *Howe Machine Co. v. National Needle Co.*, 134 U. S. 388, 394, 33 L. Ed. 963.

**63. Intention of parties.**—*Evans v. Eaton*, 3 Wheat. 454, 506, 4 L. Ed. 433; *Goodyear Dental Vulcanite Co. v. Davis*, 102 U. S. 222, 227, 26 L. Ed. 149; *Mitchell v. Tilghman*, 19 Wall. 287, 22 L. Ed. 125.

**64. Patents entitled to liberal construction.**—*Hogg v. Emerson*, 6 How. 437, 485, 12 L. Ed. 505; *Turrill v. Michigan Southern, etc., R. Co.*, 1 Wall. 491, 17 L. Ed. 668; *Stimpson v. Woodman*, 10 Wall. 117, 123, 19 L. Ed. 866; *Klein v. Russell*, 19 Wall. 433, 22 L. Ed. 116; *Keystone Mfg. Co. v. Adams*, 151 U. S. 139, 38 L. Ed. 103; *Battin v. Taggart*, 17 How. 74, 15 L. Ed. 37; *Rubber Co. v. Goodyear*, 9 Wall. 788, 19 L. Ed. 566; *Merrill v. Yeomans*, 94 U. S. 568, 573, 24 L. Ed. 235; *Grant v. Raymond*, 6 Pet. 218, 8 L. Ed. 376; *Wilson v. Rousseau*, 4 How. 646, 11 L. Ed. 1141; *Corning v. Burden*, 15 How. 252, 269, 14 L. Ed. 683.

"A patent should be construed in a liberal spirit, to sustain the just claims of the inventor. This principle is not to be carried so far as to exclude what is in it, or to interpolate anything which it does not contain. But liberality, rather than strictness, should prevail where the fate of the patent is involved, and the question to be decided is whether the inventor shall hold or lose the fruits of his genius and his labors." *Rubber Co. v. Goodyear*, 9 Wall. 788, 795, 19 L. Ed. 566.

Patents for inventions are not to be treated as mere monopolies, and therefore as odious in the law, but are to receive a liberal construction, and under a fair application of the rule that they be construed ut res magis valeat quam pereat. *Stimpson v. Woodman*, 10 Wall. 117, 123, 19 L. Ed. 866; *Turrill v. Michigan Southern, etc., R. Co.*, 1 Wall. 491, 17 L. Ed. 668.

The patentee may so restrict his claim as to cover less than what he invented, or may limit it to one particular form of machine, excluding all other forms, though they also embody his invention, yet such an interpretation should not be put upon his claim if it can fairly be construed otherwise. *Winans v. Denmead*, 15 How. 330, 14 L. Ed. 717.

Where the patentee, after describing his machine, sets forth his claim in rather ambiguous and equivocal terms, which might be construed to mean either a process or machine, the construction should be that which is most favorable to the patentee, "ut res magis valeat quam pereat." *Corning v. Burden*, 15 How. 252, 268, 14 L. Ed. 683.

**65. Construction to uphold patent.**—*Coupe v. Royer*, 155 U. S. 565, 577, 39 L. Ed. 263; *McClain v. Ortmyer*, 141 U. S. 419, 35 L. Ed. 800; *Loom Co. v. Higgins*, 105 U. S. 580, 598, 26 L. Ed. 1177; *Corning v. Burden*, 15 How. 252, 14 L. Ed. 683; *Rubber Co. v. Goodyear*, 9 Wall. 788, 795, 19 L. Ed. 566; *Turrill v. Michigan Southern, etc., R. Co.*, 1 Wall. 491, 510, 17 L. Ed. 668; *Merrill v. Yeomans*, 94 U. S. 568, 573, 24 L. Ed. 235; *Klein v. Russell*, 19 Wall. 433, 22 L. Ed. 116.

In construing a patent courts should proceed in a liberal spirit, so as to sustain the patent and the construction claimed by the patentee, if it can be done consistently with the language which he has employed; and this applies to a reissue



and, since the function of a machine is not patentable, a claim for a function or result will be construed as a claim for the accomplishment of the result by substantially the means described in the specification.<sup>66</sup>

5. **CONSTRUED AS A WHOLE**—a. *General Rule*.—As a general rule the whole patent is to be construed together.<sup>67</sup>

b. *Construed with Specifications*—(1) *General Rule*.—The specification is a part of the patent,<sup>68</sup> and the patent and claim are to be construed in connection with that instrument.<sup>69</sup> This is true whether words referring back to the specification be used in the claim or not.<sup>70</sup>

(2) *Claim Referring to Specification*—(a) *In General*.—Where the claim contains words referring back to the specifications, it cannot be properly construed in any other way than in connection with the specification.<sup>71</sup>

(b) *Claim for Invention "Substantially as Described," etc.*—Frequently the

as much as to an original patent. *Klein v. Russell*, 19 Wall. 433, 22 L. Ed. 116.

In case of doubt between two constructions of a claim, the invention is to be preserved and the one which renders the claim a practical nullity is to be disregarded. *Coupe v. Royer*, 155 U. S. 565, 577, 39 L. Ed. 263; *McClain v. Ortmyer*, 141 U. S. 419, 35 L. Ed. 800; *Corning v. Burden*, 15 How. 252, 14 L. Ed. 683; *Loom Co. v. Higgins*, 105 U. S. 580, 598, 26 L. Ed. 1177.

66. **Claim for function construed a claim for means of producing result**.—The *Corn-Planter Patent*, 23 Wall. 181, 23 L. Ed. 161; *Morley Sewing Machine Co. v. Lancaster*, 129 U. S. 263, 32 L. Ed. 715; *Electric R. Signal Co. v. Hall R. Signal Co.*, 114 U. S. 87, 96, 29 L. Ed. 96.

67. **Patent construed as a whole**.—*Brooks v. Fiske*, 15 How. 212, 215, 14 L. Ed. 665; *Hogg v. Emerson*, 11 How. 587, 13 L. Ed. 824.

The claim is not to be taken alone, but in connection with the specification and drawings; the whole instrument is to be construed together. *Brooks v. Fiske*, 15 How. 212, 14 L. Ed. 665; *Hogg v. Emerson*, 11 How. 587, 13 L. Ed. 824.

68. **Specification part of a patent**.—*Hogg v. Emerson*, 6 How. 437, 12 L. Ed. 505.

69. **Patent and claim construed with specification**.—*Wicke v. Ostrum*, 103 U. S. 461, 26 L. Ed. 409; *Hogg v. Emerson*, 6 How. 437, 12 L. Ed. 505; *O'Reilly v. Morse*, 15 How. 62, 118, 14 L. Ed. 601; *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33; *Fuller v. Yentzer*, 94 U. S. 288, 24 L. Ed. 103; *Howe Machine Co. v. National Needle Co.*, 134 U. S. 388, 394, 33 L. Ed. 963; *Brooks v. Fiske*, 15 How. 212, 215, 14 L. Ed. 665; *Bates v. Coe*, 98 U. S. 31, 38, 25 L. Ed. 68; *Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 486, 23 L. Ed. 952; *Railroad Co. v. Mellon*, 104 U. S. 112, 26 L. Ed. 639; *The Corn-Planter Patent*, 23 Wall. 181, 182, 23 L. Ed. 161; *Klein v. Russell*, 19 Wall. 433, 22 L. Ed. 116; *Hailles v. Van Wormer*, 20 Wall. 353, 374, 22 L. Ed. 241; *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 558, 42 L. Ed. 1136; *Railroad Co. v. Dubois*, 12 Wall. 47, 20 L. Ed. 265; *Mitchell v. Tilghman*, 19

Wall. 287, 22 L. Ed. 125; *Turrill v. Michigan Southern, etc., R. Co.*, 1 Wall. 491, 511, 17 L. Ed. 668; *Carnegie Steel Co. v. Cambria Iron Co.*, 185 U. S. 403, 432, 46 L. Ed. 968; *Stimpson v. Woodman*, 10 Wall. 117, 19 L. Ed. 866.

70. **Where no words in claim referring to specification**.—*Hobbs v. Beach*, 180 U. S. 383, 400, 45 L. Ed. 586; *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 42 L. Ed. 1136; *Mitchell v. Tilghman*, 19 Wall. 287, 391, 22 L. Ed. 125.

Words of such import, if not expressed in the claim, must be implied, else the patent in many cases would be invalid as covering a mere function, principle or result, which is obviously forbidden by the patent law, as it would close the door to all subsequent improvements. *Mitchell v. Tilghman*, 19 Wall. 287, 391, 22 L. Ed. 125; *Hobbs v. Beach*, 180 U. S. 383, 400, 45 L. Ed. 586.

What R. A. Tilghman, of Philadelphia, claimed as his invention under the letters-patent granted to him of January 9th, 1854, was the process of manufacturing fat acids and glycerine from fatty or oily substances by the action of water at a high temperature and pressure. Two conditions, viz, that the heating vessel must be kept entirely full of the mixture of fat and water, and that no steam or air must be allowed to accumulate in the vessel employed to impart the heat, were material and indispensable conditions of Tilghman's patented method. The claim of the patentee must be limited to the specific method or means of applying highly heated water under pressure pointed out in the specification; and although the claim is on its face broader than this, yet it is to be construed by reference to the specification. In this point of view it is unimportant whether the claim contained any direct reference to the specification or not. Such reference, where not expressed, will be implied. *Mitchell v. Tilghman*, 19 Wall. 287, 22 L. Ed. 125.

71. **Claim referring to specification**.—*Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33; *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 558, 42 L. Ed. 1136; *Fuller v. Yentzer*, 94 U. S. 288, 24 L. Ed. 103; *Smith v. Goodyear Dental*



claim contains a general clause referring to the description in the specification, such as "substantially as described" or a clause equivalent thereto, and in such cases the description is taken to be part of the claim.<sup>72</sup> But the use of such words does not limit the patentee to the exact mechanism described, nor deprive him of the benefit of the doctrine of equivalents.<sup>73</sup>

(3) *Claim Not to Be Enlarged by Specification.*—But while specifications and drawings may be resorted to for the better understanding of the claim, they cannot be referred to for the purpose of enlarging or changing it.<sup>74</sup>

Vulcanite Co., 93 U. S. 486, 23 L. Ed. 952.

In *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 560, 42 L. Ed. 1136, it was held that where a claim refers to specifications describing an auxiliary valve, the specifications as amended and the correspondence should be construed as reading the valve into the claim and as repelling the idea that the claim should be construed as one for a method or process.

Where the claim for a patent for an invention, which consists of a product or a manufacture made in a defined manner, refers in terms to the antecedent description in the specification of the process by which the product is obtained, such process is thereby made as much a part of the invention as are the materials of which the product is composed. *Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 486, 23 L. Ed. 952.

72. "Substantially as described," etc.—*Singer Mfg. Co. v. Cramer*, 192 U. S. 265, 284, 48 L. Ed. 437; *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 558, 42 L. Ed. 1136; *Brown v. Davis*, 116 U. S. 237, 29 L. Ed. 659; *Seymour v. Osborne*, 11 Wall. 516, 547, 20 L. Ed. 33; *The Corn-Planter Patent*, 23 Wall. 181, 23 L. Ed. 161; *Carlton v. Bokee*, 17 Wall. 463, 21 L. Ed. 517; *Dobson v. Hartford Carpet Co.*, 114 U. S. 439, 29 L. Ed. 177; *Hobbs v. Beach*, 180 U. S. 383, 400, 45 L. Ed. 586; *Mitchell v. Tilghman*, 19 Wall. 287, 391, 22 L. Ed. 125; *Lake Shore, etc., R. Co. v. National Car-Brake Shoe Co.*, 110 U. S. 229, 235, 28 L. Ed. 129; *Weir v. Morden*, 125 U. S. 98, 107, 31 L. Ed. 645; *Dobson v. Dornan*, 118 U. S. 10, 30 L. Ed. 63.

The use of the words "substantially as and for the purposes set forth," in a claim, throws it back to the specification, for qualification of words otherwise general. *The Corn-Planter Patent*, 23 Wall. 181, 182, 23 L. Ed. 161.

The words "substantially as specified" mean "substantially as specified in regard to the combination which is the subject of the claim." *Lake Shore, etc., R. Co. v. National Car-Brake Shoe Co.*, 110 U. S. 229, 235, 28 L. Ed. 129.

A claim which might otherwise be held to be bad as covering a function or result, when containing the words "substantially as described," must be construed in connection with the specification and be limited thereby; and when

so construed it may be held to be valid. *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33.

Where a claim in a patent uses general terms of reference to the specification, such as "substantially in the manner and for the purpose herein set forth," although the patentee will not be held to the precise combination of all the parts described, yet his claim will be limited, by reference to the history of the art, to what was really first invented by him. *Carlton v. Bokee*, 17 Wall. 463, 21 L. Ed. 517.

Where a claim recited that the combination is to be "substantially as specified" that means as described in the specifications and shown in the drawings. *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 558, 42 L. Ed. 1136; *Singer Mfg. Co. v. Cramer*, 192 U. S. 265, 284, 48 L. Ed. 437.

A claim for a "design for a carpet substantially as shown" refers to the description as well as the drawing, in using the word shown. *Dobson v. Hartford Carpet Co.*, 114 U. S. 439, 29 L. Ed. 177. See, also, *Dobson v. Dornan*, 118 U. S. 10, 14, 30 L. Ed. 63.

The patent office, after twice refusing to allow a patent for a new and improved sewing machine treadle, was led to take favorable action on the claim owing to the peculiar form of the bearing and accessories described. The view that it was the purpose of the patent office to limit the patent to this particular device of treadle bar and bearing is supported by the claim wherein it is recited that the combination is to be "substantially as specified." In the light of the circumstances surrounding the issuance of the patent, the words of limitation contained in the claim must be given due effect and the statement of the elements entering into the combination must be construed to refer to elements in combination having substantially the form and construction described in the specification and shown in the drawing. *Singer Mfg. Co. v. Cramer*, 192 U. S. 265, 285, 48 L. Ed. 437.

73. *Not limited to precise mechanism described.*—*Hobbs v. Beach*, 180 U. S. 383, 400, 45 L. Ed. 586; *Morley Sewing Machine Co. v. Lancaster*, 129 U. S. 263, 32 L. Ed. 715.

74. *Claim not to be enlarged by specification.*—*McClain v. Ortmyer*, 141 U. S. 419, 424, 35 L. Ed. 800; *Western Elec-*

6. INVENTION NOT TO BE EXTENDED BEYOND CLAIM—*a. General Rule.*—When the terms of a patent are clear and distinct, the patentee is bound by it and can claim nothing beyond it.<sup>75</sup> The invention cannot be enlarged by construction or shown to be broader than the terms of the claim.<sup>76</sup> Thus an elec-

tric Mfg. Co. *v.* Ansonia Brass, etc., Co., 114 U. S. 447, 29 L. Ed. 210; *Bates v. Coe*, 98 U. S. 31, 38, 25 L. Ed. 68; *Howe Machine Co. v. National Needle Co.*, 134 U. S. 388, 394, 33 L. Ed. 963; *White v. Dunbar*, 119 U. S. 47, 51, 30 L. Ed. 303; *Yale Lock Mfg. Co. v. Greenleaf*, 117 U. S. 554, 559, 29 L. Ed. 952; *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274, 24 L. Ed. 344; *Railroad Co. v. Mellon*, 104 U. S. 112, 26 L. E. 639.

The scope of letters-patent must be limited to the invention covered by the claim, and while the claim may be illustrated it cannot be enlarged by language used in other parts of the specification. *Western Electric Mfg. Co. v. Ansonia Brass, etc., Co.*, 114 U. S. 447, 452, 29 L. Ed. 210.

Doubtless a claim is to be construed in connection with the explanation contained in the specification and it may be so drawn as in effect to make the specification an essential part of it; but since the inventor must particularly specify and point out the part, improvement or combination which he claims as his own invention or discovery, the specification and drawings are usually looked at only for the purpose of better understanding the meaning of the claim, and certainly not for the purpose of changing it and making it different from what it is. *Howe Machine Co. v. National Needle Co.*, 134 U. S. 388, 394, 33 L. Ed. 963.

When a patentee, compelled by the patent office to narrow his claim, neglected to amend the descriptive part of his specification, he cannot go beyond what he has claimed and insist that his patent covers something not claimed, merely because it is to be found in the descriptive part of the specification. *Railroad Co. v. Mellon*, 104 U. S. 112, 118, 26 L. Ed. 639.

"Cases arise not unfrequently where the actual invention described in the specification is larger than the claims of the patent; and in such cases it is undoubtedly true that the patentees in a suit for infringement must be limited to what is specified in the claims annexed to the specification, but it is equally true that the claims of the patent, like other provisions in writing, must be reasonably construed, and in case of doubt or ambiguity it is proper in all cases to refer back to the descriptive portions of the specification to aid in solving the doubt or in ascertaining the true intent and meaning of the language employed in the claims; nor is it incorrect to say that due reference may be had to the specifications, drawings, and claims of a patent, in order to ascertain its true legal construction. *Brooks v.*

*Fiske*, 15 How. 212, 215, 14 L. Ed. 665." *Bates v. Coe*, 98 U. S. 31, 38, 25 L. Ed. 68.

"Some persons seem to suppose that a claim in a patent is like a nose of wax which may be turned and twisted in any direction, by merely referring to the specification, so as to make it include something more than, or something different from, what its words express. The context may, undoubtedly, be resorted to, and often is resorted to, for the purpose of better understanding the meaning of the claim; but not for the purpose of changing it, and making it different from what it is." *White v. Dunbar*, 119 U. S. 47, 51, 30 L. Ed. 303.

75. Patentee bound by claim.—*Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274, 278, 24 L. Ed. 344; *McClain v. Ortmyer*, 141 U. S. 419, 424, 35 L. Ed. 800; *Merrill v. Yeomans*, 94 U. S. 568, 24 L. Ed. 235.

The patentee can never go beyond his claim. As patents are procured *ex parte*, the public is not bound by them, but the patentees are. And the latter cannot show that their invention is broader than the terms of their claim; or, if broader, they must be held to have surrendered the surplus to the public. *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274, 278, 24 L. Ed. 344.

Where the language of the specification and claim shows clearly what he desired to secure as a monopoly, nothing can be held to be an infringement which does not fall within the terms the patentee has himself chosen to express his invention. *McClain v. Ortmyer*, 141 U. S. 419, 425, 35 L. Ed. 800.

It is not necessary to construe a claim for a process of "mixing molten metal to secure uniformity of product" as covering two alternative and inconsistent processes—the one for a method by which abrupt variations could be avoided without securing uniformity of product, the other for method to obtain uniform products—when all that is claimed is a uniformity in the constituent parts preparatory to further treatment. *Carnegie Steel Co. v. Cambria Iron Co.*, 185 U. S. 403, 433, 46 L. Ed. 968.

76. Invention cannot be broadened.—*Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274, 278, 24 L. Ed. 344; *Merrill v. Yeomans*, 94 U. S. 568, 24 L. Ed. 235; *Burns v. Meyer*, 100 U. S. 671, 25 L. Ed. 738; *McClain v. Ortmyer*, 141 U. S. 419, 423, 35 L. Ed. 800; *United States Repair, etc., Co. v. Assyrian Asphalt Co.*, 183 U. S. 591, 601, 46 L. Ed. 342; *Western Electric Mfg. Co. v. Ansonia Brass, etc., Co.*, 114 U. S. 447, 29 L. Ed. 210; *Cimiotti Un-*

ment which is not present in a claim, cannot be read into it for the purpose of making out a case of novelty or infringement,<sup>77</sup> or for the purpose of enlarging its scope so as to cover an invention not indicated upon its face.<sup>78</sup>

b. *Failure to Claim as Disclaimer or Dedication.*—The patentee by claiming what he regards as new, disclaims or dedicates to the public the remaining parts.<sup>79</sup>

hairing Co. v. American Fur Ref. Co., 198 U. S. 399, 410, 49 L. Ed. 1100; Fay v. Cor-desman, 109 U. S. 408, 27 L. Ed. 979; Hub-bell v. United States, 179 U. S. 77, 82, 45 L. Ed. 95; Morgan Envelope Co. v. Al-bany Perforated Wrapping Paper Co., 152 U. S. 425, 38 L. Ed. 500; Coupe v. Royer, 155 U. S. 565, 577, 39 L. Ed. 263; Lehigh Valley R. Co. v. Kearney, 158 U. S. 461, 468, 39 L. Ed. 1055; Haines v. McLaughlin, 135 U. S. 584, 34 L. Ed. 290; Howe Ma-chine Co. v. National Needle Co., 134 U. S. 388, 33 L. Ed. 963; Wollensak v. Sar-gent, 151 U. S. 221, 226, 38 L. Ed. 137; Day v. Fair Haven, etc., R. Co., 132 U. S. 98, 102, 33 L. Ed. 265; The Wood-Paper Patent, 23 Wall. 566, 606, 23 L. Ed. 31; Sutter v. Robinson, 119 U. S. 530, 30 L. Ed. 492; Kokomo Fence Machine Co. v. Kitselman, 189 U. S. 8, 19, 47 L. Ed. 689; Burr v. Duryee, 1 Wall. 531, 553, 17 L. Ed. 650; Case v. Brown, 2 Wall. 320, 17 L. Ed. 817; Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 46 L. Ed. 968; O'Reilly v. Morse, 15 How. 62, 14 L. Ed. 601; The Corn-Planter Patent, 23 Wall. 181, 23 L. Ed. 161; Grant v. Walter, 148 U. S. 547, 37 L. Ed. 552; Roemer v. Bern-heim, 132 U. S. 103, 33 L. Ed. 277; Harts-horn v. Saginaw Barrel Co., 119 U. S. 664, 30 L. Ed. 539; White v. Dunbar, 119 U. S. 47, 30 L. Ed. 303; Yale Lock Mfg. Co. v. Greenleaf, 117 U. S. 554, 555, 29 L. Ed. 952; Thompson v. Boisselier, 114 U. S. 1, 29 L. Ed. 76; Railroad Co. v. Mellon, 144 U. S. 112, 26 L. Ed. 639; Water-Meter Co. v. Desper, 101 U. S. 332, 25 L. Ed. 1024; Bates v. Coe, 98 U. S. 31, 25 L. Ed. 68; Schumacher v. Cornell, 96 U. S. 549, 24 L. Ed. 676.

It is not within the rightful power of the courts to enlarge or restrict the scope of patents which by mistake were issued in terms too narrow or too broad to cover the invention, however manifest the fact and extent of the mistake may be shown to have been. United States Repair, etc., Co. v. Assyrian Asphalt Co., 183 U. S. 591, 601, 46 L. Ed. 342.

Courts should not by construction en-large the claim which the patent office has admitted, and the patentee acquiesced in, beyond the fair interpretation of its terms. Burns v. Meyer, 100 U. S. 671, 25 L. Ed. 738; Haines v. McLaughlin, 135 U. S. 584, 596, 34 L. Ed. 290.

"While the patentee may have been un-fortunate in the language he has chosen to express his actual invention, and may have been entitled to a broader claim, we are not at liberty, without running coun-ter to the entire current of authority in this court, to construe such claims to in-

clude more than their language fairly im-ports." McClain v. Ortmyer, 141 U. S. 419, 423, 35 L. Ed. 800.

**77. Features not to be read into claim to make device patentable or to show in-fringement.**—McCarty v. Lehigh Valley R. Co., 160 U. S. 110, 40 L. Ed. 358; Howe Machine Co. v. National Needle Co., 134 U. S. 388, 33 L. Ed. 963.

Where the combination claimed is clearly set forth the patentee cannot be permitted to read into it any delicate ad-justing apparatus not originally contained in the claim, in order to show a case of patentable novelty. Howe Machine Co. v. National Needle Co., 134 U. S. 388, 33 L. Ed. 963.

**78. Enlarging patent by reading ele-ments into claim.**—Day v. Fair Haven, etc., R. Co., 132 U. S. 98, 102, 33 L. Ed. 265; Wollensak v. Sargent, 151 U. S. 221, 220, 38 L. Ed. 137.

**79. Dedication to public by failure to claim.**—The Corn-Planter Patent, 23 Wall. 181, 182, 23 L. Ed. 161; Rowell v. Lindsay, 113 U. S. 97, 101, 28 L. Ed. 906; Under-wood v. Gerber, 149 U. S. 224, 231, 37 L. Ed. 710; Mahn v. Harwood, 112 U. S. 354, 360, 28 L. Ed. 665; Merrill v. Yeomans, 94 U. S. 568, 573, 24 L. Ed. 235; Water-Meter Co. v. Desper, 101 U. S. 332, 337, 25 L. Ed. 1024; Miller v. Brass Co., 104 U. S. 350, 26 L. Ed. 783; McClain v. Ortmyer, 141 U. S. 419, 423, 35 L. Ed. 800; Deering v. Winona Harvester Works, 155 U. S. 286, 296, 39 L. Ed. 153.

If he described and claimed only a part of his invention, he is presumed to have abandoned the residue to the public. Mc-Clain v. Ortmyer, 141 U. S. 419, 35 L. Ed. 800; Deering v. Winona Harvester Works, 155 U. S. 286, 296, 39 L. Ed. 153.

Where a patentee, after describing a machine, claims as his invention a certain combination of elements, or a certain de-vice, or part of the machine, this is an im-plied declaration, as conclusive, so far as that patent is concerned, as if it were ex-pressed, that the specific combination or thing claimed is the only part which the patentee regards as new. The Corn-Planter Patent, 23 Wall. 181, 224, 23 L. Ed. 161.

Where a party having made application for a patent for certain improvements, afterwards, with his claim still on file, makes application for another but distinct improvement in the same branch of art, in which second application he describes the former improvement, but does not in such second application claim it as origi-nal, the description in such second appli-cation and nonclaim of it there, is not a



c. *Limitations of Claim*—(1) *Self-Imposed Limitations*.—Limitations and provisos, imposed by the inventor, especially such as were introduced into an application after it had been persistently rejected, must be strictly construed against the inventor and in favor of the public, and looked upon in the nature of disclaimers.<sup>80</sup>

(2) *Limitations Imposed by Patent Office*.—Where the claim originally filed by the patentee is rejected, and a narrower one accepted or substituted by him, it is well settled that the latter cannot be construed to embrace anything rejected by the patent office.<sup>81</sup> If dissatisfied with the decision rejecting his application,

dedication of the first invention to the public. *The Suffolk Co. v. Hayden*, 3 Wall. 315, 18 L. Ed. 76.

**80. Self-imposed limitations or provisos.**—*Leggett v. Avery*, 101 U. S. 256, 25 L. Ed. 865; *Goodyear Dental Vulcanite Co. v. Davis*, 102 U. S. 222, 228, 26 L. Ed. 149; *Fay v. Cordesman*, 109 U. S. 408, 27 L. Ed. 979; *Mahn v. Harwood*, 112 U. S. 354, 359, 28 L. Ed. 665; *Union Metallic Cartridge Co. v. United States Cartridge Co.*, 112 U. S. 624, 644, 28 L. Ed. 828; *Sargent v. Hall Safe, etc., Co.*, 114 U. S. 63, 29 L. Ed. 67; *Shepard v. Carrigan*, 116 U. S. 593, 29 L. Ed. 723; *White v. Dunbar*, 119 U. S. 47, 30 L. Ed. 303; *Sutter v. Robinson*, 119 U. S. 530, 30 L. Ed. 492; *Bragg v. Fitch*, 121 U. S. 478, 30 L. Ed. 1008; *Snow v. Lake Shore, etc., R. Co.*, 121 U. S. 617, 30 L. Ed. 1004; *Hubbell v. United States*, 179 U. S. 77, 82, 45 L. Ed. 95; *Coupe v. Royer*, 155 U. S. 565, 576, 39 L. Ed. 263; *Crawford v. Heysinger*, 123 U. S. 589, 606, 31 L. Ed. 269; *Thompson v. Boisselier*, 114 U. S. 1, 29 L. Ed. 76.

The patentees of an improved machine for treating hides, having chosen to carefully restrict their claims for the shaft and crib to such in a vertical position, and for the weight, to one operating by the force of gravity, aided by pressure, they cannot be permitted to extend their claims so as to include shafts and cribs in a horizontal position, and pressure upon the hides by means of false heads, actuated and controlled by gearing wheels, springs and a crank. *Coupe v. Royer*, 155 U. S. 565, 577, 39 L. Ed. 263.

**81. Substituted claim, after rejection of original.**—*Shepard v. Carrigan*, 116 U. S. 593, 29 L. Ed. 723; *Roemer v. Peddie*, 132 U. S. 313, 33 L. Ed. 382; *Royer v. Coupe*, 146 U. S. 524, 36 L. Ed. 1073; *Corbin Cabinet Lock Co. v. Eagle Lock Co.*, 150 U. S. 38, 40, 37 L. Ed. 989; *Sutter v. Robinson*, 119 U. S. 530, 30 L. Ed. 492; *Knapp v. Morss*, 150 U. S. 221, 224, 37 L. Ed. 1059; *Lehigh Valley R. Co. v. Kearney*, 158 U. S. 461, 39 L. Ed. 1055; *Hubbell v. United States*, 179 U. S. 77, 83, 45 L. Ed. 95; *Leggett v. Avery*, 101 U. S. 256, 25 L. Ed. 865; *Sargent v. Hall Safe, etc., Co.*, 114 U. S. 63, 29 L. Ed. 67; *Thompson v. Boisselier*, 114 U. S. 1, 29 L. Ed. 76; *Coupe v. Royer*, 155 U. S. 565, 576, 39 L. Ed. 263; *Fay v. Cordesman*, 109 U. S. 408, 27 L. Ed. 979; *Crawford v. Heysinger*, 123 U. S. 589, 31 L. Ed. 269; *Union Metallic Cartridge Co. v. United States Cartridge Co.*, 112

U. S. 624, 28 L. Ed. 828; *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.*, 152 U. S. 425, 429, 38 L. Ed. 500; *United States Repair, etc., Co. v. Assyrian Asphalt Co.*, 183 U. S. 591, 601, 46 L. Ed. 342; *Computing Scale Co. v. Automatic Scale Co.*, 204 U. S. 609, 51 L. Ed. 645; *American Road Machine Co. v. Pennock, etc., Co.*, 164 U. S. 26, 40, 41 L. Ed. 337; *Yale Lock Mfg. Co. v. James*, 125 U. S. 447, 463, 31 L. Ed. 807; *Yale Lock Mfg. Co. v. Beckshire Nat. Bank*, 135 U. S. 342, 34 L. Ed. 168; *Dobson v. Lees*, 137 U. S. 258, 265, 34 L. Ed. 652; *Phoenix Caster Co. v. Spiegel*, 133 U. S. 360, 33 L. Ed. 663; *McCarty v. Lehigh Valley R. Co.*, 160 U. S. 110, 40 L. Ed. 358; *Ashcroft v. Railroad Co.*, 97 U. S. 189, 200, 24 L. Ed. 982.

Where a patentee has modified his claim in obedience to the requirements of the patent office, he cannot have for it an extended construction which has been rejected by the patent office; and, in a suit on his patent, his claim must be limited, where it is a combination of parts, to a combination of all the elements which he has included in his claim as necessarily constituting that combination. *Roemer v. Peddie*, 132 U. S. 313, 317, 33 L. Ed. 382; *Phoenix Caster Co. v. Spiegel*, 133 U. S. 360, 368, 33 L. Ed. 663.

Where a patentee originally sought broader claims, which were rejected, and acquiesced in such rejection, and withdrew such claims and substituted therefor a narrower claim, describing a particular or specific device, as such, neither the patentee, nor his assignees, can be allowed to insist upon such construction of the allowed claim as would cover what had been previously rejected. *Shepard v. Carrigan*, 116 U. S. 593, 29 L. Ed. 723; *Roemer v. Peddie*, 132 U. S. 313, 33 L. Ed. 382; *Royer v. Coupe*, 146 U. S. 524, 36 L. Ed. 1073; *Corbin Cabinet Lock Co. v. Eagle Lock Co.*, 150 U. S. 38, 40, 37 L. Ed. 989.

Where an applicant for a patent to cover a new combination is compelled by the rejection of his application by the patent office to narrow his claim by the introduction of a new element, he cannot after the issue of the patent broaden his claim by dropping the element which he was compelled to include in order to secure his patent. *Shepard v. Carrigan*, 116 U. S. 593, 597, 29 L. Ed. 723.

Where a claim for a combination of "a

the patentee should pursue his remedy by appeal.<sup>82</sup> But changes of expression made to meet the views of the examiners ought not to be permitted to defeat a meritorious claimant.<sup>83</sup>

7. CONSTRUED WITH REFERENCE TO PRIOR STATE OF ART—*a. General Rule.*—A patent is to be construed with reference to the state of the art at the time it was granted, and a claim thus construed will not be held to include anything disclosed by prior patents or devices previously in public use or known to the public.<sup>84</sup>

*b. Pioneer Patents.*—(1) *What Are "Pioneer" Patents.*—By a "pioneer" patent is meant a patent covering a function never before performed, a wholly novel device, or one of such novelty and importance as to mark a distinct step in the progress of the art, as distinguished from a mere improvement or perfection of what has gone before.<sup>85</sup>

(2) *Entitled to Broad Construction.*—The patentee of a "pioneer" patent is entitled to a broad and liberal construction of his patent.<sup>86</sup> But even in case of

spark arrester with the smoke head of a locomotive" upon rejection is altered to a claim for a grate with longitudinal bars, the claim must be restricted to the device with that kind of grate. *Lehigh Valley R. Co. v. Kearney*, 158 U. S. 461, 468, 39 L. Ed. 1053.

Where the examiners refused to allow a claim for an improvement in metallic cartridges until the claimant distinctly located the vents as "openings whose inner edges nearly coincide with the edges of the central chamber of fulminate in the base of the cartridge," the relative position of the vents and the walls of the fulminate chamber was thereby made a material part of the claimant's patent. *Hubbell v. United States*, 179 U. S. 77, 83, 45 L. Ed. 95.

The patent office placed limitations upon a patentee's claims which were accepted by the patentee "without prejudice to the claims which remain in view of the fact that the allowed claims appear to cover the invention as it would be constructed in practice." It was held that the patent could not be extended beyond the limitation thus imposed and accepted, especially as the patent was not a pioneer and its elements were well known. *Computing Scale Co. v. Automatic Scale Co.*, 204 U. S. 609, 51 L. Ed. 645.

Where the patentee had acquiesced in the rejection of his claim for a road machine with a blade that was elevated or depressed by a hand wheel operating through suitable gearing, he could not claim the benefit thereof, or of an equivalent construction of the claim allowed. *American Road Machine Co. v. Pennock, etc., Co.*, 164 U. S. 26, 40, 41 L. Ed. 337.

82. *Failure to appeal upon rejection of claim.*—*Shepard v. Carrigan*, 116 U. S. 593, 29 L. Ed. 723; *Hubbell v. United States*, 179 U. S. 77, 83, 45 L. Ed. 95.

83. *Change of expression made at suggestion of patent office.*—*Hubbell v. United States*, 179 U. S. 77, 80, 45 L. Ed. 95; *Computing Scale Co. v. Automatic Scale Co.*, 204 U. S. 609, 617, 51 L. Ed. 645.

While not allowed to revive a rejected claim, by a broad construction of the

claim allowed, yet the patentee is entitled to a fair construction of the terms of his claim as actually granted. *Hubbell v. United States*, 179 U. S. 77, 80, 45 L. Ed. 95.

84. *Prior state of art considered.*—*Thompson v. Boisselier*, 114 U. S. 1, 29 L. Ed. 76; *Lawther v. Hamilton*, 124 U. S. 1, 9, 31 L. Ed. 325; *Computing Scale Co. v. Automatic Scale Co.*, 204 U. S. 609, 51 L. Ed. 645; *Garneau v. Dozier*, 102 U. S. 230, 234, 26 L. Ed. 133; *Pope Mfg. Co. v. Gormully, etc., Mfg. Co.*, No. 2, 144 U. S. 238, 241, 36 L. Ed. 420; *Royer v. Coupe*, 146 U. S. 524, 36 L. Ed. 1073; *Boyd v. Janesville Hay Tool Co.*, 158 U. S. 260, 39 L. Ed. 973; *Gordon v. Warder*, 150 U. S. 47, 37 L. Ed. 992; *Miller v. Foree*, 116 U. S. 22, 29 L. Ed. 552; *McCarty v. Lehigh Valley R. Co.*, 160 U. S. 110, 40 L. Ed. 358; *Gordon v. Warder*, 150 U. S. 47, 37 L. Ed. 992; *Cimiotti Unhairing Co. v. American Fur Ref. Co.*, 198 U. S. 399, 49 L. Ed. 1100; *Leggett v. Avery*, 101 U. S. 256, 25 L. Ed. 865; *Shepard v. Carrigan*, 116 U. S. 593, 29 L. Ed. 723; *Knapp v. Morss*, 150 U. S. 221, 227, 37 L. Ed. 1059; *Hubbell v. United States*, 179 U. S. 77, 80, 45 L. Ed. 95.

To determine accurately the extent of the invention secured by a patent, the state of the art at the time when the original patent was granted must be considered. *Garneau v. Dozier*, 102 U. S. 230, 234, 26 L. Ed. 133.

85. *What are "pioneer" patents.*—*Singer Mfg. Co. v. Cramer*, 192 U. S. 265, 276, 48 L. Ed. 437; *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 42 L. Ed. 1136; *Cimiotti Unhairing Co. v. American Fur Ref. Co.*, 198 U. S. 399, 406, 49 L. Ed. 1100.

*Examples of "pioneer" patents.*—Most conspicuous examples of pioneer patents are: The one to Howe of the sewing machine; to Morse of the electrical telegraph; and to Bell of the telephone. *Singer Mfg. Co. v. Cramer*, 192 U. S. 265, 276, 48 L. Ed. 437; *Cimiotti Unhairing Co. v. American Fur Ref. Co.*, 198 U. S. 399, 406, 49 L. Ed. 1100.

86. *Pioneer patents liberally construed.*—*Westinghouse v. Boyden Power Brake*

pioneer patents, the rights of the patentee cannot be extended beyond his real invention.<sup>87</sup>

c. *Patents for Improvements*.—Where the patentee is not a pioneer in that field of the art wherein his invention lies, and his invention is a mere improvement of prior devices, his patent must be limited to the particular device claimed.<sup>88</sup>

Co., 170 U. S. 537, 42 L. Ed. 1136; Singer Mfg. Co. v. Cramer, 192 U. S. 265, 48 L. Ed. 437; Cimiotti Unhairing Co. v. American Fur Ref. Co., 198 U. S. 399, 406, 49 L. Ed. 1100; Hobbs v. Beach, 180 U. S. 383, 400, 45 L. Ed. 586; Miller v. Eagle Mfg. Co., 151 U. S. 186, 38 L. Ed. 121; Morley Sewing Machine Co. v. Lancaster, 129 U. S. 263, 32 L. Ed. 715; Sewall v. Jones, 91 U. S. 171, 184, 23 L. Ed. 275; Clough v. Barker, 106 U. S. 166, 27 L. Ed. 134; Railway Co. v. Sayles, 97 U. S. 534, 24 L. Ed. 1053; Royer v. Schultz Belting Co., 135 U. S. 319, 34 L. Ed. 214; Sessions v. Romadka, 145 U. S. 29, 45, 36 L. Ed. 609; Keystone Mfg. Co. v. Adams, 151 U. S. 139, 38 L. Ed. 103; Ives v. Hamilton, 92 U. S. 426, 23 L. Ed. 494; Hoyt v. Horne, 145 U. S. 302, 36 L. Ed. 713; Deering v. Winona Harvester Works, 155 U. S. 286, 295, 39 L. Ed. 153; The Corn-Planter Patent, 23 Wall. 181, 23 L. Ed. 161; Wright v. Yuengling, 155 U. S. 47, 52, 39 L. Ed. 64; Bene v. Jeantet, 129 U. S. 683, 686, 32 L. Ed. 803; Computing Scale Co. v. Automatic Scale Co., 204 U. S. 609, 621, 51 L. Ed. 645.

In determining whether the means employed by an alleged infringing machine are the same, a patent is to receive a liberal construction and must not be limited to the particular device described, where the patentee was a pioneer in the construction of such machines. *Morley Sewing Machine Co. v. Lancaster*, 129 U. S. 263, 286, 32 L. Ed. 715.

When in a class of machines widely used, it is made to appear that at last, after repeated and futile attempts, a machine has been contrived which accomplished the result desired, and when the patent office has granted a patent to the successful inventor, the courts should not be ready to adopt a narrow or astute construction, fatal to the grant. *Keystone Mfg. Co. v. Adams*, 151 U. S. 139, 144, 38 L. Ed. 103.

A pioneer in the art of making a practical metallic trunk fastener, who has invented a principle which has gone into almost universal use, is entitled to a liberal construction of his claim, and a device, containing all the elements of the combination, should be held an infringement, though there are superficial dissimilarities in their construction. *Sessions v. Romadka*, 145 U. S. 29, 45, 36 L. Ed. 609.

**Range of equivalents as affected by character as pioneer or otherwise.**—See post, "Range of Equivalents," XIII, A, 2, a, (2), (c), bb.

**87.** *Bene v. Jeantet*, 129 U. S. 683, 32 L. Ed. 803.

**88. Patents for improvements limited to particular device claimed.**—*Bridge v. Excelsor Co.*, 105 U. S. 618, 26 L. Ed. 1190; *Sutter v. Robinson*, 119 U. S. 530, 30 L. Ed. 492; *Royer v. Coupe*, 146 U. S. 524, 36 L. Ed. 1073; *Manufacturing Co. v. Ladd*, 102 U. S. 408, 26 L. Ed. 184; *Sargent v. Hall Safe, etc., Co.*, 114 U. S. 63, 29 L. Ed. 67; *Eddy v. Dennis*, 95 U. S. 560, 24 L. Ed. 363; *McCormick v. Talcott*, 20 How. 402, 15 L. Ed. 930; *Knapp v. Morss*, 150 U. S. 221, 229, 37 L. Ed. 1059; *Singer Mfg. Co. v. Cramer*, 192 U. S. 265, 48 L. Ed. 437; *Wollensak v. Reiher*, 115 U. S. 87, 94, 29 L. Ed. 350; *Deering v. Winona Harvester Works*, 155 U. S. 286, 295, 39 L. Ed. 153; *Consolidated Roller Mill Co. v. Walker*, 138 U. S. 124, 133, 34 L. Ed. 920; *Phoenix Caster Co. v. Spiegel*, 133 U. S. 360, 369, 33 L. Ed. 663; *Dryfoos v. Wiese*, 124 U. S. 32, 31 L. Ed. 362; *Thompson v. Boisselier*, 114 U. S. 1, 29 L. Ed. 76; *Duff v. Sterling Pump Co.*, 107 U. S. 636, 639, 27 L. Ed. 517; *Newton v. Furst, etc., Co.*, 119 U. S. 373, 30 L. Ed. 442; *Bragg v. Fitch*, 121 U. S. 478, 30 L. Ed. 1008; *Crawford v. Heysinger*, 123 U. S. 589, 31 L. Ed. 269; *Kokomo Fence Machine Co. v. Kitselman*, 189 U. S. 8, 19, 47 L. Ed. 689; *Wollensak v. Sargent*, 151 U. S. 221, 224, 38 L. Ed. 137; *Plummer v. Sargent*, 120 U. S. 442, 30 L. Ed. 737; *McCormick v. Graham*, 129 U. S. 1, 32 L. Ed. 593; *Railway Co. v. Sayles*, 97 U. S. 554, 556, 24 L. Ed. 1053; *Clark Thread Co. v. Williamantic Linen Co.*, 140 U. S. 481, 35 L. Ed. 521; *Evans v. Eaton*, 7 Wheat. 356, 5 L. Ed. 472; *Wright v. Yuengling*, 155 U. S. 47, 52, 39 L. Ed. 64; *Boyd v. Janesville Hay Tool Co.*, 158 U. S. 260, 39 L. Ed. 973; *Gordon v. Warder*, 150 U. S. 47, 37 L. Ed. 992; *Grier v. Wilt*, 120 U. S. 412, 30 L. Ed. 712; *Carnegie Steel Co. v. Cambria Iron Co.*, 185 U. S. 403, 46 L. Ed. 968.

Where a patentable invention is but one in a series of improvements, all having the same general object and purpose, the patent must be restricted to the precise form and arrangement of parts described in the specification, and to the purpose indicated therein. *Bragg v. Fitch*, 121 U. S. 478, 483, 30 L. Ed. 1008.

Where an invention, a mere improvement of prior devices, was of doubtful utility and never went into practical use, a broad construction would operate rather to the discouragement than the promotion of inventive talent. *Deering v. Winona*



8. CONSTRUCTION OF PATENTEE ADOPTED.—When a patent bears on its face a particular construction, inasmuch as the specification and claim are in the words of the patentee, it is reasonable to hold that such a construction may be

Harvester Works, 155 U. S. 286, 295, 39 L. Ed. 153.

The contention of an applicant that since his idea of utilizing a vertical double brace as a support for a sewing machine treadle was new, the combination devised by him produced such new and useful results and exhibited such an exercise of the inventive faculty as to cause the patent to be a pioneer cannot be supported so as to entitle the patentee to demand a broad and liberal construction for his claim where at the time of his alleged invention a vertical and a lower cross brace were common adjuncts of sewing machines, it being also customary to support the lower cross brace, in the web of the legs of the machine, and to utilize the legs as bearings and it being old in machinery to employ solid castings as bearings or supports for oscillating shafts where a fixed alignment was essential. *Singer Mfg. Co. v. Cramer*, 192 U. S. 265, 48 L. Ed. 437.

A patent for bronzing iron, which has been especially cleansed and oiled by subjecting it to such a degree of heat as to cause a simultaneous and joint oxidation of the iron and oil, must be restricted to that exact method, where previous to its issuance iron had been bronzed by coating it with oil and subjecting it to such a degree of heat as to cause the oxidation of the oil only. *Plummer v. Sargent*, 120 U. S. 442, 30 L. Ed. 737.

The claim of a patent for the telegraph was as follows: "I do not propose to limit myself to the specific machinery or parts of machinery described in the foregoing specifications and claims; the essence of my invention being the use of the motive power of the electric or galvanic current, which I call electro-magnetism, however developed, for making or printing intelligible characters, signs or letters at any distances, being a new application of that power, of which I claim to be the first inventor or discoverer." Held, that the patentee was limited to the particular thing patented and described. *O'Reilly v. Morse*, 15 How. 62, 14 L. Ed. 601.

A patent for a fruit drier of movable trays the outer walls of which constitute the drying house, and the arrangement in such fruit drier with such trays of a suspending device connected with the drier to the lowermost tray, so as to raise that tray, with all those above it, and allow the insertion underneath all of a fresh tray and then lower the trays, and couple the suspending device again to the tray which is at the bottom being one for mechanism and not for a process, must be limited to the mechanism described and shown in view of the fact that movable trays the outer walls of which constitute the drying chambers were old and other apparatus

had been used for raising and suspending the trays for the purpose of inserting other trays underneath. *Grier v. Wilt*, 120 U. S. 412, 30 L. Ed. 712.

In a suit for infringement of a process for mixing molten metals tapped from blast furnaces, it is unnecessary to consider whether a claim for a process of mixing molten metals would be void if construed to include the products of cupola as well as blast furnaces, when the specification, taken in connection with the disclaimer, which describes a process designed to dispense with the use of cupolas, shows that it was intended to include metal tapped from blast furnaces and was probably intended to be limited to that. *Carnegie Steel Co. v. Cambria Iron Co.*, 185 U. S. 403, 432, 46 L. Ed. 968.

Where the invention in a patent for improvements in car trucks consists in turning a rigid into a floating bolster by adding a guide plate and resting its ends upon springs in the side trusses, if there were anything more in this than mechanical skill, or the aggregation of familiar devices each operating in its old way, to produce an aggregated result, it was invention of such a limited character as to require a narrow construction. *McCarty v. Lehigh Valley R. Co.*, 160 U. S. 110, 118, 40 L. Ed. 358.

Where in the field of washboards made of sheet metal, with the surface broken into protuberances formed of the body of the metal, so as to make a rasping surface, and to strengthen the metal by its form, and to provide channels for the water to run off, the patentee was not a pioneer, the invention must be restricted to the form shown and described by the patentee. *Duff v. Sterling Pump Co.*, 107 U. S. 636, 639, 27 L. Ed. 517.

A patent for an "improvement in harvesters" being a modified combination of old features, in view of the state of the art and of the special limitation put upon it on the requirement of the patent office, must be limited to the special construction and arrangement set forth. *McCormick v. Graham*, 129 U. S. 1, 32 L. Ed. 593.

Where the capacity of the finger-beam to "rise and fall freely at either end" had been used for many years in mowing and reaping machines and it was also old to have a lever, loosely connected, by which the driver could tip up the front edge of the finger-bar arbitrarily and secure it so that it could not fall below the inclination at which he had set it, although it was left free to tip up further automatically, it is apparent, from the proceedings of the patent office on an application for an improvement in harvesters and from the terms of patentee's specifications and claims as granted, that the intention was

confirmed by what the patentee said when he was making his application. The understanding of a party to a contract has always been regarded as of some importance in its interpretation.<sup>89</sup>

9. CONSTRUED TO EMBRACE EQUIVALENTS.—The exclusive right to the thing patented is not secured, if the public are at liberty to make substantial copies of it, varying its forms or proportions. And, therefore, the patentee, having described his invention, and shown its principles, and claimed it in that form which most perfectly embodies it, is, in contemplation of law, deemed to claim every form in which his invention may be copied, unless he manifests an intention to disclaim some of those forms.<sup>90</sup>

10. CONSTRUCTION OF PATENTS FOR COMBINATIONS.—A patent for a combination must be limited to the particular combination of elements described in the claim,<sup>91</sup> and is not to be construed as securing a monopoly for any of the constituent elements thereof<sup>92</sup> or for a combination consisting of more<sup>93</sup> or less<sup>94</sup> than all of its elements.

11. PAROL EVIDENCE.—While extrinsic evidence is admissible for the purpose

to limit the modification which he made to the particular location of the swivel-joint on which the cross wise rocking movement takes place and to the rigid arm by which the positive rocking of the finger-beam in both directions is effected and controlled. *McCormick v. Graham*, 129 U. S. 1, 14, 32 L. Ed. 593.

A claim for an improvement in harvesters which consists of "a binding arm, capable of adjustment in the direction of the length of the grain, in combination with an automatic twisting device" must be restricted to the devices applied to render the binder and twister adjustable to the varying length of the stalks to be bound, for although not anticipated by earlier patents, such a state of art was brought about as to require the scope of the patent to be closely limited to the devices claimed. *Gordon v. Warder*, 150 U. S. 47, 37 L. Ed. 992.

89. Construction of patentee adopted.—*Goodyear Dental Vulcanite Co. v. Davis*, 102 U. S. 222, 227, 26 L. Ed. 149.

90. Construction to embrace equivalents.—*Winans v. Denmead*, 15 How. 330, 14 L. Ed. 717. See post, "Use of Equivalents," XIII, A, 2, a, (2), (e).

91. Combination limited to that described.—*Vance v. Campbell*, 1 Black 427, 17 L. Ed. 168; *Schumacher v. Cornell*, 96 U. S. 549, 554, 24 L. Ed. 676; *Hubbell v. United States*, 179 U. S. 77, 82, 45 L. Ed. 95; *Fay v. Cordesman*, 109 U. S. 408, 27 L. Ed. 979; *Shepard v. Carrigan*, 116 U. S. 593, 29 L. Ed. 723. See post, "Combinations," XIII, A, 4, d.

A claim for a combination of several devices, so combined together as to produce a particular result, is not good as a claim for "any mode of combining those devices which would produce that result," and can only be sustained as a valid claim for the peculiar combination of devices invented and described. *Case v. Brown*, 2 Wall. 320, 17 L. Ed. 817; *Burr v. Duryee*, 1 Wall. 531, 553, 17 L. Ed. 650.

92. Patent for combination does not in-

clude elements.—*Rowell v. Lindsay*, 113 U. S. 97, 28 L. Ed. 906.

The patent of the plaintiffs is for a combination only. None of the separate elements of which the combination is composed are claimed as the invention of the patentee, therefore none of them standing alone are included in the monopoly of the patent. *Rowell v. Lindsay*, 113 U. S. 97, 101, 28 L. Ed. 906.

93. Combination of more elements than embraced by patent.—*Vance v. Campbell*, 1 Black 427, 17 L. Ed. 168; *Schumacher v. Cornell*, 96 U. S. 549, 554, 24 L. Ed. 676.

94. Combination of less elements than patent.—*Water-Meter Co. v. Desper*, 101 U. S. 332, 337, 25 L. Ed. 1024; *Schumacher v. Cornell*, 96 U. S. 549, 554, 24 L. Ed. 676; *Vance v. Campbell*, 1 Black 427, 17 L. Ed. 168; *Fay v. Cordesman*, 109 U. S. 408, 27 L. Ed. 979; *Hubbell v. United States*, 179 U. S. 77, 82, 45 L. Ed. 95; *Shepard v. Carrigan*, 116 U. S. 593, 29 L. Ed. 723.

"Our law requires the patentee to specify particularly what he claims to be new, and if he claims a combination of certain elements or parts, we cannot declare that any one of these elements is immaterial." *Water-Meter Co. v. Desper*, 101 U. S. 332, 337, 25 L. Ed. 1024.

In the case of *Fay v. Cordesman*, 109 U. S. 408, 27 L. Ed. 979, it was said by Mr. Justice Blatchford, who delivered the judgment: "The claims of the patents sued on in this case are claims for combinations. In such a claim, if the patentee specifies any element as entering into the combination, either directly by the language of the claim, or by such a reference to the descriptive part of the specification as carries such element into the claim, he makes such element material to the combination, and the court cannot declare it to be immaterial. It is his province to make his own claim and his privilege to restrict it. If it be a claim to a combination, and be restricted to specified elements, all must be regarded as material, leaving open only the question

of explaining the terms used in a patent,<sup>95</sup> the general rule that parol or extrinsic evidence is inadmissible for the purpose of varying a written instrument is applicable to patents, and correspondence between the applicant for a patent and the commissioner of patents cannot be allowed to enlarge, diminish, or vary the language of a patent afterwards issued.<sup>96</sup>

12. **PROVINCE OF COURT AND JURY.**—As a general rule the construction of a patent is for the court.<sup>97</sup> But when a claim does not point out and designate the particular elements which compose a combination, but only declares, as it properly may, that the combination is made up of so much of the described machinery as effects a particular result, it is a question of fact which of the described parts are essential to produce that result, and to this extent, not the construction of the claim, strictly speaking, but the application of the claim, should be left to the jury.<sup>98</sup>

### VIII. Reissue.

**A. Definition and Nature.**—A reissue is in the nature of an amendment for the purpose of giving validity and effectiveness to an inoperative or defective patent.<sup>99</sup>

**B. Power to Grant Reissue.**—By statute, power is now expressly conferred upon the commissioner of patents to allow reissues of patents.<sup>1</sup> And, even in the absence of any statute upon the subject, it has held that a reissue could be granted by the proper officer of the government.<sup>2</sup>

**C. Persons Entitled to Reissue.**—Reissues may be granted to the inventor or his assignee,<sup>3</sup> but it is the duty of the commissioner to decide whether the

whether an omitted part is supplied by an equivalent device or instrumentality." *Shepard v. Carrigan*, 116 U. S. 593, 597, 29 L. Ed. 723; *Hubbell v. United States*, 179 U. S. 77, 82, 45 L. Ed. 95.

95. **Explaining terms used.**—*Loom Co. v. Higgins*, 105 U. S. 580, 26 L. Ed. 1177.

**Expert evidence.**—See post, "Expert Evidence," XIII, B, 5, e, (2).

96. **Extrinsic evidence to vary.**—*Good-year Dental Vulcanite Co. v. Davis*, 102 U. S. 222, 227, 26 L. Ed. 149. See the title **PAROL EVIDENCE**, ante, p. 12.

97. **Province of court and jury.**—*Silsby v. Foote*, 14 How. 218, 225, 14 L. Ed. 394; *Coupe v. Royer*, 155 U. S. 565, 39 L. Ed. 263; *Heald v. Rice*, 104 U. S. 737, 26 L. Ed. 910; *Miller v. Eagle Mfg. Co.*, 151 U. S. 186, 196, 38 L. Ed. 121; *Powder Co. v. Powder Works*, 98 U. S. 126, 134, 25 L. Ed. 77; *Bates v. Coe*, 98 U. S. 31, 38, 25 L. Ed. 68; *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33.

In construing patents, it is the province of the court to determine what the subject matter is upon the whole face of the specification and the accompanying drawings. *Bates v. Coe*, 98 U. S. 31, 38, 25 L. Ed. 68.

Whether a patent is for a process or a composition is especially a question of construction, and is for the court to decide; and whether a patent for a process is the same invention as a patent for a composition is certainly a mere question of law. *Powder Co. v. Powder Works*, 98 U. S. 126, 134, 25 L. Ed. 77.

98. *Silsby v. Foote*, 14 How. 218, 219, 14 L. Ed. 394.

99. **Definition and nature.**—*Dobson v.*

*Lees*, 137 U. S. 258, 34 L. Ed. 652; *Grant v. Raymond*, 6 Pet. 218, 8 L. Ed. 376.

1. **Power of commissioner to reissue.**—*Rev. Stat.*, § 4916; *Seymour v. Osborne*, 11 Wall. 516, 542, 20 L. Ed. 33. See, also, *Wilson v. Rousseau*, 4 How. 646, 11 L. Ed. 1141; *Allen v. Culp*, 166 U. S. 501, 504, 41 L. Ed. 1093; *Shaw v. Cooper*, 7 Pet. 292, 315, 8 L. Ed. 689; *Read v. Bowman*, 2 Wall. 591, 17 L. Ed. 812; *Bantz v. Frantz*, 105 U. S. 160, 26 L. Ed. 1013; *Russell v. Dodge*, 93 U. S. 460, 23 L. Ed. 973; *Ball v. Langles*, 102 U. S. 128, 26 L. Ed. 104; *The Corn-Planter Patent*, 23 Wall. 181, 23 L. Ed. 161.

2. **In absence of statute.**—*Grant v. Raymond*, 6 Pet. 218, 8 L. Ed. 376; *Shaw v. Cooper*, 7 Pet. 292, 310, 8 L. Ed. 689; *Battin v. Taggart*, 17 How. 74, 82, 15 L. Ed. 37; *Wilson v. Rousseau*, 4 How. 646, 685, 11 L. Ed. 1141.

3. **Persons entitled to reissue.**—Section 13, Patent Act of 1836; *Commissioner of Patents v. Whiteley*, 4 Wall. 522, 18 L. Ed. 335; *Rubber Co. v. Goodyear*, 9 Wall. 788, 19 L. Ed. 566.

**Assignee of part of patent.**—*Semble*, that an applicant for a reissue of a patent under the thirteenth section of the Patent Act of 1836, which allows a reissue in certain cases to a patentee "and in case of his death or any assignment by him made of the original patent," vests a similar right "in his executors, administrators, or assignees," must be an assignee of the whole interest in the patent; and not the assignee of a sectional interest only. *Commissioner of Patents v. Whiteley*, 4 Wall. 522, 18 L. Ed. 335.



interest is such as to entitle the applicant to a reissue.<sup>4</sup>

**D. Grounds for Reissue**—1. **NECESSITY FOR PATENT TO BE INOPERATIVE OR INVALID.**—While, in order to obtain a reissue, a patent must be inoperative or invalid,<sup>5</sup> it is not necessary that it should be totally inoperative or absolutely void, but it is sufficient that it fails to secure to him that which he has invented and claimed.<sup>6</sup> Indeed a reissue may be had to cure an immaterial error.<sup>7</sup>

2. **NECESSITY FOR MISTAKE, ACCIDENT, ETC.**—In order to have a reissue, the error or defect sought to be cured thereby must have arisen from inadvertence, accident or mistake, and without any fraudulent or deceptive intention.<sup>8</sup> A reissue cannot be had merely to correct errors of judgment.<sup>9</sup>

4. **Duty of commissioner to decide on interest of applicant.**—Where a statute directed the commissioner of patents to grant a reissue of patents in certain cases, to "assignees," it is the duty of the commissioner to decide whether the applicant is an assignee with such an interest as entitled him to a reissue within the meaning of the statutory provision on the subject. *Commissioner of Patents v. Whiteley*, 4 Wall. 522, 18 L. Ed. 335.

5. **Patent must be inoperative or invalid.**—*Russell v. Dodge*, 93 U. S. 460, 23 L. Ed. 973; *Gill v. Wells*, 22 Wall. 1, 19, 22 L. Ed. 699; *Eames v. Andrews*, 122 U. S. 40, 30 L. Ed. 1064; *Burr v. Duryee*, 1 Wall. 531, 577, 17 L. Ed. 650; *James v. Campbell*, 104 U. S. 356, 26 L. Ed. 786.

Mr. Justice Grier, in the case of *Burr v. Duryee*, 1 Wall. 531, 17 L. Ed. 650, says: "The surrender of valid patents, and the granting of reissued patents thereon, with expanded or equivocal claims, when the original was clearly neither 'inoperative nor invalid,' and whose specification is neither 'defective nor insufficient,' is a great abuse of the privilege granted by the statute, and productive of great injury to the public." *James v. Campbell*, 104 U. S. 356, 26 L. Ed. 786.

In *Russell v. Dodge*, 93 U. S. 460, 23 L. Ed. 973, it was held that according to the provisions of the statutes in reference to reissues, a reissue could only be had where the original patent was inoperative or invalid. *Eames v. Andrews*, 122 U. S. 40, 63, 30 L. Ed. 1064.

6. **Patent need not be wholly inoperative or invalid.**—*Hobbs v. Beach*, 180 U. S. 383, 394, 45 L. Ed. 586.

The object of a patentee applying for a reissue is not to reopen the question of the validity of the original patent, but to rectify any error which may have been found to have arisen from his inadvertence or mistake. *McCormick Harvesting Machine Co. v. Aultman*, 169 U. S. 606, 610, 42 L. Ed. 875.

7. **Correction of immaterial error.**—Although an error is not such as to impair the patentee's rights, he is entitled to secure the full scope of his invention by a reissue, if the error is purely an inadvertent one. *Hobbs v. Beach*, 180 U. S. 383, 394, 45 L. Ed. 586.

8. **Error must have arisen from accident, mistake, etc.**—Rev. Stat., § 4916; Act of 1870; *Gill v. Wells*, 22 Wall. 1, 15, 22

L. Ed. 699; *Eachus v. Broomall*, 115 U. S. 429, 438, 29 L. Ed. 419; *Morey v. Lockwood*, 8 Wall. 230, 240, 19 L. Ed. 339; *Shaw v. Cooper*, 7 Pet. 292, 315, 8 L. Ed. 689; *Read v. Bowman*, 2 Wall. 591, 17 L. Ed. 812; *Bantz v. Frantz*, 105 U. S. 160, 26 L. Ed. 1013; *McCormick Harvesting Machine Co. v. Aultman*, 169 U. S. 606, 609, 42 L. Ed. 875; *Eby v. King*, 158 U. S. 366, 39 L. Ed. 1018; *Yale Lock Mfg. Co. v. James*, 125 U. S. 447, 31 L. Ed. 807; *Coon v. Wilson*, 113 U. S. 268, 277, 28 L. Ed. 963; *Ives v. Sargent*, 119 U. S. 652, 30 L. Ed. 544; *Parker, etc., Co. v. Yale Clock Co.*, 123 U. S. 87, 31 L. Ed. 100; *Yale Lock Mfg. Co. v. Berkshire Nat. Bank*, 135 U. S. 342, 34 L. Ed. 168; *Miller v. Brass Co.*, 104 U. S. 350, 26 L. Ed. 783; *Dunham v. Dennison Mfg. Co.*, 154 U. S. 103, 38 L. Ed. 924; *Worden v. Searls*, 121 U. S. 14, 30 L. Ed. 853; *Manufacturing Co. v. Ladd*, 102 U. S. 408, 26 L. Ed. 184; *Matthews v. Ironclad Mfg. Co.*, 124 U. S. 347, 31 L. Ed. 477; *Huber v. Nelson Mfg. Co.*, 148 U. S. 270, 37 L. Ed. 447; *Olin v. Timken*, 155 U. S. 141, 39 L. Ed. 100.

A reissue cannot be allowed unless the imperfections in the original patent arose without fraud, and from inadvertence, accident or mistake. Rev. Stat., § 4916; *Dobson v. Lees*, 137 U. S. 258, 265, 34 L. Ed. 652.

There must be a real bona fide mistake, inadvertently committed. *Miller v. Brass Co.*, 104 U. S. 350, 355, 26 L. Ed. 783.

Where the description and claim of the original specifications were entirely sufficient to cover the device, and no inadvertence, accident or mistake is shown, a reissue enlarging the original claim cannot be allowed. *Worden v. Searls*, 121 U. S. 14, 30 L. Ed. 853.

A reissue of a patent not defective, or insufficient in the original, manifestly obtained for the sole purpose of securing an enlarged claim, is invalid. *Yale Lock Mfg. Co. v. Berkshire Nat. Bank*, 135 U. S. 342, 378, 34 L. Ed. 168.

9. **Correction of errors of judgment.**—*Yale Lock Mfg. Co. v. James*, 125 U. S. 447, 463, 31 L. Ed. 807; *Manufacturing Co. v. Ladd*, 102 U. S. 408, 26 L. Ed. 184; *Miller v. Brass Co.*, 104 U. S. 350, 26 L. Ed. 783.

An error of judgment may be corrected by appeal. *Miller v. Brass Co.*, 104 U. S. 350, 26 L. Ed. 783.

3. **MISTAKE OF PATENT OFFICE.**—A mistake of the patent office in too narrowly restricting a claim may be corrected by a reissue.<sup>10</sup>

**E. Defects Remediable by Reissue.**—1. **DEFECTS IN SPECIFICATION.**—A reissue may be had to cure defects or errors in the specification,<sup>11</sup> or to remove ambiguity or obscurity in the description contained therein.<sup>12</sup> The patentee may be permitted to redescribe his invention and to include in the description and claims of the patent not only what was well described before, but whatever else was suggested or substantially indicated in the specification or drawings which properly belonged to the invention as actually made and perfected.<sup>13</sup>

2. **DEFECTS IN CLAIM.**—a. *Right to Restate Claim.*—Where a patentee has been apprised of the weak points in his prior specification and claims, it is perfectly competent for him to restate them, in the reissue, provided that his patent is not essentially broadened to cover intervening devices.<sup>14</sup>

b. *Right to Restrict or Narrow Claim.*—A reissue may also be had for the purpose of narrowing a claim.<sup>15</sup>

c. *Right to Enlarge or Expand Claim.*—While the scope of the original invention cannot be enlarged by a reissue,<sup>16</sup> a reissue may be had for the purpose

10. **Correcting mistake of patent office.**—Where a claim has been too narrowly limited through an erroneous supposition that prior inventions would be covered, it is the right, and, as it would seem, the duty of the commissioner, upon being satisfied of the mistake, to grant a reissue with an amended specification and a broader claim. *Morey v. Lockwood*, 8 Wall. 230, 19 L. Ed. 339. See, also, *Grant v. Raymond*, 6 Pet. 218, 8 L. Ed. 376.

11. **Defects in specification.**—*Battin v. Taggart*, 17 How. 74, 15 L. Ed. 37; *Topliff v. Topliff*, 145 U. S. 156, 170, 36 L. Ed. 658; *Russell v. Dodge*, 93 U. S. 460, 463, 23 L. Ed. 973; *Collar Co. v. Van Dusen*, 23 Wall. 530, 557, 23 L. Ed. 128; *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33; *Eames v. Andrews*, 122 U. S. 40, 59, 30 L. Ed. 1064; *O'Reilly v. Morse*, 15 How. 62, 112, 14 L. Ed. 601; *Gill v. Wells*, 22 Wall. 1, 15, 22 L. Ed. 699.

12. **Removal of ambiguity or obscurity.**—*James v. Campbell*, 104 U. S. 356, 370, 26 L. Ed. 786; *Russell v. Dodge*, 93 U. S. 460, 23 L. Ed. 973.

A defective specification may be rendered more definite and certain so as to embrace the claim made, or the claim be so modified as to correspond with the specifications. *Russell v. Dodge*, 93 U. S. 460, 463, 23 L. Ed. 973. See, also, *Eames v. Andrews*, 122 U. S. 40, 30 L. Ed. 1064.

13. **Enlarging specification to secure invention.**—*Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33.

14. **Restating claim.**—*Hobbs v. Beach*, 180 U. S. 383, 396, 45 L. Ed. 586.

15. **Narrowing claim.**—*Thomson v. Wooster*, 114 U. S. 104, 29 L. Ed. 105; *Seymour v. Osborne*, 11 Wall. 516, 545, 20 L. Ed. 33; *Gill v. Wells*, 22 Wall. 1, 15, 22 L. Ed. 699.

Corrections may be made in the description, specification or claim where the patentee has claimed as new more than he had a right to claim. *Seymour v. Osborne*, 11 Wall. 516, 545, 20 L. Ed. 33.

16. **Enlargement of scope of invention.**—*Mahn v. Harwood*, 112 U. S. 354, 28 L. Ed. 665; *Dunham v. Dennison Mfg. Co.*, 154 U. S. 103, 38 L. Ed. 924; *Miller v. Brass Co.*, 104 U. S. 350, 26 L. Ed. 783; *Topliff v. Topliff*, 145 U. S. 156, 36 L. Ed. 658; *Huber v. Nelson Mfg. Co.*, 148 U. S. 270, 37 L. Ed. 447; *Leggett v. Standard Oil Co.*, 149 U. S. 287, 37 L. Ed. 737; *Corbin Cabinet Lock Co. v. Eagle Lock Co.*, 150 U. S. 38, 37 L. Ed. 989; *Hoffheins v. Russell*, 107 U. S. 132, 27 L. Ed. 332; *Eames v. Andrews*, 122 U. S. 40, 30 L. Ed. 1064; *Eby v. King*, 158 U. S. 366, 39 L. Ed. 1018; *Coon v. Wilson*, 113 U. S. 268, 277, 28 L. Ed. 963; *Gill v. Wells*, 22 Wall. 1, 19, 22 L. Ed. 699; *James v. Campbell*, 104 U. S. 356, 26 L. Ed. 786; *Parker, etc., Co. v. Yale Clock Co.*, 123 U. S. 87, 31 L. Ed. 100; *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33; *Russell v. Dodge*, 93 U. S. 460, 23 L. Ed. 973; *Yale Lock Mfg. Co. v. James*, 125 U. S. 447, 31 L. Ed. 807; *Cornell v. Weidner*, 127 U. S. 261, 264, 32 L. Ed. 148; *Matthews v. Ironclad Mfg. Co.*, 124 U. S. 347, 351, 31 L. Ed. 477; *Farmers' Friend Mfg. Co. v. Challenge Corn-Planter Co.*, 128 U. S. 506, 510, 32 L. Ed. 529; *Wollensak v. Reiher*, 115 U. S. 87, 96, 29 L. Ed. 355; *Burr v. Duryee*, 1 Wall. 531, 17 L. Ed. 650; *Manufacturing Co. v. Ladd*, 102 U. S. 408, 26 L. Ed. 184; *Powder Co. v. Powder Works*, 98 U. S. 126, 25 L. Ed. 77; *Ball v. Langles*, 102 U. S. 128, 26 L. Ed. 104; *Johnson v. Railroad Co.*, 105 U. S. 539, 26 L. Ed. 1162; *Cochrane v. Badische, etc., Soda Fabrik*, 111 U. S. 293, 28 L. Ed. 433; *Turner, etc., Mfg. Co. v. Dover Stamping Co.*, 111 U. S. 319, 28 L. Ed. 442; *Gosling v. Roberts*, 106 U. S. 39, 47, 27 L. Ed. 61; *Yale Lock Mfg. Co. v. Sargent*, 117 U. S. 536, 29 L. Ed. 954; *McMurray v. Mallory*, 111 U. S. 97, 105, 28 L. Ed. 365; *Bantz v. Frantz*, 105 U. S. 160, 26 L. Ed. 1013; *Mathews v. Machine Co.*, 105 U. S. 54, 26 L. Ed. 1022; *Manufacturing Co. v. Corbin*, 103 U. S. 786, 791, 26

of enlarging the claim so as to embrace what the patentee really invented;<sup>17</sup> in other words, the patentee may perfect but not enlarge his invention.<sup>18</sup> But to warrant new and broader claims in a reissue, such claims must not be merely suggested or indicated in the original specification, drawings, or models, but it must further appear from the original patent that they constitute parts or portions of the invention which were intended or sought to be covered or secured by such original patent.<sup>19</sup> The decisions are unanimous in denying reissues applied for with the sole purpose of enlarging the claim so as to cover new forms of improvement, or new devices, made by other inventors.<sup>20</sup>

L. Ed. 610; *The Wood-Paper Patent*, 23 Wall. 566, 568, 23 L. Ed. 31; *Miller v. Brass Co.*, 104 U. S. 350, 26 L. Ed. 783; *Heald v. Rice*, 104 U. S. 737, 26 L. Ed. 910; *Wing v. Anthony*, 106 U. S. 142, 27 L. Ed. 110; *White v. Dunbar*, 119 U. S. 47, 52, 30 L. Ed. 303; *Freeman v. Asmus*, 145 U. S. 226, 36 L. Ed. 685. See post, "Identity of Invention," VIII, G.

**17. Enlarging of claims so as to secure patentee's invention.**—*Corbin Cabinet Lock Co. v. Eagle Lock Co.*, 150 U. S. 38, 37 L. Ed. 989; *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33; *The Corn-Planter Patent*, 23 Wall. 181, 23 L. Ed. 161; *Russell v. Dodge*, 93 U. S. 460, 23 L. Ed. 973; *Rubber Co. v. Goodyear*, 9 Wall. 788, 19 L. Ed. 566; *Hobbs v. Beach*, 180 U. S. 383, 45 L. Ed. 586; *Eames v. Andrews*, 122 U. S. 40, 30 L. Ed. 1064; *Morey v. Lockwood*, 8 Wall. 230, 19 L. Ed. 339; *Topliff v. Topliff*, 145 U. S. 156, 36 L. Ed. 658; *Ives v. Sargent*, 119 U. S. 652, 30 L. Ed. 544; *Mahn v. Harwood*, 112 U. S. 354, 28 L. Ed. 665.

The claim may be changed to correspond with the specification. *Russell v. Dodge*, 93 U. S. 460, 23 L. Ed. 973.

A reissue may be had to meet a possible construction of the original whereby the patentee would be precluded from a use of his process where it was evidently intended to be applied. *Eames v. Andrews*, 122 U. S. 40, 63, 30 L. Ed. 1064.

Reissues for things contained within the machines and apparatus described in the original patents, although not claimed therein, are valid. *The Corn-Planter Patent*, 23 Wall. 181, 23 L. Ed. 161.

Where an air-tight connection was indispensable to the operation of a pump, it was implied of necessity in the original specification, as much so as if it had been expressed, and there was no enlargement of the invention in stating the fact in the reissued specification. *Eames v. Andrews*, 122 U. S. 40, 58, 30 L. Ed. 1064.

**18. Reissue to perfect, not to enlarge.**—*Steinmetz v. Allen*, 192 U. S. 543, 551, 48 L. Ed. 555; *James v. Campbell*, 104 U. S. 356, 26 L. Ed. 786; *McCormick Harvesting Machine Co. v. Aultman*, 169 U. S. 606, 610, 42 L. Ed. 875.

**19. New claims must be suggested as part of invention by original claim.**—*Corbin Cabinet Lock Co. v. Eagle Lock Co.*, 150 U. S. 38, 37 L. Ed. 989; *Seymour v. Osborne*, 11 Wall. 516, 544, 20 L. Ed. 33; *The Corn-Planter Patent*, 23 Wall. 181, 23

L. Ed. 161; *Gill v. Wells*, 22 Wall. 1, 32, 22 L. Ed. 699; *Huber v. Nelson Mfg. Co.*, 148 U. S. 270, 37 L. Ed. 447; *Eames v. Andrews*, 122 U. S. 40, 59, 30 L. Ed. 1064; *Russell v. Dodge*, 93 U. S. 460, 23 L. Ed. 973; *Hoskin v. Fisher*, 125 U. S. 217, 31 L. Ed. 759; *Parker, etc., Co. v. Yale Clock Co.*, 123 U. S. 87, 31 L. Ed. 100; *Flower v. Detroit*, 127 U. S. 563, 32 L. Ed. 175.

What is suggested in the original specification, drawings, or patent office model is not to be considered as a part of the invention intended to have been covered by the original patent, unless it can be seen from a comparison of the two patents that the invention which the original patent was intended to cover embraced the things thus suggested or indicated in the original specification, drawings, or patent office model, and unless the original specification indicated that those things were embraced in the invention intended to have been secured by the original patent. *Flower v. Detroit*, 127 U. S. 563, 571, 32 L. Ed. 175; *Parker, etc., Co. v. Yale Clock Co.*, 123 U. S. 87, 31 L. Ed. 100. See, also, *Hoskin v. Fisher*, 125 U. S. 217, 31 L. Ed. 759.

**20. Enlargement embracing improvements or devices of other inventors.**—*Hobbs v. Beach*, 180 U. S. 383, 45 L. Ed. 586; *Railway Co. v. Sayles*, 97 U. S. 554, 24 L. Ed. 1053; *Eby v. King*, 158 U. S. 366, 39 L. Ed. 1018; *Dunham v. Dennison Mfg. Co.*, 154 U. S. 103, 38 L. Ed. 924; *Gill v. Wells*, 22 Wall. 1, 19, 22 L. Ed. 699; *Miller v. Brass Co.*, 104 U. S. 350, 355, 26 L. Ed. 783; *Torrent Arms Lumber Co. v. Rodgers*, 112 U. S. 659, 28 L. Ed. 842; *Brown v. Davis*, 116 U. S. 237, 29 L. Ed. 659; *Turner, etc., Mfg. Co. v. Dover Stamping Co.*, 111 U. S. 319, 28 L. Ed. 442; *Parker, etc., Co. v. Yale Lock Co.*, 123 U. S. 87, 31 L. Ed. 100; *Powder Co. v. Powder Works*, 98 U. S. 126, 25 L. Ed. 77; *Clements v. Odorless, etc., Co.*, 109 U. S. 641, 27 L. Ed. 1060; *Freeman v. Asmus*, 145 U. S. 226, 36 L. Ed. 685; *Coon v. Wilson*, 113 U. S. 268, 28 L. Ed. 963; *Electric Gas-Lighting Co. v. Boston Electric Co.*, 139 U. S. 481, 35 L. Ed. 250; *Newton v. Furst, etc., Co.*, 119 U. S. 373, 30 L. Ed. 442; *Ives v. Sargent*, 119 U. S. 652, 30 L. Ed. 544; *White v. Dunbar*, 119 U. S. 47, 52, 30 L. Ed. 303; *James v. Campbell*, 104 U. S. 356, 26 L. Ed. 786. See post, "Identity of Invention," VIII, G.

It is incompetent for a patentee to abandon claims, inoperative by reason of



d. *Inclusion of Matters Rejected, Disclaimed or Omitted*.—In applications for a reissue, the patentee is not allowed to incorporate claims covering what had been previously rejected upon his original application,<sup>21</sup> or disclaimed,<sup>22</sup> or intentionally omitted.<sup>23</sup>

3. DEFECTS OR ERRORS IN DRAWINGS.—A reissue may be had for the purpose of correcting an obvious error in the drawings.<sup>24</sup>

**F. Application**—1. TIME FOR APPLICATION—a. *In General*.—The length of

anticipation and to reconstruct his patent in the reissue in order to hold as infringers others who have entered the field relying upon his original patent as representing what he claimed as his own invention. *Eby v. King*, 158 U. S. 366, 374, 39 L. Ed. 1018.

Congress never intended that a patent which was valid and operative should be reissued merely to afford the patentee an opportunity to expand the exclusive privileges which it secures, to enable him to suppress subsequent improvements which do not conflict with the invention described in the surrendered patent. *Gill v. Wells*, 22 Wall. 1, 19, 22 L. Ed. 699.

To uphold a reissue, enlarging the claims and altering the specifications throughout, would be to grant a new and distinct privilege to the patentee at the expense of innocent parties and would be inconsistent with the whole course of recent decisions in this court. *Durham v. Dennison Mfg. Co.*, 154 U. S. 103, 110, 38 L. Ed. 924.

A patent for a collar having short sectional bands which start from the center of the collar or from any point between the center and the ends, will not support a reissue for a continuous band, or for one which ignores the short sectional bands, where the collar embraced within the reissue would interfere with those made by third parties. *Coon v. Wilson*, 113 U. S. 268, 28 L. Ed. 963.

**21. Reissues embracing rejected matter void**.—*Bantz v. Frantz*, 105 U. S. 160, 26 L. Ed. 1013; *Heald v. Rice*, 104 U. S. 737, 26 L. Ed. 910; *Miller v. Brass Co.*, 104 U. S. 350, 26 L. Ed. 783; *James v. Campbell*, 104 U. S. 356, 26 L. Ed. 786; *Topliff v. Topliff*, 145 U. S. 156, 36 L. Ed. 658; *Corbin Cabinet Lock Co. v. Eagle Lock Co.*, 150 U. S. 38, 43, 37 L. Ed. 989; *Shepard v. Carrigan*, 116 U. S. 593, 29 L. Ed. 723; *Dobson v. Lees*, 137 U. S. 258, 34 L. Ed. 652; *Leggett v. Avery*, 101 U. S. 256, 25 L. Ed. 865; *Mahn v. Harwood*, 112 U. S. 354, 28 L. Ed. 665; *Yale Lock Mfg. Co. v. Berkshire Nat. Bank*, 135 U. S. 342, 34 L. Ed. 168.

Where it is clear that the claim of the reissue is not covered by the original patent, and it appears that before the issue of the latter it was passed upon and rejected; was withdrawn and erased an interference was dissolved upon condition of the amendment; and the issue of the original letters was predicated upon its abandonment, there is no room for the contention that there was any inadvertence, accident or mistake in the premises.

*Dobson v. Lees*, 137 U. S. 258, 265, 34 L. Ed. 652.

**22. Reissues embracing disclaimed matter void**.—*Leggett v. Avery*, 101 U. S. 256, 25 L. Ed. 865; *Goodyear Dental Vulcanite Co. v. Davis*, 102 U. S. 222, 26 L. Ed. 149; *Leggett v. Standard Oil Co.*, 149 U. S. 287, 293, 37 L. Ed. 737; *Beecher Mfg. Co. v. Atwater Mfg. Co.*, 114 U. S. 523, 29 L. Ed. 232.

Where, on the surrender of letters-patent, a disclaimer of a part of the inventions described in them is filed by the patentee in the patent office, and reissued letters are granted for the remainder, held, that, if in a second reissue the disclaimed inventions are embraced, he cannot sustain a bill to enjoin the infringement of them. *Leggett v. Avery*, 101 U. S. 256, 25 L. Ed. 865.

**23. Matters intentionally omitted**.—A reissue cannot be permitted to enlarge the claims of the original patent by including matters once intentionally omitted. "Acquiescence in the rejection of a claim; its withdrawal by amendment, either to save the application or to escape an interference; the acceptance of a patent containing limitations imposed by the patent office, which narrow the scope of the invention as at first described and claimed; are instances of such omission. *Union Metallic Cartridge Co. v. United States Cartridge Co.*, 112 U. S. 624, 28 L. Ed. 828; *Shepard v. Carrigan*, 116 U. S. 593, 29 L. Ed. 723; *Roemer v. Peddie*, 132 U. S. 313, 33 L. Ed. 382; *Yale Lock Mfg. Co. v. Berkshire Nat. Bank*, 135 U. S. 342, 34 L. Ed. 168." *Dobson v. Lees*, 137 U. S. 258, 265, 34 L. Ed. 652.

Assuming that a claim is new and for a patentable combination, and that the patentee would have been entitled to make it in his application for his original patent, he is debarred from making it in his reissue, where such a claim has been made and abandoned. *Yale Lock Mfg. Co. v. Berkshire Nat. Bank*, 135 U. S. 342, 379, 34 L. Ed. 168.

**24. Correction of error in drawings**.—*Hobbs v. Beach*, 180 U. S. 383, 45 L. Ed. 586.

Where a reissue of a patent is applied for merely to correct an obvious error in one of the drawings, although the error is not such as to impair the patentee's rights under his original designs, he is entitled to the full scope of his invention, and if dissatisfied with the drawings as they stand, and the error was purely an inadvertent one, it is within the jurisdiction of the commissioner of patents to order the

time which may intervene between the issuance of a patent and the application for a reissue varies with the circumstances.<sup>25</sup>

b. *Reissue to Correct Description.*—The correction of a patent by means of a reissue, where it is invalid or inoperative for want of a full and clear description of the invention, cannot be attended with such injurious results as follow where the reissue seeks an enlargement of the claim. And hence a reissue may be proper in such cases, though a longer period has elapsed since the issue of the original patent.<sup>26</sup>

c. *Reissue Expanding or Enlarging Claim.*—Since reissues expanding or enlarging the original claim may be attended with serious consequences to the public, the rule of laches is much more strictly applied in such cases than where the object of the reissue is only to correct a mistake in the description.<sup>27</sup> The circumstances of the case may be such as to require the reissue to be applied for immediately,<sup>28</sup> and the lapse of two years will ordinarily,<sup>29</sup> though not al-

patent to be reissued, when applied for in good faith and with a design only of securing to the patentee what he had actually invented. *Hobbs v. Beach*, 180 U. S. 383, 45 L. Ed. 586.

**25. Time dependent on circumstances.**—*Yale Lock Mfg. Co. v. Berkshire Nat. Bank*, 135 U. S. 342, 34 L. Ed. 168; *Wollensak v. Reiher*, 115 U. S. 96, 29 L. Ed. 350; *Mahn v. Harwood*, 112 U. S. 354, 28 L. Ed. 665; *Hartshorn v. Saginaw Barrel Co.*, 119 U. S. 664, 30 L. Ed. 539.

No precise limit of time can be fixed and laid down for all cases. If the specification is complicated and the claim involved, the patentee may be entitled to greater indulgence. The courts will always exercise a proper liberality in favor of the patentee. *Mahn v. Harwood*, 112 U. S. 354, 28 L. Ed. 665.

**26. Reissue to correct description.**—*Miller v. Brass Co.*, 104 U. S. 350, 355, 356, 26 L. Ed. 783.

**27. Rule of laches strictly applied where reissue seeks to enlarge claims.**—*Miller v. Brass Co.*, 104 U. S. 350, 355, 356, 26 L. Ed. 783.

**28. Circumstances may require immediate application.**—*Freeman v. Asmus*, 145 U. S. 226, 36 L. Ed. 685; *Miller v. Brass Co.*, 104 U. S. 350, 351, 26 L. Ed. 783; *Bantz v. Frantz*, 105 U. S. 160, 26 L. Ed. 1013; *Clements v. Odorless, etc., Co.*, 109 U. S. 641, 27 L. Ed. 1060; *Wollensak v. Reiher*, 115 U. S. 87, 96, 29 L. Ed. 355; *Mathews v. Machine Co.*, 105 U. S. 54, 26 L. Ed. 1022.

A reissue with enlarged claims was held invalid, although it was applied for within less than a year after the grant of the original patent. *Freeman v. Asmus*, 145 U. S. 226, 36 L. Ed. 685.

Where the defect appears upon the face of the patent, the reissue must be applied for immediately. *Miller v. Brass Co.*, 104 U. S. 350, 26 L. Ed. 783; *Bantz v. Frantz*, 105 U. S. 160, 26 L. Ed. 1013; *Clements v. Odorless, etc., Co.*, 109 U. S. 641, 27 L. Ed. 1060; *Wollensak v. Reiher*, 115 U. S. 96, 100, 29 L. Ed. 350.

Where the mistake suggested was merely that the claim was not as broad as

it might have been, it was apparent upon the first inspection of the patent, and if any correction was desired, it should have been applied for immediately. *Miller v. Brass Co.*, 104 U. S. 350, 26 L. Ed. 783.

Where the specification in the original patent was defective or insufficient in claiming a combination of several devices, instead of making a distinct claim for every device which entered into the combination, the fact was instantly discernible as soon as the patent was read. Therefore, if any correction was desired, it should have been applied for immediately, lest the right be abandoned and lost by unreasonable delay. *Bantz v. Frantz*, 105 U. S. 160, 26 L. Ed. 1013.

**29. Two years delay as a bar.**—*Mahn v. Harwood*, 112 U. S. 354, 28 L. Ed. 665; *Miller v. Brass Co.*, 104 U. S. 350, 26 L. Ed. 783; *Wollensak v. Reiher*, 115 U. S. 96, 29 L. Ed. 350; *Ives v. Sargent*, 119 U. S. 652, 30 L. Ed. 544; *Wollensak v. Sargent*, 151 U. S. 221, 228, 38 L. Ed. 137; *Topliff v. Topliff*, 145 U. S. 156, 170, 36 L. Ed. 658; *Johnson v. Railroad Co.*, 105 U. S. 539, 547, 26 L. Ed. 1162; *Hoskin v. Fisher*, 125 U. S. 217, 222, 31 L. Ed. 759.

Special circumstances are required to excuse a delay of two years. *Mahn v. Harwood*, 112 U. S. 354, 28 L. Ed. 665; *Ives v. Sargent*, 119 U. S. 652, 30 L. Ed. 544; *Wollensak v. Reiher*, 115 U. S. 96, 29 L. Ed. 350.

In *Topliff v. Topliff*, 145 U. S. 156, 165, 36 L. Ed. 658, a reissue, applied for within five months and as soon as the mistake was discovered and before any rights in favor of third persons could be reasonably expected to have attached, was held valid.

Where a reissue expands the claims of the original patent, and it appears that there was a delay of two years, or more, in applying for it, the delay invalidates the reissue, unless accounted for and shown to be reasonable. *Hoskin v. Fisher*, 125 U. S. 217, 222, 31 L. Ed. 759; *Wollensak v. Reiher*, 115 U. S. 96, 29 L. Ed. 350.

When an injunction bill sets out or exhibits both the original and the reissued patent, and it appears from inspection that the sole object of the reissue was to en-



ways,<sup>30</sup> be treated as evidence of an abandonment of the new matter to the public to the same extent that a failure by the inventor to apply for a patent within two years from the public use or sale of his invention is regarded by the statute as conclusive evidence of an abandonment of the patent to the public. Certainly a patentee will not be allowed to wait until other inventors have produced new forms of improvement and then, with the new light thus acquired, under pretense of an inadvertence or mistake, apply for such an enlargement of his claim as to embrace these new forms.<sup>31</sup>

d. *Reissue Narrowing Claim*.—Where in the original patent the patentee

large and expand the claims of the original, and that a delay of two or more years has taken place in applying for the reissue, not explained by special circumstances showing it to be reasonable, the question of laches is a question of law arising on the face of the bill, which avails as a defense, upon a general demurrer for want of equity. *Wollensak v. Reiher*, 115 U. S. 96, 101, 29 L. Ed. 350.

A reissue applied for after nearly four years, must be regarded as void, so far as the new and expanded claims are concerned, the delay being unreasonable and inexcusable. *Mahn v. Harwood*, 112 U. S. 354, 363, 28 L. Ed. 665.

In *Johnson v. Railroad Co.*, 105 U. S. 539, 547, 26 L. Ed. 1162, the patent was issued in 1857, and at the expiration of the original term of fourteen years an extension of seven years was granted, and a reissue was applied for after a lapse of fifteen years, and it was held, upon the authority of *Miller v. Brass Co.*, 104 U. S. 350, 26 L. Ed. 783, that if the patentee had the right to a reissue if applied for in reasonable time, he had lost it by his unreasonable delay. *Topliff v. Topliff*, 145 U. S. 156, 167, 36 L. Ed. 658.

In the case of *Miller v. Brass Co.*, 104 U. S. 350, 26 L. Ed. 783, a reissue with expanded claims was applied for fifteen years after the original patent was granted. It was held to be manifest upon the face of the patent that the suggestion of inadvertence and mistake was a mere pretense, or, if not a pretense, that the mistake was so obvious as to be instantly discernible on the opening of the patent, and the right to have it corrected was abandoned and lost by unreasonable delay. *Topliff v. Topliff*, 145 U. S. 156, 166, 36 L. Ed. 658.

**30. Lapse of two years not always conclusive.**—*Topliff v. Topliff*, 145 U. S. 156, 36 L. Ed. 658; *Thomson v. Wooster*, 114 U. S. 104, 29 L. Ed. 105.

The fact that a reissue was applied for and granted fourteen years after the original is strongly presumptive of unreasonable delay, but may be susceptible of explanation. *Thomson v. Wooster*, 114 U. S. 104, 114, 29 L. Ed. 105.

**31. Reissue embracing intervening inventions.**—*Miller v. Brass Co.*, 104 U. S. 350, 355, 26 L. Ed. 783; *Eby v. King*, 158 U. S. 366, 374, 39 L. Ed. 1018; *Torrent Arms Lumber Co. v. Rodgers*, 112 U. S. 659, 28 L. Ed. 842; *Railway Co. v. Sayles*,

97 U. S. 554, 24 L. Ed. 1053; *Hobbs v. Beach*, 180 U. S. 383, 396, 45 L. Ed. 586; *Brown v. Davis*, 116 U. S. 237, 29 L. Ed. 659; *Turner, etc., Mfg. Co. v. Dover Stamping Co.*, 111 U. S. 319, 28 L. Ed. 442; *Parker, etc., Co. v. Yale Clock Co.*, 123 U. S. 87, 31 L. Ed. 100; *Powder Co. v. Powder Works*, 98 U. S. 126, 25 L. Ed. 77; *Clements v. Odorless, etc., Co.*, 109 U. S. 641, 27 L. Ed. 1060; *Freeman v. Asmus*, 145 U. S. 226, 36 L. Ed. 685; *Coon v. Wilson*, 113 U. S. 268, 28 L. Ed. 963; *Electric Gas-Lighting Co. v. Boston Electric Co.*, 139 U. S. 481, 35 L. Ed. 250; *Newton v. Furst, etc., Co.*, 119 U. S. 373, 30 L. Ed. 442; *Ives v. Sargent*, 119 U. S. 652, 30 L. Ed. 544; *White v. Dunbar*, 119 U. S. 47, 52, 30 L. Ed. 303.

The privilege of reissue was not given in order that the patent may be rendered more expansive and therefore more available for the suppression of all other inventions. *James v. Campbell*, 104 U. S. 356, 26 L. Ed. 786; *Railway Co. v. Sayles*, 97 U. S. 554, 24 L. Ed. 1053; *Hobbs v. Beach*, 180 U. S. 383, 396, 45 L. Ed. 586; *Eby v. King*, 158 U. S. 366, 39 L. Ed. 1018; *Dunham v. Dennison Mfg. Co.*, 154 U. S. 103, 38 L. Ed. 924; *Gill v. Wells*, 22 Wall. 1, 19, 22 L. Ed. 699.

The omission to claim features whose existence is apparent on the face of the patent, is a dedication of them to the public, and a reissue in revocation of such dedication cannot be availed of to the prejudice of the rights of the public. *Clements v. Odorless, etc., Co.*, 109 U. S. 641, 27 L. Ed. 1060.

If, by actual inadvertence, accident, or mistake, innocently committed, the claim does not fully assert or define the patentee's right in the invention, specified in the patent, a speedy application for its correction, before adverse rights have accrued, may be granted. *James v. Campbell*, 104 U. S. 356, 371, 26 L. Ed. 786.

**Three months.**—In *Coon v. Wilson*, 113 U. S. 268, 28 L. Ed. 963, a reissue was applied for only a little over three months after the original patent was granted, but the patentee had waited until the defendants produced their device and then applied for such enlarged claims as to embrace this device, which was not covered by the claim of the original patent, and it was apparent from a comparison of the two patents that the application for a reissue was made merely to enlarge the scope of the original, and a reissue



claimed as his own invention more than he had a right to claim as new, the mistake may be corrected at any time.<sup>32</sup>

e. *Excuses for Delay*.—The fact that the applicant followed the advice of a solicitor is no excuse for unreasonable delay in applying for a reissue.<sup>33</sup>

f. *Burden of Proof as to Reasonableness of Time*.—The party seeking a reissue after a delay *prima facie* unlawful, must account for the delay and show it to be reasonable.<sup>34</sup>

g. *Reasonableness of Time a Question of Law*.—The question whether delay in applying for a reissue of a patent has been reasonable or unreasonable is a question of law for the determination of the court.<sup>35</sup>

2. FORM AND REQUISITES.—The application for a reissue should set forth facts entitling the patentee to a reissue.<sup>36</sup>

3. FILING APPLICATION.—Where an applicant for reissue of a patent has done all in his power to make his application effectual—has filed his application with the acting commissioner and paid the requisite amount of fees—the application is to be considered as properly before the commissioner.<sup>37</sup>

G. Identity of Invention—1. GENERAL RULE.—While a claim which is too narrow may be enlarged or extended by a reissue in case of accident, inadvertence or mistake, where the rights of third parties have not intervened, it is well settled that a reissue cannot be granted for an invention different from that embraced within the original claim.<sup>38</sup>

was accordingly denied. *Topliff v. Topliff*, 145 U. S. 156, 169, 36 L. Ed. 658.

A delay of less than a year held to bar a reissue with claims enlarged to embrace intervening inventions. *Freeman v. Asmus*, 145 U. S. 226, 36 L. Ed. 685.

Five years.—A reissue is void where application is not made until five years after the date of the original patent and not until another invention had made a substantial advance in the art, which the assignee of the original patent desired to include in the monopoly of his patent and sought to accomplish this by its reissue. *Torrent Arms Lumber Co. v. Rodgers*, 112 U. S. 659, 28 L. Ed. 842.

Eleven years.—A claim in a reissued patent is invalid where the application for the reissue was made nearly eleven years after the original patent was granted, and after machines effecting the shifting by other means than a rotating crankshaft had gone into use subsequently to the date of the original patent, and no sufficient excuse is given for the laches and delay. *Brown v. Davis*, 116 U. S. 237, 251, 29 L. Ed. 659.

Fifteen years.—Where one has rested supinely until the use of an improvement has become universal, and then, after a lapse of fifteen years, attempts by a reissue to extend his patent to cover it, held that even if the patentee had the right to a reissue if applied for in seasonable time, he had lost it by his laches and unreasonable delay. *Miller v. Brass Co.*, 104 U. S. 350, 26 L. Ed. 782.

32. Reissue narrowing claim.—*Thomson v. Wooster*, 114 U. S. 104, 115, 29 L. Ed. 105.

33. Advice of solicitor no excuse.—*Dobson v. Lees*, 137 U. S. 258, 34 L. Ed. 652; *Wollensak v. Sargent*, 151 U. S. 221,

229, 38 L. Ed. 137; *Ives v. Sargent*, 119 U. S. 652, 30 L. Ed. 544.

34. Burden of proof as to reasonableness of time.—*Wollensak v. Reiher*, 115 U. S. 96, 101, 29 L. Ed. 350; *Hoskin v. Fisher*, 125 U. S. 217, 222, 31 L. Ed. 759.

Grant by patent office does not explain delay.—The action of the patent office in granting a reissue, and deciding that, from special circumstances shown, it appeared that the applicant had not been guilty of laches in applying for it, is not sufficient to explain a delay in the application which otherwise appears unreasonable and to constitute laches. *Hoskin v. Fisher*, 125 U. S. 217, 222, 31 L. Ed. 759; *Wollensak v. Reiher*, 115 U. S. 96, 29 L. Ed. 350.

35. Reasonableness of time a question of law.—*Hoskin v. Fisher*, 125 U. S. 217, 222, 31 L. Ed. 759; *Wollensak v. Reiher*, 115 U. S. 96, 29 L. Ed. 350; *Miller v. Brass Co.*, 104 U. S. 350, 356, 26 L. Ed. 783; *Topliff v. Topliff*, 145 U. S. 156, 171, 36 L. Ed. 658.

The court cannot substitute the decision of the patent office upon that question for its own. *Wollensak v. Reiher*, 115 U. S. 96, 101, 29 L. Ed. 350.

36. Form and requisites.—*Eby v. King*, 158 U. S. 366, 370, 39 L. Ed. 1018.

Oath to application.—See *Freeman v. Asmus*, 145 U. S. 226, 36 L. Ed. 685.

37. Filing of application.—Commissioner of Patents *v. Whiteley*, 4 Wall. 522, 18 L. Ed. 335.

38. Necessity for identity of invention.—*James v. Campbell*, 104 U. S. 356, 26 L. Ed. 786; *Miller v. Brass Co.*, 104 U. S. 350, 26 L. Ed. 783; *Mahn v. Harwood*, 112 U. S. 354, 28 L. Ed. 665; *Wollensak v. Reiher*, 115 U. S. 96, 29 L. Ed. 350; *Leggett v. Standard Oil Co.*, 149 U. S. 287, 292, 37 L. Ed. 737; *Morey v. Lockwood*, 8

2. ADDING NEW ESSENTIAL ELEMENTS.—A reissue which embraces as essential elements thereof features not mentioned in the original patent, is void because for a different invention.<sup>39</sup>

Wall, 230, 19 L. Ed. 339; *Topliff v. Topliff*, 145 U. S. 156, 36 L. Ed. 658; *Eames v. Andrews*, 122 U. S. 40, 30 L. Ed. 1064; *Johnson v. Railroad Co.*, 105 U. S. 539, 26 L. Ed. 1162; *Torrent Arms Lumber Co. v. Rodgers*, 112 U. S. 659, 28 L. Ed. 842; *Pattee Plow Co. v. Kingman*, 129 U. S. 294, 32 L. Ed. 700; *Battin v. Taggart*, 17 How. 74, 83, 15 L. Ed. 37; *Seymour v. Osborne*, 11 Wall. 516, 544, 20 L. Ed. 33; *The Wood-Paper Patent*, 23 Wall. 566, 23 L. Ed. 31; *Parker, etc., Co. v. Yale Clock Co.*, 123 U. S. 87, 31 L. Ed. 100; *Russell v. Dodge*, 93 U. S. 460, 23 L. Ed. 973; *Gill v. Wells*, 122 Wall. 1, 22 L. Ed. 699; *Wing v. Anthony*, 106 U. S. 142, 147, 27 L. Ed. 110; *Powder Co. v. Powder Works*, 98 U. S. 126, 25 L. Ed. 77; *Ball v. Langles*, 102 U. S. 128, 26 L. Ed. 104; *Moffitt v. Rogers*, 106 U. S. 423, 27 L. Ed. 76; *Marsh v. Seymour*, 97 U. S. 348, 349, 24 L. Ed. 963; *Heald v. Rice*, 104 U. S. 737, 26 L. Ed. 910; *Johnson v. Railroad Co.*, 105 U. S. 539, 26 L. Ed. 1162; *Bantz v. Frantz*, 105 U. S. 160, 26 L. Ed. 1013; *Burr v. Duryee*, 1 Wall. 531, 17 L. Ed. 650; *Garneau v. Dozier*, 102 U. S. 230, 26 L. Ed. 133; *Manufacturing Co. v. Ladd*, 102 U. S. 408, 413, 26 L. Ed. 184; *Ives v. Sargent*, 119 U. S. 652, 662, 30 L. Ed. 544; *Freeman v. Asmus*, 145 U. S. 226, 36 L. Ed. 685; *Coon v. Wilson*, 113 U. S. 268, 28 L. Ed. 963; *Reedy v. Scott*, 23 Wall. 352, 365, 23 L. Ed. 109; *Collar Co. v. Van Dusen*, 23 Wall. 530, 23 L. Ed. 128; *Union Metallic Cartridge Co. v. United States Cartridge Co.*, 112 U. S. 624, 28 L. Ed. 828; *Corbin Cabinet Lock Co. v. Eagle Lock Co.*, 150 U. S. 38, 37 L. Ed. 989.

39. Adding essential elements to original.—*James v. Campbell*, 104 U. S. 356, 26 L. Ed. 786; *Johnson v. Railroad Co.*, 105 U. S. 539, 26 L. Ed. 1162; *Mathews v. Machine Co.*, 105 U. S. 54, 26 L. Ed. 1022; *McMurray v. Mallory*, 111 U. S. 97, 105, 28 L. Ed. 365; *Hartshorn v. Saginaw Barrel Co.*, 119 U. S. 664, 30 L. Ed. 539; *White v. Dunbar*, 119 U. S. 47, 30 L. Ed. 303; *Coon v. Wilson*, 113 U. S. 268, 28 L. Ed. 963; *Russell v. Dodge*, 93 U. S. 460, 23 L. Ed. 973; *Dunham v. Dennison Mfg. Co.*, 154 U. S. 103, 38 L. Ed. 924; *Flower v. Detroit*, 127 U. S. 563, 571, 32 L. Ed. 175; *Union Metallic Cartridge Co. v. United States Cartridge Co.*, 112 U. S. 624, 28 L. Ed. 828; *McCormick Harvesting Machine Co. v. Aultman*, 169 U. S. 606, 610, 42 L. Ed. 875; *Steinmetz v. Allen*, 192 U. S. 543, 551, 48 L. Ed. 555; *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33; *Garneau v. Dozier*, 102 U. S. 230, 26 L. Ed. 133; *Ball v. Langles*, 102 U. S. 128, 26 L. Ed. 104; *Ives v. Sargent*, 119 U. S. 652, 30 L. Ed. 544; *Gardner v. Herz*, 118 U. S. 180, 30 L. Ed. 158; *Hoffheins v. Russell*, 107 U. S. 132, 27 L. Ed. 332; *Collar Co. v. Van*

*Dusen*, 23 Wall. 530, 23 L. Ed. 128; *Parker, etc., Co. v. Yale Clock Co.*, 123 U. S. 87, 31 L. Ed. 100; *Powder Co. v. Powder Works*, 98 U. S. 126, 25 L. Ed. 77; *Gill v. Wells*, 22 Wall. 1, 22 L. Ed. 699; *Topliff v. Topliff*, 145 U. S. 156, 166, 36 L. Ed. 658; *Corbin Cabinet Lock Co. v. Eagle Lock Co.*, 150 U. S. 38, 37 L. Ed. 989.

The purpose of a reissue is to render effectual the actual invention for which the original patent should have been granted, not to introduce new features. *Collar Co. v. Van Dusen*, 23 Wall. 530, 23 L. Ed. 128.

When a patent fully and clearly, without ambiguity or obscurity, describes and claims a specific invention, complete in itself, so that it cannot be said to be inoperative or invalid by reason of a defective or insufficient specification, a reissue cannot be had for the purpose of expanding and generalizing the claim so as to make it embrace an invention not described and specified in the original. *James v. Campbell*, 104 U. S. 356, 370, 26 L. Ed. 786.

Where it appears perfectly obvious that the patentee has embraced in the reissued patent several matters of supposed invention different from and additional to the invention which formed the subject of the original patent, this addition to the patent is no part of the original invention, and cannot lawfully be embraced in the reissue, and the claim for it is therefore void. *James v. Campbell*, 104 U. S. 356, 374, 26 L. Ed. 786.

Where in the reissued patent several of the devices essential to the combination described in the original patent are left out and a separate claim made for the parts which remain, and to these parts a new and essential function is given, which they could not perform under the original patent, and it is, therefore, perfectly clear that the second claim of the reissued patent was not covered by the original patent, since it describes another device operating in a different way and for a different purpose, the reissue is void. *Johnson v. Railroad Co.*, 105 U. S. 539, 546, 26 L. Ed. 1162.

Interpolations in a reissued patent of new features or ingredients or devices, which were neither described, suggested, nor substantially indicated in the original specifications, drawings, or patent office model, are not allowed. *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33.

Parol testimony as to the scope of an original invention, is not allowable on an application for a reissue as the basis of interpolation of new matter. *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33.

When the original patent for an improvement in lamps claimed among other

3. OMISSION OF ESSENTIAL ELEMENTS OF ORIGINAL.—Upon a like principle, a reissue which omits one or more of the essential features of the original patent is void.<sup>40</sup>

things a double dome without a chimney, a reissue, claiming a single dome with a chimney, is void, being not only obviously for a different thing, but for the very thing which the patentee professed to dispense with. *Miller v. Brass Co.*, 104 U. S. 350, 26 L. Ed. 783.

**Stamping device.**—In a patent for a stamping implement, the elasticity of the blotting material being a distinctive feature, and the language amounting to an express disclaimer of solid metal, any claim in the reissued patent which can be construed to embrace a blotter made of metal is void. *James v. Campbell*, 104 U. S. 356, 26 L. Ed. 786.

**Lock.**—Where the claim of the original patent is for a lock as such, while the first claim of the reissue is for a combination of that lock with something not claimed as an element in the original patent, this being a departure from the original claim not warranted by anything appearing in the original specification, the first claim of the reissue is void. *Corbin Cabinet Lock Co. v. Eagle Lock Co.*, 150 U. S. 38, 42, 37 L. Ed. 989.

**A patent for a method of preserving shrimps by canning**, the claim of which provided for placing a textile fabric between the can and its contents, will not support a reissue providing for interposing an enveloping material between the can and the shrimps. *White v. Dunbar*, 119 U. S. 47, 49, 30 L. Ed. 303.

**A reissued patent for a shade roller** the specification of which states that the roller is so constructed that the spring will remain locked when the roller as a whole is removed from the brackets, is void where the original patent is entirely silent as to this feature. *Hartshorn v. Saginaw Barrel Co.*, 119 U. S. 664, 30 L. Ed. 539.

**Soldering irons.**—Where the original claim of a patent for soldering irons was for one having a circular disk at the bottom, fitting the cap, and a recess in its underside, the soldering being done while the cap was totally under the iron and out of sight, a reissue so broad as to embrace all soldering irons, even such as may be adjusted radially to fit all sizes of caps, cannot be sustained. *McMurray v. Mallory*, 111 U. S. 97, 105, 28 L. Ed. 365.

**Tag—Envelope.**—In *Dunham v. Denison Mfg. Co.*, 154 U. S. 103, 110, 38 L. Ed. 924, it is held that a reissued patent for a combined tag and envelope, which expands the original patent for an envelope with an end flap covering its side so as to include an envelope with a flap of any size or shape, is invalid.

**Frost jackets for hydrants.**—Where the original invention was a jacket, or casing, whose top was enclosed and covered by a

flange projecting from the hydrant, which effectually prevented the removal of the jacket without removing the hydrant also, and which caused the hydrant to be raised when the jacket was lifted by the frost, and in the reissued patent nothing is said of this arrangement of the top of the jacket, and the claims ignored it altogether, and the reissue covered a jacket such as described and claimed in a late patent to another person, which slides like a sleeve over the hydrant at top as well as bottom, it was held that the reissue was not only for a broader claim made many years after the original was granted, but was for a different invention, and could not be sustained. *Mathews v. Machine Co.*, 105 U. S. 54, 58, 26 L. Ed. 1022.

40. Omission of essential elements of original.—*Olin v. Timken*, 155 U. S. 141, 147, 39 L. Ed. 100; *Mahn v. Harwood*, 112 U. S. 354, 28 L. Ed. 665; *Mathews v. Iron-clad Mfg. Co.*, 124 U. S. 347, 351, 31 L. Ed. 477; *Miller v. Brass Co.*, 104 U. S. 350, 26 L. Ed. 783; *Heald v. Rice*, 104 U. S. 737, 26 L. Ed. 910; *Russell v. Dodge*, 93 U. S. 460, 23 L. Ed. 973; *Cornell v. Weidner*, 127 U. S. 261, 264, 32 L. Ed. 148; *Pattee Plow Co. v. Kingman*, 129 U. S. 294, 32 L. Ed. 700; *Johnson v. Railroad Co.*, 105 U. S. 539, 26 L. Ed. 1162; *Torrent Arms Lumber Co. v. Rodgers*, 112 U. S. 659, 28 L. Ed. 842; *Huber v. Nelson Mfg. Co.*, 148 U. S. 270, 292, 37 L. Ed. 447; *Eames v. Godfrey*, 1 Wall. 78, 17 L. Ed. 547; *Burr v. Duryee*, 1 Wall. 531, 17 L. Ed. 650; *Case v. Brown*, 2 Wall. 320, 17 L. Ed. 817; *Gould v. Rees*, 15 Wall. 187, 21 L. Ed. 39; *Gill v. Wells*, 22 Wall. 1, 22 L. Ed. 699; *Fuller v. Yentzer*, 94 U. S. 288, 24 L. Ed. 103; *Powder Co. v. Powder Works*, 98 U. S. 126, 25 L. Ed. 77; *Leggett v. Avery*, 101 U. S. 256, 25 L. Ed. 865; *James v. Campbell*, 104 U. S. 356, 26 L. Ed. 786; *Coon v. Wilson*, 113 U. S. 268, 28 L. Ed. 963; *Parker, etc., Co. v. Yale Clock Co.*, 123 U. S. 87, 31 L. Ed. 100; *Electric Gas-Lighting Co. v. Boston Electric Co.*, 139 U. S. 481, 35 L. Ed. 250; *Topliff v. Topliff*, 145 U. S. 156, 36 L. Ed. 658; *Prouty v. Draper*, 16 Pet. 336, 341, 10 L. Ed. 985; *Brookes v. Fiske*, 15 How. 212, 219, 14 L. Ed. 665; *Reckendorfer v. Faber*, 92 U. S. 347, 23 L. Ed. 719; *Railway Co. v. Sayles*, 97 U. S. 554, 24 L. Ed. 1053; *Water-Meter Co. v. Desper*, 101 U. S. 332, 25 L. Ed. 1024.

Where the original patent and the first issue of a patent for a bung bush were distinctly limited to a bushing having a notch to aid in forcing it into place, by means of a wrench, the second reissue, obtained nearly seven years later, for a bushing without any such notch, is a unwarrantable enlargement of the supposed invention, which, according to the



4. **SUBSTITUTION OF ESSENTIAL ELEMENTS**—a. *In General*.—A reissue which substitutes another and different element for one of the essentials of the original is void, being for a different invention.<sup>41</sup>

b. *Substitution of Equivalents*.—As a general rule, an equivalent cannot be substituted in a reissue for an essential element of the original patent, though perhaps this may be done where it would be competent for the court to decide as a matter of law that the substituted element is an equivalent for the one withdrawn.<sup>42</sup>

5. **CHANGE IN REISSUE OF COMBINATIONS**.—A combination cannot be re-

now well-settled law, renders the issue void. *Cornell v. Weidner*, 127 U. S. 261, 264, 32 L. Ed. 148.

Where the patent was for a process of treating bark tanned lamb or sheep skin by means of a compound, in which heated fat liquor was an essential ingredient, and a change was made in the original specification, by eliminating the necessity of using the fat liquor in a heated condition, and making, in the new specification, its use in that condition a mere matter of convenience, and by inserting an independent claim for the use of fat liquor in the treatment of leather generally, the character and scope of the invention, as originally claimed, were held to be so enlarged as to constitute a different invention. *Russell v. Dodge*, 93 U. S. 460, 23 L. Ed. 973.

Where, in the original patent, the invention is stated to consist, among other things of a combination of a straw-feeding attachment with the furnace door of a return flue steam boiler for the use of straw alone as a fuel, a reissue is void which abandons the claim for the boiler itself and describes the invention as for a particular mode of using it, with straw as a fuel, by means of an attachment to the furnace door for that purpose. *Heald v. Rice*, 104 U. S. 737, 26 L. Ed. 910.

Where the original patent shows a device for turning logs upon their axes when placed upon the carriage of a saw-mill and a reissue describes a device adopted, not only to turn logs on their axes, but to roll them from place to place, by the omission of the knees for holding the logs in place and by a change in the location, movement and effect of the toothed bar, the reissue is void, since it covers a different invention. *Torrent Arms Lumber Co. v. Rodgers*, 112 U. S. 659, 28 L. Ed. 842.

Where a person obtained a patent for a sanitary closet, including as an essential element of the claim, a flushing chamber, and subsequently applied for a reissue for the purpose of eliminating that chamber, it was held that this could not be done. *Huber v. Nelson Mfg. Co.*, 148 U. S. 270, 37 L. Ed. 447. See, also, *Olin v. Timken*, 155 U. S. 141, 147, 39 L. Ed. 100.

A claim of a reissue for an improvement in cultivators must be held to have been illegally expanded, where a feature of the original which constituted an element of the invention has been omitted, with the effect of enlarging the claim. Pattee

*Plow Co. v. Kingman*, 129 U. S. 294, 298, 32 L. Ed. 700.

In a driven well patent, the effect of an amendment, omitting the words "where no rock is to be penetrated" contained in the original specification and claim, is not to enlarge the scope of the patent so as to cover by the reissued patent the process of driven wells whether rock is to be penetrated or not, where the obvious purpose of the amendment was to meet a possible construction of the original whereby the patentee would be precluded from the use of his process where it was evidently intended to be applied, simply because one or more strata of rock had to be penetrated in the process of driving. *Eames v. Andrews*, 122 U. S. 40, 30 L. Ed. 1064.

41. **Substitution of essential elements**.—*Olin v. Timken*, 155 U. S. 141, 39 L. Ed. 100; *Gill v. Wells*, 22 Wall. 1, 2, 22 L. Ed. 699.

A patentee cannot legally surrender a patent for an invention consisting of a combination of old ingredients, and amend the descriptive parts of the specification by striking out the entire description of one of the ingredients of the combination and inserting in lieu thereof a full description of several other devices, without any allegation that they are the equivalents of the one whose description is stricken out. *Gill v. Wells*, 22 Wall. 1, 2, 22 L. Ed. 699.

As the patent for an improvement in springs for vehicles originally stood, the connection of the cross springs was an essential element of the claim. Since the original patent makes no reference to an alternative construction, the insertion of the word "preferably" for the first time in the reissue is an expansion of the invention described in the original patent, and so invalidates the reissue. *Olin v. Timken*, 155 U. S. 141, 146, 39 L. Ed. 100.

42. **Substitution of equivalents**.—*Gill v. Wells*, 22 Wall. 1, 29, 22 L. Ed. 699.

Perhaps a spring for a lever to produce power, or a weight for a spring to produce pressure, are such well-known equivalents as to be substituted without objection. *Gill v. Wells*, 22 Wall. 1, 29, 22 L. Ed. 699.

The court could seldom or never, in a suit at law, undertake to determine without a jury whether a particular ingredient substituted in a reissue was or was not known at the date of the original patent as a proper substitute for the one withdrawn.

issued so as to contain a smaller number of elements,<sup>43</sup> nor for the elements separately,<sup>44</sup> nor for the combination and for each of its elements.<sup>45</sup>

6. PATENT FOR MACHINE REISSUED AS PROCESS.—Where the original patent was for a machine, a reissue claiming a process is invalid.<sup>46</sup>

7. PATENT FOR PROCESS REISSUED AS COMPOSITION.—And where the original patent was taken out for a process, the reissue will not cover a composition unless it be the result of the process.<sup>47</sup>

8. PATENT FOR PROCESS REISSUED FOR BOTH PROCESS AND PRODUCT.—But where a new process produces a new substance, the invention of the process is the same as the invention of the substance, and a patent for the one may be reissued so as to include both.<sup>48</sup>

9. EVIDENCE OF IDENTITY—*a. Presumptions.*—A reissue is prima facie to be presumed to be for the same invention as is the original patent.<sup>49</sup>

Gill v. Wells, 22 Wall. 1, 30, 22 L. Ed. 699.

**43. Reissue of combination claiming fewer elements.**—Gill v. Wells, 22 Wall. 1, 22 L. Ed. 699; Johnson v. Railroad Co., 105 U. S. 539, 547, 26 L. Ed. 1162; Huber v. Nelson Mfg. Co., 148 U. S. 270, 37 L. Ed. 447.

A complete description was given in the original patent of the combination of the four parts which constituted the "chamber or tunnel," and that patent did not contain the slightest evidence that the patentee ever made any other combination than that of all the four parts which together form this "tunnel or chamber." Held, that in such case, even if the patentee had subsequently discovered that he could accomplish a new and useful result by a combination of some of the several parts included in this "tunnel or chamber," he could not surrender and reissue his patent for this combination of a smaller number of the ingredients, because the reissued patent in that event would not be for the same invention as the surrendered original. Gill v. Wells, 22 Wall. 1, 22 L. Ed. 699.

**44. Johnson v. Railroad Co.,** 105 U. S. 539, 546, 26 L. Ed. 1162; Mathews v. Machine Co., 105 U. S. 54, 26 L. Ed. 1022; Bantz v. Frantz, 105 U. S. 160, 26 L. Ed. 1013.

**45. Combination reissued as patent for combination and elements thereof.**—Gage v. Herring, 107 U. S. 640, 27 L. Ed. 601; Mathews v. Machine Co., 105 U. S. 54, 26 L. Ed. 1022.

**46. Machine or process.**—James v. Campbell, 104 U. S. 356, 26 L. Ed. 786; Heald v. Rice, 104 U. S. 737, 26 L. Ed. 910; Wing v. Anthony, 106 U. S. 142, 27 L. Ed. 110; Eachus v. Broomall, 115 U. S. 429, 29 L. Ed. 419.

Letters-patent for a machine cannot be reissued for the purpose of claiming the process of operating that class of machines; because, if the claim for the process is anything more than for the use of the particular machine patented, it is for a different invention. James v. Campbell, 104 U. S. 356, 26 L. Ed. 786; Heald v. Rice, 104 U. S. 737, 26 L. Ed. 910; Wing v. Anthony, 106 U. S. 142, 27 L. Ed. 110.

Where it is apparent on the face of a patent for a machine, or by contemporary records, that no such inadvertence, accident or mistake, as claimed in a reissue of it, could have occurred, an expansion of the claim to cover a process cannot be allowed or sustained. James v. Campbell, 104 U. S. 356, 371, 26 L. Ed. 786.

An original claim was for a mechanism; namely, "a plate-holder in combination with the frame in which it moves, constructed and operating in the manner and for the purpose" set forth in the specification. The claim of the reissued patent was plainly for a process; namely, "the bringing of the different portions of a single plate, or several smaller plates, successively into the field of the lens of the camera, substantially in the manner and for the purpose specified." Held, the reissue was void. Wing v. Anthony, 106 U. S. 142, 145, 27 L. Ed. 110.

Where the original patent was for a machine and the patentee claimed in the reissue a process, because "the process would cover more than a mere machine," the reissue is invalid. Eachus v. Broomall, 115 U. S. 429, 438, 29 L. Ed. 419.

**47. Process or composition.**—Powder Co. v. Powder Works, 98 U. S. 126, 25 L. Ed. 77; Wing v. Anthony, 106 U. S. 142, 27 L. Ed. 110; James v. Campbell, 104 U. S. 356, 26 L. Ed. 786.

Original letters for a process will not support reissued letters for a composition, unless it is the result of the process, and the invention of the one involves the invention of the other. Powder Co. v. Powder Works, 98 U. S. 126, 25 L. Ed. 77; Wing v. Anthony, 106 U. S. 142, 146, 27 L. Ed. 110.

Letters granted for certain processes of exploding nitroglycerine will not support reissued letters for a composition of nitroglycerine and gunpowder or other substances, even though the original application claimed the invention of the process and the compound. They are distinct inventions. Powder Co. v. Powder Works, 98 U. S. 126, 25 L. Ed. 77.

**48. Patent for process reissued as process and product.**—James v. Campbell, 104 U. S. 356, 377, 26 L. Ed. 786.

**49. Presumption as to identity.**—Klein

b. *Admissibility*.—The original patent is relevant evidence upon the question whether the reissue is for the same invention as the original,<sup>50</sup> and should be introduced where the question of identity is involved.<sup>51</sup> Where both or either of the claims or specifications contain technical terms or terms of art, the court may hear the testimony of scientific witnesses to aid the court in coming to a correct conclusion.<sup>52</sup>

10. *PROVINCE OF COURT AND JURY*.—Whether the reissued patent is for the same invention as the original is a question of fact for the jury,<sup>53</sup> unless the question of the identity of the reissued and original patent can be determined from a comparison of the face of the patents when it is ordinarily one for the court.<sup>54</sup>

**H. Surrender of Original on Reissue.**—Prior to 1870, the surrender of a patent was a legal cancellation of it and no rights could afterwards be asserted upon it,<sup>55</sup> and the patentee, by merely disclaiming all the changes made in a reissue, could not revive the original.<sup>56</sup> To obviate the injustice to inventors oc-

*v. Russell*, 19 Wall. 433, 22 L. Ed. 116; *Smith v. Goodyear, Dental Vulcanite Co.*, 93 U. S. 486, 23 L. Ed. 952; *Thompson v. Wooster*, 114 U. S. 104, 29 L. Ed. 105; *Clark v. Wooster*, 119 U. S. 322, 326, 30 L. Ed. 392; *O'Reilly v. Morse*, 15 How. 62, 14 L. Ed. 601; *Seymour v. Osborne*, 11 Wall. 516, 544, 20 L. Ed. 33; *Bates v. Coe*, 98 U. S. 31, 25 L. Ed. 68.

**50. Original patent relevant evidence.**—*Oregon Imp. Co. v. Excelsior Coal Co.*, 132 U. S. 215, 33 L. Ed. 344.

**51. Eureka Co. v. Bailey Co.**, 11 Wall. 488, 492, 20 L. Ed. 209; *Clark v. Wooster*, 119 U. S. 322, 326, 30 L. Ed. 392; *Thomson v. Wooster*, 114 U. S. 104, 29 L. Ed. 105; *Oregon Imp. Co. v. Excelsior Coal Co.*, 132 U. S. 215, 33 L. Ed. 344.

**52. Examination of experts.**—*Seymour v. Osborne*, 11 Wall. 516, 546, 20 L. Ed. 33.

**53. Province of court and jury.**—*Battin v. Taggart*, 17 How. 74, 84, 15 L. Ed. 37; *Stimpson v. West Chester R. Co.*, 4 How. 380, 403, 11 L. Ed. 1020.

**54. When question of identity for court.**—*Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33; *Heald v. Rice*, 104 U. S. 737, 26 L. Ed. 910; *Gage v. Herring*, 107 U. S. 640, 27 L. Ed. 601.

If it appears from the face of the instrument that extrinsic evidence is not needed to explain terms of art, or to apply the descriptions to the subject matter, so that the court is able from mere comparison to say what is the invention described in each, and to affirm from such mere comparison that the inventions are not the same, but different, then the question of identity is one of pure construction, and not of evidence, and consequently is matter of law for the court, without any auxiliary matter of fact to be passed upon by a jury if the action be at law. *Heald v. Rice*, 104 U. S. 737, 749, 26 L. Ed. 910; *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33.

**55. Surrender under act of 1836.**—*Moffitt v. Garr*, 1 Black 273, 17 L. Ed. 207; *Reedy v. Scott*, 23 Wall. 352, 364, 23 L. Ed. 109; *Eby v. King*, 158 U. S. 366, 373, 39 L. Ed. 1018; *Meyer v. Pritchard*, 131

U. S., appx., ccix, 23 L. Ed. 961; *Mevs v. Conover*, 131 U. S., appx., cxlii, 23 L. Ed. 1008; *Peck v. Collins*, 103 U. S. 660, 664, 26 L. Ed. 512.

The surrender of a patent to the commissioner within the sense of the provision, means an act which, in judgment of law, extinguishes the patent. It is a legal cancellation of it, and hence the patent can no more be the foundation for the assertion of a right, after the surrender, than could an act of congress which has been repealed, and it has frequently been determined that suits pending which rest upon an act of congress fall with the repeal of it. Antecedent suits depend upon the patent existing at the time they were commenced, and unless it exists and is in force at the time of the trial and judgment, the suits fail. *Moffitt v. Garr*, 1 Black 273, 17 L. Ed. 207; *Reedy v. Scott*, 23 Wall. 352, 364, 23 L. Ed. 109.

A patent surrendered for reissue was canceled in law as well when the application was rejected as when it was granted. *Peck v. Collins*, 103 U. S. 660, 664, 26 L. Ed. 512.

But moneys recovered or paid under a patent previous to its surrender could not be recovered back afterwards. *Moffitt v. Garr*, 1 Black 273, 17 L. Ed. 207.

**Effect on pending suits.**—Suits pending for an infringement of such a patent fall with its surrender, because the foundation upon which they were commenced no longer exists. *Moffitt v. Garr*, 1 Black 273, 17 L. Ed. 207; *Peck v. Collins*, 103 U. S. 660, 664, 26 L. Ed. 512; *Mevs v. Conover*, 131 U. S., appx. cxlii, 23 L. Ed. 1008.

**Surrender after final judgment or decree** can have no effect upon a right passed previously into judgment. After that there is nothing open for litigation. The right of a patentee then rests on his judgment or decree, and not on his patent. *Mevs v. Conover*, 131 U. S., appx. cxlii, 23 L. Ed. 1008.

**56. Disclaimer of changes as reviving original.**—The original patent had been declared on the oath of the patentee to be



casioned by this peremptory extinguishment, it was provided that the surrender should take effect upon the reissue of the amended patent.<sup>57</sup> If the application for a reissue be rejected, the original patent stands as though a reissue had never been applied for.<sup>58</sup>

**I. Effect of Decision of Commissioner on Application.**—The act of the commissioner in accepting a surrender and granting a reissue is final and conclusive upon all questions of fact.<sup>59</sup> Thus his decision that the mistake in a specification or claim arose from inadvertence, accident or mistake, is conclusive.<sup>60</sup> But this rule is not applicable where it is apparent upon the face of the reissue that he has exceeded his authority.<sup>61</sup> While there is a presumption that

invalid and inoperative. It had been surrendered and canceled and reissued letters-patent granted in its place. It is not competent for the patentee or his assignees, by merely disclaiming all the changes made in the reissued patent, to revive and restore the original patent. This could be done only, if it could be done at all, by surrender of the reissued patent and the grant of another reissue. *McMurray v. Mallory*, 111 U. S. 97, 109, 28 L. Ed. 365.

**57. Surrender takes effect upon reissue.**—Act of July 8, 1870; Rev. Stat., § 4916; *Peck v. Collins*, 103 U. S. 660, 665, 26 L. Ed. 512; *Allen v. Culp*, 166 U. S. 501, 504, 41 L. Ed. 1093.

These words were obviously inserted for the purpose of preventing the surrender taking immediate effect, and to postpone its legal operation until the patent should be reissued. *Allen v. Culp*, 166 U. S. 501, 504, 41 L. Ed. 1093.

**58. Where reissue is refused, original patent stands.**—*Allen v. Culp*, 166 U. S. 501, 505, 41 L. Ed. 1093; *McCormick Harvesting Machine Co. v. Aultman*, 169 U. S. 606, 611, 42 L. Ed. 875.

When a patent is thus surrendered, there can be no doubt that it continues to be a valid patent until it is reissued, when it becomes inoperative; but if a reissue be refused, it is entirely clear that the surrender never takes effect, and the patent stands as if no application had ever been made for a reissue. *Allen v. Culp*, 166 U. S. 501, 505, 41 L. Ed. 1093; *McCormick Harvesting Machine Co. v. Aultman*, 169 U. S. 606, 611, 42 L. Ed. 875.

The fact that the rules of the patent office require that the original patent should be placed in its custody for the purpose of surrendering it upon the issue of an amended patent gives that department no right to the possession of it upon the rejection of the application for a reissue. If the patentee abandoned his application for a reissue, he is entitled to a return of his original patent precisely as it stood when such application was made, and the patent office has no greater authority to mutilate it by rejecting any of its claims than it has to cancel the entire patent. *McCormick Harvesting Machine Co. v. Aultman*, 169 U. S. 606, 610, 42 L. Ed. 875.

**59. Grant of reissue conclusive on questions of fact.**—*Mahn v. Harwood*, 112 U.

S. 354, 28 L. Ed. 665; *Collar Co. v. Van Dusen*, 23 Wall. 530, 558, 23 L. Ed. 128; *Philadelphia, etc., R. Co. v. Stimpson*, 14 Pet. 448, 458, 10 L. Ed. 535; *Stimpson v. West Chester R. Co.*, 4 How. 380, 384, 11 L. Ed. 1020; *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33; *Topliff v. Topliff*, 145 U. S. 156, 36 L. Ed. 658; *Hobbs v. Beach*, 180 U. S. 383, 394, 45 L. Ed. 586; *Russell v. Dodge*, 93 U. S. 460, 464, 23 L. Ed. 973.

If the owner of a patent applies to the patent office for a reissue of it and includes, among the claims in the application, the same claims as those which were included in the old patent, and the primary examiner rejects some of such claims for want of patentable novelty, by reference to prior patents, and allows others, both old and new, the owner of the patent does not, by taking no appeal and by abandoning his application for reissue, hold the original patent (the return of which he procures from the patent office) invalidated as to those of its claims which were disallowed for want of patentable novelty by the primary examiner in the proceeding for reissue; as the patent office, by the issue of the original patent, had lost jurisdiction over it, and did not regain it by the application for a reissue. *McCormick Harvesting Machine Co. v. Aultman*, 169 U. S. 606, 42 L. Ed. 875. See, also, *Allen v. Culp*, 166 U. S. 501, 505, 41 L. Ed. 1093; *Eby v. King*, 158 U. S. 366, 374, 39 L. Ed. 1018.

**Reissue cannot be collaterally attacked for fraud.**—Any question of fraud in obtaining a reissue is to be regarded as settled by the act of the commissioner of patents in granting them. *The Corn-Planter Patent*, 23 Wall. 181, 23 L. Ed. 161; *Seymour v. Osborne*, 11 Wall. 516, 543, 20 L. Ed. 33; *Rubber Co. v. Goodyear*, 9 Wall. 788, 19 L. Ed. 566.

**60. Decision as to accident, mistake or inadvertence.**—*Mahn v. Harwood*, 112 U. S. 354, 360, 28 L. Ed. 665; *Topliff v. Topliff*, 145 U. S. 156, 171, 36 L. Ed. 658.

**61. Where commissioner exceeds authority.**—*Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33; *Mahn v. Harwood*, 112 U. S. 354, 28 L. Ed. 665; *Collar Co. v. Van Dusen*, 23 Wall. 530, 538, 23 L. Ed. 128; *Reckendorfer v. Faber*, 92 U. S. 347, 354, 23 L. Ed. 719.

The decision of the board of commissioners, to whom the question of renewal

the reissue is for the same patent as the original,<sup>62</sup> the decision of the commissioner in granting the reissue is not conclusive upon this question.<sup>63</sup>

**J. Divisional Reissue.**—The commissioner may, in his discretion cause several patents to be issued for distinct and separate parts of the thing patented upon demand of the applicant and upon payment of the required fee for a reissue for each of such reissued letters-patent.<sup>64</sup>

**K. Operation and Effect of Reissue.**—1. **EFFECT ON ORIGINAL CLAIMS OF INVALIDITY OF NEW CLAIMS IN REISSUE.**—The invalidity of a new claim in the reissue does not impair the validity of the original which is repeated and separately stated in the reissued patent.<sup>65</sup>

2. **RELATION BACK TO ORIGINAL PATENT**—a. *In General.*—Reissues have relation to the emanation of the original, and the rights of the patentee must be ascertained by the law under which the original application was made.<sup>66</sup>

b. *Effect of Use of Patented Article between Dates of Original and Reissued Patent.*—Proof of the use of the thing patented during the interval between the original and renewed patents cannot be considered a dedication.<sup>67</sup>

**L. Term and Duration of Reissue.**—A new patent may be issued for the

is referred, by the act of 1836, is not conclusive upon the question of their jurisdiction to act in a given case. *Wilson v. Rousseau*, 4 How. 646, 11 L. Ed. 1141.

**62. Presumption as to identity of invention.**—*Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 486, 23 L. Ed. 952; *Russell v. Dodge*, 93 U. S. 460, 23 L. Ed. 973.

It is to be presumed until the contrary is made to appear that the commissioner did his duty in granting a reissue. *Klein v. Russell*, 19 Wall. 433, 22 L. Ed. 116; *Russell v. Dodge*, 93 U. S. 460, 464, 23 L. Ed. 973.

The presumption arising from the decision of the commissioner of patents granting the reissue of letters-patent, that they are for the same invention which was described in the specification of the original patent, can only be overcome by clearly showing, from a comparison of the original specification with that of the reissue, that the former does not substantially describe what is described and claimed in the latter. *Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 486, 23 L. Ed. 952.

**63. Patent for different invention.**—*Collar Co. v. Van Dusen*, 23 Wall. 530, 558, 23 L. Ed. 128; *Stimpson v. West Chester R. Co.*, 4 How. 380, 11 L. Ed. 1020; *Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 486, 23 L. Ed. 952; *Russell v. Dodge*, 93 U. S. 460, 23 L. Ed. 973; *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33; *Reckendorfer v. Faber*, 92 U. S. 347, 354, 23 L. Ed. 719.

**Province of court and jury as to identity.**—See ante, "Identity of Invention," VIII, G.

**64. Divisional reissue.**—Rev. Stat., § 4916; *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33; *Bennet v. Fowler*, 8 Wall. 445, 19 L. Ed. 431.

No general rule can be laid down by which to determine when a given invention shall be embraced in two or more patents. Some discretion on this subject

must necessarily be left to the head of the patent office. *Bennet v. Fowler*, 8 Wall. 445, 19 L. Ed. 431.

It may require several reissues to constitute a complete machine. *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33.

**65. Invalidity of claim in reissue does not impair original.**—*Gage v. Herring*, 107 U. S. 640, 27 L. Ed. 601; *Leggett v. Standard Oil Co.*, 149 U. S. 287, 293, 37 L. Ed. 737; *O'Reilly v. Morse*, 15 How. 62, 14 L. Ed. 601; *Vance v. Campbell*, 1 Black 427, 17 L. Ed. 168.

**66. Reissues relate back.**—*Shaw v. Cooper*, 7 Pet. 292, 8 L. Ed. 689; *Grant v. Raymond*, 6 Pet. 218, 220, 8 L. Ed. 376; *Read v. Bowman*, 2 Wall. 591, 17 L. Ed. 812; *Klein v. Russell*, 19 Wall. 433, 434, 22 L. Ed. 116.

Hence when there has been a reissue on an original patent, and the meaning of the specification and claim in the reissue is not perfectly clear, they may be read by the light of the specification and claim of the original patent, and if they can be sustained consistently with the language there used, be sustained by them. *Klein v. Russell*, 19 Wall. 433, 434, 22 L. Ed. 116.

Action for an alleged violation of a patent for an improvement in guns and firearms. The letters-patent were obtained in 1822; and in 1829, the patentee having surrendered the same, for an alleged defect in the specification, obtained another patent. This second patent is to be considered as having relation to the emanation of the patent of 1822; and not as having been issued on an original application. *Shaw v. Cooper*, 7 Pet. 292, 8 L. Ed. 689.

**67. Use of patented article between dates of original and reissued patent.**—*Battin v. Taggart*, 17 How. 74, 15 L. Ed. 37; *Stimpson v. West Chester R. Co.*, 4 How. 380, 11 L. Ed. 1020. See, also, *Eames v. Andrews*, 122 U. S. 40, 59, 30 L. Ed. 1064.

same invention, for the residue of the period then unexpired for which the original patent was granted.<sup>68</sup>

### IX. Date and Duration.

**A. Date.**—Every patent shall bear date as of a day not later than six months from the time at which it was allowed and notice thereof sent to the applicant or his agent.<sup>69</sup> The date of letters-patent must be taken as the date of the application and assignment, where evidence of the date is not introduced.<sup>70</sup> The date of the application, and not the date of the patent, controls in determining the legal effect to be given to two patents, issued at different dates to the same inventor, and the order in which they are to be considered.<sup>71</sup> Under the act of 1839, a patent may be antedated, where a foreign patent has been obtained.<sup>72</sup>

**B. Duration.**—1. DURATION OF ORIGINAL TERM.—The duration of the term for which patents shall be granted is within the control of congress.<sup>73</sup> Prior to 1861, all patents were granted for the term of fourteen years with a right, under certain circumstances, to an extension for seven years longer.<sup>74</sup> But they now remain in force for the term of seventeen years from the date of issue, without any right to renewal.<sup>75</sup>

2. DURATION LIMITED BY FOREIGN PATENT.—A patent for a device previously patented in a foreign country is limited in duration so as to expire with the foreign patent, and if there be more than one foreign patent at the time with the one having the shortest term,<sup>76</sup> provided the foreign patent was ob-

When a reissued and corrected patent is taken out, the omissions and defects are cured, and nothing within the scope of the patentee's original invention can be considered as having been dedicated to the public by the lapse of time between the original and reissued patent. *Battin v. Taggart*, 17 How. 74, 15 L. Ed. 37.

Where a patent was taken out for a new and useful improvement in the machine for breaking and screening coal, and the claim was for the manner in which the party had arranged and combined with each other the breaking rollers and the screen; and the amended specification of the reissued patent described essentially the same machine as the former one did, but claimed, as the thing invented, the breaking apparatus only, a dedication to the public did not accrue in the interval between the one patent and the other. *Battin v. Taggart*, 17 How. 74, 15 L. Ed. 37.

Where a defective patent had been surrendered, and a new one taken out, and the patentee brought an action for a violation of his patent right, laying the infringement at a date subsequent to that of the renewed patent, proof of the use of the thing patented during the interval between the original and renewed patents will not defeat the action. *Stimpson v. West Chester R. Co.*, 4 How. 380, 11 L. Ed. 1020.

**68. Term and duration of reissue.**—Section 13, Patent Act of 1836; *Allen v. Culp*, 166 U. S. 501, 504, 41 L. Ed. 1093; *Wilson v. Rousseau*, 4 How. 646, 685, 11 L. Ed. 1141; *Grant v. Raymond*, 6 Pet. 218, 8 L. Ed. 376.

**69. Date.**—Rev. Stat., § 4885; *Marsh v. Nichols, etc., Co.*, 128 U. S. 605, 615, 32

L. Ed. 538.

**70. Date of application and assignment.**—*Worley v. Tobacco Co.*, 104 U. S. 340, 26 L. Ed. 821.

**71. Date of application determines priority.**—*The Barbed Wire Patent*, 143 U. S. 275, 281, 36 L. Ed. 154.

**72. Antedating.**—*Tilghman v. Proctor*, 102 U. S. 707, 734, 26 L. Ed. 279.

**73. Power of congress to fix duration.**—*United States v. American Bell Tel. Co.*, 167 U. S. 224, 247, 42 L. Ed. 144.

Congress, instead of fixing seventeen had the power to fix thirty years as the life of a patent. No court can disregard any statutory provisions in respect to these matters on the ground that in its judgment they are unwise or prejudicial to the interests of the public. *United States v. American Bell Tel. Co.*, 167 U. S. 224, 247, 42 L. Ed. 144.

**74. Duration prior to act of 1861.**—Act of 1836, 5 Stat. 117, § 6, art. 1839; *Siemens v. Sellers*, 123 U. S. 276, 284, 31 L. Ed. 153.

**75. Duration under act of 1870.**—Section 4881, Rev. Stat. *Siemens v. Sellers*, 123 U. S. 276, 31 L. Ed. 153; *Keeler v. Standard Folding Bed Co.*, 157 U. S. 659, 661, 39 L. Ed. 848; *United States v. American Bell Tel. Co.*, 167 U. S. 224, 247, 42 L. Ed. 144.

On the expiration of the patent, the monopoly created by it ceases to exist, and the right to make the thing formerly covered by the patent becomes public property. *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 185, 41 L. Ed. 118.

**76. Limited by foreign patent.**—*Bate Refrigerating Co. v. Hammond*, 129 U. S. 151, 32 L. Ed. 645; *Siemens v. Sellers*, 123 U. S. 276, 283, 31 L. Ed. 153; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S.



tained by the American patentee or with his consent.<sup>77</sup> And a patent for a device for which a foreign patent has been issued and which has expired before the issuance of the United States patent, is void.<sup>78</sup> Where a foreign patent may be extended at the option of the patentee as a matter of right, its term is continuous, and the United States patent expires with the extensions.<sup>79</sup> While the foreign patent must be substantially for the same invention, it need not be identical in every respect,<sup>80</sup> as where the American patent adds some new improvement.<sup>81</sup> The American patent does not expire until the foreign patent expires by the lapse of the regular period for which it was issued.<sup>82</sup> The limitation imposed by the existence of the foreign patent need not appear on the face of the patent.<sup>83</sup>

1, 19, 39 L. Ed. 601; *The Telephone Cases*, 126 U. S. 1, 572, 31 L. Ed. 863.

The condition imposed by the act of 1839, that the term of a patent for an invention which has been patented in a foreign country, shall commence to run from the time of publication of the foreign patent, was not repealed or abrogated by the act of 1861. *Siemens v. Sellers*, 123 U. S. 276, 285, 31 L. Ed. 153.

**Meaning "previously patented in foreign country."**—In *Bates Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 46, 39 L. Ed. 601, it was held that a foreign patent having been granted pending an application in the United States, the invention for which the United States patent was issued was "previously patented in a foreign country" within the meaning of those words in § 4887 of the Revised Statutes, and that the United States patent expired, under the terms of that section, before the expiration of the seventeen years from its date.

**77. Foreign patent must have been obtained by patentee or with his consent.**—The provision of Rev. Stat., § 4887, that "every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent" obviously presupposed that the foreign patent shall have been obtained by the American patentee or with his consent. *Hobbs v. Beach*, 180 U. S. 383, 397, 45 L. Ed. 586.

**78. Expiration of foreign patent before issuance.**—*Huber v. Nelson Mfg. Co.*, 148 U. S. 270, 275, 37 L. Ed. 447.

**79. Foreign patent subject to extension as matter of right.**—Where the Canadian statute under which the extensions of a Canadian patent were granted, was in force when the United States patent was issued, and also when that patent was applied for, and where, by the Canadian statute, the extension of the patent for Canada was a matter entirely of right, at the option of the patentee, on his payment of a required fee, and where the fifteen years term of the Canadian patent has been continuous and without interruption, the United States patent does not expire before the end of the fifteen years' duration of the Canadian patent. *Bate Refrigerating Co. v. Hammond*, 129 U. S. 151, 168, 32 L. Ed. 645. See, also, *Huber*

*v. Nelson Mfg. Co.*, 148 U. S. 270, 275, 37 L. Ed. 447.

**80. Substantial identity.**—*Commercial Mfg. Co. v. Fairbank Canning Co.*, 135 U. S. 176, 34 L. Ed. 88.

**81. Improvements do not exempt patent.**—"It is contended by the counsel of the complainants, that the American patent contains improvements which are not exhibited in the English patent. But if this were so, it would not help the complainants. The principal invention is in both; and if the American patent contains additional improvements, this fact cannot save the patent from the operation of the law which is invoked, if it is subject to that law at all. A patent cannot be exempted from the operation of the law by adding some new improvements to the invention; and cannot be construed as running partly from one date and partly from another. This would be productive of endless confusion." *Siemens v. Sellers*, 123 U. S. 276, 283, 31 L. Ed. 153.

**82. Foreign patent must expire by lapse of time.**—*Bate Refrigerating Co. v. Hammond*, 129 U. S. 151, 32 L. Ed. 645; *Pohl v. Anchor Brewing Co.*, 134 U. S. 381, 33 L. Ed. 953; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 36, 39 L. Ed. 601; *Hobbs v. Beach*, 180 U. S. 383, 398, 45 L. Ed. 586; *Huber v. Nelson Mfg. Co.*, 148 U. S. 270, 274, 37 L. Ed. 447.

It is assumed that the patent previously granted in a foreign country is one granted for a definite term and its meaning is, that the United States patent shall be so limited as to expire at the same time with such term of the foreign patent. The foreign patent must expire by lapse of time, not through a forfeiture by breach of a condition or by means of the operation of a condition subsequent according to the foreign statute. *Pohl v. Anchor Brewing Co.*, 134 U. S. 381, 383, 33 L. Ed. 953.

**83. Failure to show limitation on face.**—*Bate Refrigerating Co. v. Hammond*, 129 U. S. 151, 169, 32 L. Ed. 645; *O'Reilly v. Morse*, 15 How. 62, 14 L. Ed. 601; *Smith v. Ely*, 15 How. 137, 157, 14 L. Ed. 634; *The Telephone Cases*, 126 U. S. 1, 572, 31 L. Ed. 863; *Siemens v. Sellers*, 123 U. S. 276, 31 L. Ed. 153; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 19, 39 L. Ed. 601.

Where an American patent does not

3. **EXTENSION OR RENEWAL.**—Under the act of 1836, patents might be extended or renewed for the period of seven years.<sup>84</sup> The words "extension" and "renewal" in the patent laws are synonymous.<sup>85</sup> By the act of 1820, patents are granted for seventeen years, and the privilege of extension withdrawn.<sup>86</sup> An executor or administrator could obtain an extension.<sup>87</sup> The extended term was assignable.<sup>88</sup> A special act of congress in favor of a patentee, extending the time beyond that originally limited, must be considered as engrafted on the general law.<sup>89</sup>

## X. Disclaimer.

**A. Power to Disclaim.**—A patentee can lawfully claim only what he has invented and described, and if he claims more, his patent is void.<sup>90</sup> To obviate this hardship of the common law, power is conferred upon a patentee who "has claimed more than that of which he was the original inventor to disclaim such parts of the thing patented as he shall not choose to claim by virtue of the patent."<sup>91</sup> After disclaiming, the patentee may maintain a suit upon that part

bear the same date as a foreign patent for the same invention, it is not rendered invalid but only limited as to term. *O'Reilly v. Morse*, 15 How. 62, 112, 14 L. Ed. 601; *Smith v. Ely*, 15 How. 137, 14 L. Ed. 634; *The Telephone Cases*, 126 U. S. 1, 572, 31 L. Ed. 863. See, also, *Siemens v. Sellers*, 123 U. S. 276, 31 L. Ed. 153.

**84. Patents extended under act of 1836.**—*Bloomer v. McQuewan*, 14 How. 539, 549, 14 L. Ed. 532; *Wilson v. Rousseau*, 4 How. 646, 11 L. Ed. 1141.

**85. "Extension" or "renewal" synonymous.**—When used in relation to patents the words "extension" or "renewal" are used as if synonymous. It is true, that some renewals are not extensions in the sense of prolonging the length of the patent, that is, when an old patent is surrendered and a new one taken out, or a renewal made for the rest of the term,—while all extensions prolong the term. But still renewals are as often used for a prolongation of the term, or for a new term, as extensions are, and in this very section (the act of congress of 1836), to renew and extend is used as if synonymous, and this in sound analogy to the use of the word "renewal" on several other subjects. Thus to renew a lease is to extend it another term. To renew an office to extend it another term. *Wilson v. Rousseau*, 4 How. 646, 697, 11 L. Ed. 1141.

**86. Siemens v. Sellers**, 123 U. S. 276, 31 L. Ed. 153.

**87. Renewal by executor or administrator.**—*Wilson v. Rousseau*, 4 How. 646, 11 L. Ed. 1141.

**Where patentee has disposed of interest.**—The extension could be applied for and obtained by the administrator, although the original patentee had, in his lifetime, disposed of all his interest in the then existing patent. Such sale did not carry any thing beyond the term of the original patent. Section 18, Act 1836; *Wilson v. Rousseau*, 4 How. 646, 11 L. Ed. 1141.

**88. Extended term assignable.**—*Nicolson Pavement Co. v. Jenkins*, 14 Wall. 452, 20 L. Ed. 777; *Railroad Co. v. Trimble*, 10 Wall. 367, 19 L. Ed. 948.

**Assignments as passing extension or renewal.**—See post, "Extensions and Renewals," XII, A, 5, b, (2), (b).

**89. Extensions by act of congress.**—*Evans v. Eaton*, 3 Wheat. 454, 518, 4 L. Ed. 433; *Wilson v. Rousseau*, 4 How. 646, 688, 11 L. Ed. 1141; *Bloomer v. McQuewan*, 14 How. 539, 14 L. Ed. 532.

Where a patent is extended by virtue of a special act of congress, it is not necessary to recite in the certificate of extension all the provisos contained in the act. *Agawam Co. v. Jordan*, 7 Wall. 583, 19 L. Ed. 177.

**90. Effect of excessive claims.**—*O'Reilly v. Morse*, 15 How. 62, 120, 14 L. Ed. 601; *Hailes v. Albany Stove Co.*, 123 U. S. 582, 589, 31 L. Ed. 284.

**91. Power to disclaim.**—Rev. Stat., § 4917; *Union Metallic Cartridge Co. v. United States Cartridge Co.*, 112 U. S. 624, 28 L. Ed. 828; *Hailes v. Albany Stove Co.*, 123 U. S. 582, 31 L. Ed. 284; *O'Reilly v. Morse*, 15 How. 62, 120, 14 L. Ed. 601; *Silsby v. Foote*, 14 How. 218, 14 L. Ed. 394.

When any patentee shall have in his specification claimed to be the first and original inventor or discoverer of any material or substantial part of the thing patented, of which he was not the first and original inventor, and shall have no legal or just claim to the same, he must disclaim in order to protect so much of the claim as is legally patented. The evil is the same as if he claims more than he has invented although no other person has invented it before him. *O'Reilly v. Morse*, 15 How. 62, 120, 14 L. Ed. 601; *Dunbar v. Myers*, 94 U. S. 187, 194, 24 L. Ed. 34.

**Where patentee is not first inventor.**—A disclaimer can be made only when something has been claimed of which the patentee was not the original or first inventor, and when it is intended to limit a claim in respect to the thing so not originally or first invented. *Union Metallic Cartridge Co. v. United States Cartridge Co.*, 112 U. S. 624, 642, 28 L. Ed. 828.

which he is entitled to hold.<sup>92</sup> The power to disclaim is a beneficial one and ought not to be denied, except where it is resorted to for a fraudulent and deceptive purpose.<sup>93</sup>

**B. Persons Entitled to Disclaim.**—The patentee, his executors, administrators, or assigns, whether of the whole or a sectional interest, are authorized to make a disclaimer.<sup>94</sup>

**C. Office of Disclaimer.**—The proper function of a disclaimer is to surrender a separate claim or other distinct matter.<sup>95</sup> It may be used to limit a claim to a particular class of objects,<sup>96</sup> or to change the form of a claim which is too broad in its terms,<sup>97</sup> as where two or more inventions are covered by a single claim,<sup>98</sup> but it cannot be used to change the character of the invention.<sup>99</sup> A disclaimer may extend to a part of the specification as well as to a distinct claim,<sup>1</sup> and be made to obviate an ambiguity in the specification.<sup>2</sup> While descriptive matter on which the matter disclaimed is based may be erased as in-

**92. Power to maintain suit.**—Rev. Stat., § 4922; *Gage v. Herring*, 107 U. S. 640, 646, 27 L. Ed. 601; *Hailes v. Albany Stove Co.*, 123 U. S. 582, 589, 31 L. Ed. 284; *O'Reilly v. Morse*, 15 How. 62, 121, 14 L. Ed. 601; *Vance v. Campbell*, 1 Black 427, 17 L. Ed. 168.

**93. Disclaimer remedial, not penal.**—*Carnegie Steel Co. v. Cambria Iron Co.*, 185 U. S. 403, 435, 46 L. Ed. 968; *Sessions v. Romadka*, 145 U. S. 29, 36 L. Ed. 609; *O'Reilly v. Morse*, 15 How. 62, 120, 14 L. Ed. 601; *Dunbar v. Myers*, 94 U. S. 187, 194, 24 L. Ed. 34.

The law which requires and permits a disclaimer is intended for the protection of the patentee as well as the public. *O'Reilly v. Morse*, 15 How. 62, 120, 14 L. Ed. 601.

**94. Who may disclaim.**—Rev. Stat., § 4917; *Union Metallic Cartridge Co. v. United States Cartridge Co.*, 112 U. S. 624, 28 L. Ed. 828; *Hailes v. Albany Stove Co.*, 123 U. S. 582, 31 L. Ed. 284; *Silsky v. Foote*, 14 How. 218, 14 L. Ed. 394.

**95. To surrender distinct or separable matter.**—*Hailes v. Albany Stove Co.*, 123 U. S. 582, 31 L. Ed. 284; *Collins Co. v. Coes*, 130 U. S. 56, 68, 32 L. Ed. 858.

A disclaimer is usually and properly employed for the surrender of a separate claim in a patent, or some other distinct and separable matter, which can be excised without mutilating or changing what is left standing. *Hailes v. Albany Stove Co.*, 123 U. S. 582, 31 L. Ed. 284.

**96. Limiting claim to particular class of objects.**—*Hailes v. Albany Stove Co.*, 123 U. S. 582, 587, 31 L. Ed. 284.

**97. Narrowing claim.**—*Hailes v. Albany Stove Co.*, 123 U. S. 582, 31 L. Ed. 284.

**98. Two inventions covered by single claim.**—*Sessions v. Romadka*, 145 U. S. 29, 40, 36 L. Ed. 609.

A disclaimer may be made to avoid the effect of having included in the patent more devices than could properly be made the subject of a single patent. *Sessions v. Romadka*, 145 U. S. 29, 40, 36 L. Ed. 609.

**99. Cannot change character of invention.**—*Hailes v. Albany Stove Co.*, 123 U. S. 582, 587, 31 L. Ed. 284; *Parker, etc., Co. v. Yale Clock Co.*, 123 U. S. 87, 31 L. Ed. 100; *Grant v. Walter*, 148 U. S. 547, 37 L. Ed. 552; *Roemer v. Bernheim*, 132 U. S. 103, 106, 33 L. Ed. 277.

A disclaimer cannot operate to change a patent for a product into one for a process. *Grant v. Walter*, 148 U. S. 547, 37 L. Ed. 552.

"It is contended that the drawings annexed to the patent may be referred to for the purpose of defining the invention and showing what it really was. But the drawings cannot be used, even on an application for a reissue, much less on a disclaimer, to change the patent and make it embrace a different invention from that described in the specification. This is fully and clearly shown in the recent case of *Parker, etc., Co. v. Yale Clock Co.*, 123 U. S. 87, 31 L. Ed. 100." *Hailes v. Albany Stove Co.*, 123 U. S. 582, 587, 31 L. Ed. 284.

A patent void, as originally issued, for want of patentable novelty, cannot be saved by a disclaimer, when the terms imposed as a condition precedent to a rehearing are not complied with. *Roemer v. Bernheim*, 132 U. S. 103, 106, 33 L. Ed. 277.

**1. May extend to specification as well as claim.**—"We think there is no force in the criticism that a disclaimer may not extend to a part of the specification, as well as to a distinct claim. *Hurlbut v. Schillinger*, 130 U. S. 456, 32 L. Ed. 1011." *Carnegie Steel Co. v. Cambria Iron Co.*, 185 U. S. 403, 436, 46 L. Ed. 968.

**2. Obviating ambiguity.**—A disclaimer not of a claim, but of certain statements in the specifications, which is retained might be construed to have the effect of illegally broadening the claim, is not subject to criticism where it appears to have been made to obviate an ambiguity in the specification and with no idea of obtaining the benefit of a reissue. *Carnegie Steel Co. v. Cambria Iron Co.*, 185 U. S. 403, 435, 46 L. Ed. 968.



cidental,<sup>3</sup> a defective or insufficient specification cannot be corrected by disclaimer.<sup>4</sup>

**D. When Excess May Be Disclaimed.**—1. **NECESSITY FOR ACCIDENT, MISTAKE, ETC.**—The claim must have been too comprehensive through inadvertence, accident or mistake and without any fraudulent intent on the part of the patentee.<sup>5</sup>

2. **EXCESS MUST BE SEPARABLE.**—The part which is bona fide the patentee's own, must be clearly distinguishable from the part claimed without right.<sup>6</sup> Therefore disclaimer cannot apply to a patent granted for a combination of old ingredients.<sup>7</sup>

**E. Form and Requisites.**—Disclaimer must be made in writing, duly attested and recorded in the patent office,<sup>8</sup> and, ordinarily, it should state the extent of disclaimant's interest in the patent.<sup>9</sup>

**F. Time of Filing.**—If a patentee be unreasonably negligent or dilatory in filing a disclaimer, he is not entitled to the benefit of it.<sup>10</sup> The patentee may file a disclaimer either before or after the commencement of a suit,<sup>11</sup> or even after final judgment,<sup>12</sup> but in a suit brought before the disclaimer, the patentee cannot recover costs.<sup>13</sup> A disclaimer cannot be filed after expiration of

3. **Erasing descriptive matter in specification.**—*Union Metallic Cartridge Co. v. United States Cartridge Co.*, 112 U. S. 624, 28 L. Ed. 828.

4. **Correction of defective specification.**—*Union Metallic Cartridge Co. v. United States Cartridge Co.*, 112 U. S. 624, 28 L. Ed. 828; *Hailes v. Albany Stove Co.*, 123 U. S. 582, 31 L. Ed. 284; *Collins Co. v. Coes*, 130 U. S. 56, 32 L. Ed. 858.

Where an amended specification or supplemental description is required to make a claim intelligible, a disclaimer is not available. *Hailes v. Albany Stove Co.*, 123 U. S. 582, 587, 31 L. Ed. 284; *Collins Co. v. Coes*, 130 U. S. 56, 68, 32 L. Ed. 858.

5. **Necessity for inadvertence, accident or mistake.**—*Hailes v. Albany Stove Co.*, 123 U. S. 582, 31 L. Ed. 284; *O'Reilly v. Morse*, 15 How. 62, 121, 14 L. Ed. 601.

Whether the patent is illegal in part because the patentee claims more than he has sufficiently described, or more than he invented, he must in either case disclaim, in order to save the portion to which he is entitled; and he is allowed to do so when the error was committed by mistake. *O'Reilly v. Morse*, 15 How. 62, 120, 14 L. Ed. 601.

6. **Excess must be separable.**—*Hailes v. Albany Stove Co.*, 123 U. S. 582, 31 L. Ed. 284; *Vance v. Campbell*, 1 Black 427, 428, 17 L. Ed. 168; *Gill v. Wells*, 22 Wall. 1, 26, 22 L. Ed. 699.

7. **Patents for combinations of old elements.**—*Vance v. Campbell*, 1 Black 427, 428, 17 L. Ed. 168; *Case v. Brown*, 2 Wall. 320, 17 L. Ed. 817; *Burr v. Duryee*, 1 Wall. 531, 566, 17 L. Ed. 650; *Gill v. Wells*, 22 Wall. 1, 27, 22 L. Ed. 699.

8. **Formal requisites.**—*Dunbar v. Myers*, 94 U. S. 187, 24 L. Ed. 34.

9. **Stating extent of interest.**—*Silsby v. Foote*, 14 How. 218, 14 L. Ed. 394.

Where a disclaimer states that the plaintiff was himself the patentee, and is silent respecting a transfer of any part of

his interest, the implication that he has parted with no interest is sufficient. *Silsby v. Foote*, 14 How. 218, 14 L. Ed. 394.

10. **Right lost by negligent delay.**—Act of 1837 (5 Stat. at L. 194) *Seymour v. McCormick*, 19 How. 96, 15 L. Ed. 557; *Hailes v. Albany Stove Co.*, 123 U. S. 582, 31 L. Ed. 284; *O'Reilly v. Morse*, 15 How. 62, 14 L. Ed. 601; *Smith v. Nichols*, 21 Wall. 112, 22 L. Ed. 566; *Silsby v. Foote*, 20 How. 378, 15 L. Ed. 953; *Sessions v. Romadka*, 145 U. S. 29, 41, 36 L. Ed. 609.

11. **Before or after suit.**—*Smith v. Nichols*, 21 Wall. 112, 22 L. Ed. 566; *Silsby v. Foote*, 20 How. 378, 15 L. Ed. 953; *Seymour v. McCormick*, 19 How. 96, 15 L. Ed. 557.

It would, however, in case of its being filed after, be the duty of the court to see that the defendant was not injuriously taken by surprise, and to impose such terms as right and justice might require. *Smith v. Nichols*, 21 Wall. 112, 22 L. Ed. 566; *Silsby v. Foote*, 14 How. 218, 14 L. Ed. 394.

12. **After judgment.**—Where a claim was sanctioned by the head of the patent office, and held valid by a circuit court, a delay in entering a disclaimer until the highest court to which it could be carried had pronounced its judgment, was not unreasonable. *O'Reilly v. Morse*, 15 How. 62, 14 L. Ed. 601.

In *Roemer v. Bernheim*, 132 U. S. 103, 106, 33 L. Ed. 277, a bill in equity for the infringement of letters-patent, it was held that after the case had been heard and decided upon its merits, the plaintiff could not file a disclaimer in court, or introduce new evidence upon that or any other subject, except at a rehearing granted by the court, upon such terms as it thought fit to impose.

13. **Recovery of costs.**—Sections 4917, 4922, Rev. Stat.; *Sessions v. Romadka*, 145 U. S. 29, 36 L. Ed. 609. This was practi-

patent.<sup>14</sup> The question of reasonableness of the delay may be one of law for the court to decide.<sup>15</sup>

**G. Operation and Effect.**—A disclaimer is a part of the original claim,<sup>16</sup> and the patent is to be construed as if the disclaimed matters had never been included therein.<sup>17</sup> The only effect of the disclaimer is to limit the nature of the invention secured by the patent, and it has no effect on pending suits.<sup>18</sup> After an extension has been obtained on the condition precedent of making a disclaimer, the disclaimer cannot be held inoperative as respects the extended term.<sup>19</sup>

## XI. Notice of Patent or Marking Patented Articles.

A patentee should give notice to the public of the existence of his patent either by affixing thereon the word "patented," together with the day and year the patent was granted, or when, from the character of the article, this cannot be done, by fixing to it, or to the package wherein one or more of them is enclosed, a label containing the like notice.<sup>20</sup> And in any suit for infringement, by the party failing so to mark, no damages can be recovered by the plaintiff, ex-

cally the construction given to corresponding sections of the act of 1837 in *Smith v. Nichols*, 21 Wall. 112, 22 L. Ed. 566, and of the Revised Statutes in *Dunbar v. Myers*, 94 U. S. 187, 24 L. Ed. 34. See, also, *Seymour v. McCormick*, 19 How. 96, 15 L. Ed. 557; *O'Reilly v. Morse*, 15 How. 62, 14 L. Ed. 601; *Hailes v. Albany Stove Co.*, 123 U. S. 582, 31 L. Ed. 284; *Gage v. Herring*, 107 U. S. 640, 27 L. Ed. 601; *Vance v. Campbell*, 1 Black 427, 17 L. Ed. 168.

**14. After expiration of patent.**—*Yale Lock Mfg. Co. v. Sargent*, 117 U. S. 536, 554, 29 L. Ed. 954.

**15. Question for court or jury.**—*Seymour v. McCormick*, 19 How. 96, 15 L. Ed. 557; *O'Reilly v. Morse*, 15 How. 62, 14 L. Ed. 601.

**16. Incorporated in specification.**—*Dunbar v. Myers*, 94 U. S. 187, 193, 24 L. Ed. 34; *Smith v. Nichols*, 21 Wall. 112, 117, 22 L. Ed. 566.

Authority to make a disclaimer is beyond question, if it be made in writing, and is duly attested and recorded in the patent office. When so made, attested, and recorded, it becomes a part of the original specification to the extent of the interest of those who make it; but the provision is that it shall not affect any action pending at the time of its being filed, except so far as may relate to the question of unreasonable neglect or delay in filing it. 16 Stat. 206; Rev. Stat., Section 4917. *Dunbar v. Myers*, 94 U. S. 187, 193, 24 L. Ed. 34.

**17. Nullity of disclaimed matters.**—*Dunbar v. Myers*, 94 U. S. 187, 194, 24 L. Ed. 34; *O'Reilly v. Morse*, 15 How. 62, 121, 14 L. Ed. 601.

**18. Disclaimer limits nature of invention.**—*Dunbar v. Myers*, 94 U. S. 187, 193, 24 L. Ed. 34; *Silby v. Foote*, 20 How. 378, 15 L. Ed. 955; *Smith v. Nichols*, 21 Wall. 112, 117, 22 L. Ed. 566.

Where the effect of the disclaimer is to diminish the claims of the patent without prejudicing the rights of the respondent,

the suit may proceed, notwithstanding the disclaimer, it being held that the disclaimer, under such circumstances, does not affect the pending suit, except to limit and qualify the claims of the patent, and in respect to the question of unreasonable neglect or delay in filing the same. Unreasonable delay not having been suggested, the only effect of the disclaimer in such a case is to limit the nature of the invention secured by the patent, and to diminish the claims of the patent as set forth in the specification. *Dunbar v. Myers*, 94 U. S. 187, 193, 24 L. Ed. 34.

**19. Disclaimer filed as condition to extension.**—*Union Metallic Cartridge Co. v. United States Cartridge Co.*, 112 U. S. 624, 28 L. Ed. 828.

**20. Marking article with notice of patent.**—Rev. Stat., § 4900; *Sessions v. Romadka*, 145 U. S. 29, 49, 36 L. Ed. 609; *Dunlap v. Schofield*, 152 U. S. 244, 247, 38 L. Ed. 426; *Coupe v. Royer*, 155 U. S. 565, 584, 39 L. Ed. 263.

The clear meaning of this section is that the patentee or his assignee, if he makes or sells the article patented, cannot recover damages against infringers of the patent, unless he has given notice of his right, either to the whole public by marking his article "patented" or to the particular defendants by informing them of his patent and of their infringement of it. *Dunlap v. Schofield*, 152 U. S. 244, 247, 38 L. Ed. 426.

Plaintiff, a manufacturer of trunk catches, stamped upon the larger sizes the fact and the date of the patent, but failed to affix such stamp to the smaller sizes, on account, as he averred, of the difficulty of marking them in such way as the mark would be legible when the catches were japanned or tinned. It was held that while it was not altogether clear that the stamp could not have been made upon the smaller sizes, yet, as the case was a doubtful one, something was to be left to the judgment of the patentee, who had complied with the alternative pro-

cept on proof that the defendant was duly notified of the infringement, and continued, after such notice, to make, use or vend the article so patented.<sup>21</sup>

## XII. Sales, Assignments, Mortgages, and Licenses.

**A. Sales and Assignments of Patent Rights**—1. **RIGHT TO SELL OR ASSIGN**—a. *General Rule*.—A patent which vests the sole and exclusive right of making, using, and vending the invention in the person to whom it has been granted by the government, as against all persons not deriving title through him, is property, capable of being assigned by him at his pleasure.<sup>22</sup> The rights growing out of an invention may be sold, including the right to use it, though no patent ever issues for it.<sup>23</sup>

b. *Splitting Up Patent*.—A patentee cannot split up his patent into as many different parts as there are claims, and vest the legal title to those claims in as many different persons.<sup>24</sup>

2. **WHO ARE ASSIGNEES**.—An assignee is one who holds, by a valid assignment in writing, the whole interest of a patent, or any undivided part of such whole interest, throughout the United States.<sup>25</sup>

3. **TIME OF TRANSFER**.—The assignment of a right in a patent before it issues is effectual to pass the patent when it issues.<sup>26</sup> And where the conveyance or assignment precedes the granting of the patent, it may be issued to the assignee, the assignment being first entered of record in the patent office.<sup>27</sup>

4. **CONTRACT OF SALE OR ASSIGNMENT**—a. *What Constitutes*.—Whether a transfer of a particular right or interest under a patent is an assignment or a

visions of the act, in affixing a label to the packages in which the trunk catches were shipped and sold. *Sessions v. Romadka*, 145 U. S. 29, 36 L. Ed. 609.

21. **Right to sue for infringement in absence of mark or notice**.—*Sessions v. Romadka*, 145 U. S. 29, 49, 36 L. Ed. 609; *Dunlap v. Schofield*, 152 U. S. 244, 38 L. Ed. 426; *Coupe v. Royer*, 155 U. S. 565, 584, 39 L. Ed. 263.

22. **Patent is assignable**.—*Adams v. Burke*, 17 Wall. 453, 21 L. Ed. 700; *Ager v. Murray*, 105 U. S. 126, 127, 26 L. Ed. 942; *Hendrie v. Sayles*, 98 U. S. 546, 548, 25 L. Ed. 176; *Gayler v. Wilder*, 10 How. 477, 13 L. Ed. 504; *Machine Co. v. Murphy*, 97 U. S. 120, 121, 24 L. Ed. 935; *Railroad Co. v. Trimble*, 10 Wall. 367, 19 L. Ed. 948; *Agawam Co. v. Jordan*, 7 Wall. 583, 19 L. Ed. 177; *Durham v. Seymour*, 161 U. S. 235, 238, 40 L. Ed. 682; *Keeler v. Standard Folding Bed Co.*, 157 U. S. 659, 661, 39 L. Ed. 848.

23. **Sale valid though patent never issues**.—*Hammond v. Mason*, etc., *Organ Co.*, 92 U. S. 724, 725, 23 L. Ed. 767; *Agawam Co. v. Jordan*, 7 Wall. 583, 19 L. Ed. 177; *Keeler v. Standard Folding Bed Co.*, 157 U. S. 659, 661, 39 L. Ed. 848; *Bement v. National Harrow Co.*, 186 U. S. 70, 88, 46 L. Ed. 1058; *Durham v. Seymour*, 161 U. S. 235, 238, 40 L. Ed. 682.

"Rights growing out of an invention may be sold, whether the sale in any case carries with it anything of value or not. *Hammond v. Mason*, etc., *Organ Co.*, 92 U. S. 724, 728, 23 L. Ed. 767." *Durham v. Seymour*, 161 U. S. 235, 238, 40 L. Ed. 682.

24. **Right to split up patent by several assignments**.—*Pope Mfg. Co. v. Gormully*,

etc., *Mfg. Co.*, No. 3, 144 U. S. 248, 250, 36 L. Ed. 423; *Waterman v. Mackenzie*, 138 U. S. 252, 34 L. Ed. 923.

25. **Who is an assignee**.—*Moore v. Marsh*, 7 Wall. 515, 520, 19 L. Ed. 37. See post, "What Constitutes," XII, A, 4, a.

"Assignee" and "grantee" not synonymous terms.—The terms "assignee" and "grantee" as used in the patent law are not synonymous. *Moore v. Marsh*, 7 Wall. 515, 521, 19 L. Ed. 37.

26. **Assignment before issuance of patent**.—*Railroad Co. v. Trimble*, 10 Wall. 367, 19 L. Ed. 948; *Hendrie v. Sayles*, 98 U. S. 546, 25 L. Ed. 176; *Gayler v. Wilder*, 10 How. 477, 13 L. Ed. 504; *Hartshorn v. Day*, 19 How. 211, 15 L. Ed. 605; *Durham v. Seymour*, 161 U. S. 235, 238, 40 L. Ed. 682; *Littlefield v. Perry*, 21 Wall. 205, 225, 22 L. Ed. 577.

An assignment of a patent right, made and recorded in the patent office before the patent issued, which purported to convey to the assignee all the inchoate right which the assignor then possessed, as well as the legal title which he was about to obtain, was sufficient to transfer the right to the assignee, although a patent afterwards was issued to the assignor. *Gayler v. Wilder*, 10 How. 477, 13 L. Ed. 504.

Where a patentee is about to apply for a renewal of his patent, and agrees with another person that, in case of success, he will assign to him the renewed patent, and the patent is renewed, such an agreement is valid, and conveys to the assignee an equitable title, which can be converted into a legal title by paying, or offering to pay, the stipulated consideration. *Hartshorn v. Day*, 19 How. 211, 15 L. Ed. 605.

27. **Patent assigned before issuance may**



license does not depend upon the name by which it is called, but upon the legal effect of its provisions.<sup>28</sup> An assignment may be of the whole patent, of the exclusive right within certain territory, or of an individual part.<sup>29</sup>

b. *Form and Requisites*—(1) *In General*.—A contract of sale or assignment of a patent must convey the exclusive right, under the patent, to make and use, and vend to others to be used, the thing patented, within and throughout some specified district or portion of the United States, and such right must be exclusive of the patentee, as well as of all others except the grantee.<sup>30</sup>

(2) *Who May Make*.—In Texas, an executor de son tort may make an assignment of a patent which will be valid if not repudiated by the regularly appointed personal representative or by the children of the decedent.<sup>31</sup>

(3) *Writing*.—A sale or assignment of a patent right must be in writing.<sup>32</sup> But an oral agreement to sell or assign is valid.<sup>33</sup>

(4) *Sealing*.—Assignments of patents, though required to be in writing, are not required to be sealed.<sup>34</sup>

(5) *Recording*.—The assignment, unless recorded in the patent office within three months from its execution, is void against subsequent purchasers or mortgagees for a valuable consideration without notice.<sup>35</sup> But as between the parties, recording is not necessary to the validity of the assignment.<sup>36</sup>

**issue to assignee.**—*Hendrie v. Sayles*, 98 U. S. 546, 25 L. Ed. 176.

**28. What constitutes.**—*Waterman v. Mackenzie*, 138 U. S. 252, 256, 34 L. Ed. 923; *Wilson v. Rousseau*, 4 How. 646, 686, 11 L. Ed. 1141.

**29. Assignment may be of whole or part of patent right.**—*Waterman v. Mackenzie*, 138 U. S. 252, 34 L. Ed. 923; *Pope Mfg. Co. v. Gormully, etc.*, Mfg. Co., No. 3, 144 U. S. 248, 251, 36 L. Ed. 423.

"The patentee or his assigns may, by instrument in writing, assign, grant and convey, either, 1st, the whole patent, comprising the exclusive right to make, use and vend the invention throughout the United States; or, 2d, an undivided part or share of that exclusive right; or, 3d, the exclusive right under the patent within and throughout a specified part of the United States. Rev. Stat., § 4898. A transfer of either of these three kinds of interests is an assignment, properly speaking, and vests in the assignee a title in so much of the patent itself, with a right to sue infringers; in the second case, jointly with the assignor; in the first and third cases, in the name of the assignee alone. Any assignment or transfer, short of one of these, is a mere license, giving the licensee no title in the patent, and no right to sue at law in his own name for an infringement. Rev. Stat., § 4919; *Gayler v. Wilder*, 10 How. 477, 494, 495, 13 L. Ed. 504; *Moore v. Marsh*, 7 Wall. 515, 19 L. Ed. 37." *Waterman v. Mackenzie*, 138 U. S. 252, 255, 34 L. Ed. 923.

A grant of an exclusive right to make, use and vend two patented machines within a certain district, is an assignment, and gives the grantee the right to sue in his own name for an infringement within the district, because the right, although limited to making, using and vending two

machines, excludes all other persons, even the patentee, from making, using or vending like machines within the district. *Waterman v. Mackenzie*, 138 U. S. 252, 34 L. Ed. 923; *Wilson v. Rousseau*, 4 How. 646, 11 L. Ed. 1141. See post, "What Constitutes," XII, C, 1.

**30. Form and validity of grant.**—*Moore v. Marsh*, 7 Wall. 515, 521, 19 L. Ed. 37.

**31. Who may make assignment.**—*De La Vergne, etc., Machine Co. v. Featherstone*, 147 U. S. 209, 37 L. Ed. 138.

**32. Assignment must be in writing.**—*Agawam Co. v. Jordan*, 7 Wall. 583, 19 L. Ed. 177; *Moore v. Marsh*, 7 Wall. 515, 19 L. Ed. 37; *Machine Co. v. Murphy*, 97 U. S. 120, 121, 24 L. Ed. 935. See the title **FRAUDS, STATUTE OF**, vol. 6, p. 451.

**33. An oral agreement for the sale and assignment of the right to obtain a patent for an invention is not within the statute of frauds, nor within § 4898 of the Revised Statutes requiring assignments of patents to be in writing; and may be specifically enforced in equity, upon sufficient proof thereof.** *Dalzell v. Dueber, etc.*, Mfg. Co., 149 U. S. 315, 320, 37 L. Ed. 749.

**34. Assignments of patents are not required to be under seal.** *Gottfried v. Miller*, 104 U. S. 521, 527, 26 L. Ed. 851.

**35. Recording.**—*Ager v. Murray*, 105 U. S. 126, 127, 26 L. Ed. 942; *Gayler v. Wilder*, 10 How. 477, 13 L. Ed. 504; *Littlefield v. Perry*, 21 Wall. 205, 22 L. Ed. 577; *Waterman v. Mackenzie*, 138 U. S. 252, 34 L. Ed. 923.

**36. Recording not necessary as between parties.**—*De La Vergne, etc., Machine Co. v. Featherstone*, 147 U. S. 209, 225, 37 L. Ed. 138.

Where an inventor died pending the application for a patent, and the patent was issued to him "his heirs or assigns," and subsequently the inventor's administrator conveyed the entire patent right to a third person, it was held that the

(6) *Compliance with State Statutes.*—The states may require that on a sale or assignment of letters-patent copies thereof shall be filed with the clerk of the court, and that notes given therefor shall state on their face that they were "given for a patent right."<sup>37</sup>

c. *Construction*—(1) *General Rules*—(a) *Intention as Governing.*—An assignment of an interest in an invention secured by letters-patent is a contract, and like all other contracts is to be construed so as to carry out the intention of the parties to it.<sup>38</sup>

(b) *Several Contracts Construed Together.*—Where an inventor signed several different agreements with the same party, on the same day, for the sale of his invention and for a license to use it, they must all be construed together.<sup>39</sup>

(c) *Parol Evidence to Vary.*—Parol evidence is not admissible to impeach a sealed contract to assign a patent when issued.<sup>40</sup>

(2) *Rights Passing by Contract.*—See post, "Rights of Transferee," XII, A, 5, b.

(3) *Reservations to Patentee.*—A contract for the sale of a patent which stipulates that improvements shall enure to the benefit of both parties, and which secures to the patentee the right to manufacture under the patent, entitles the patentee to manufacture without royalty and without infringement under a patent for further improvements taken out by the purchaser of the original patent.<sup>41</sup>

## 5. RIGHTS AND LIABILITIES OF TRANSFEREE—a. *In General.*—The assignee

failure to record the title papers in the patent office did not invalidate the patent, it appearing that the administrator and equitable owner in part had obtained the patent. *De La Vergne, etc., Machine Co. v. Featherstone*, 147 U. S. 209, 37 L. Ed. 138.

**37. State statutes regulating sales and transfers of patents.**—*Allen v. Riley*, 203 U. S. 347, 51 L. Ed. 216; *Woods & Sons v. Carl*, 203 U. S. 358, 51 L. Ed. 219.

**The Kansas statute** (ch. 182, Laws of 1889, prescribing the provisions which shall accompany the sale or assignments of rights arising under a patent, i. e., filing with clerk of the district court duly authenticated copies of the letters-patent and inserting the words "Given for a patent right" in all written obligations taken for a patent right, does not trench upon the federal power or the rights of the patentee as fixed by U. S. Const., art. 1, § 8, authorizing congress to provide for securing to inventors the exclusive rights to their discoveries for limited periods and Revised Statutes, § 4898, which authorizes assignments of patent rights which shall be valid as to third parties when recorded in the patent office. *Allen v. Riley*, 203 U. S. 347, 51 L. Ed. 216.

A note given for the sale of a patent was not executed as provided for by the statute of that state relating to the sale of rights under a patent. The act of April 23, 1891, Kirby's Dig., § 513, provides that unless such notes show on their face for what they were given, they shall be void. The violation of the statute being set up as a defense, the statute was declared valid, following the ruling of *Allen*

*v. Riley*, 203 U. S. 347, 51 L. Ed. 216; *Woods & Sons v. Carl*, 203 U. S. 358, 51 L. Ed. 219.

**38. Intention as governing.**—*Hammond v. Mason, etc., Organ Co.*, 92 U. S. 724, 23 L. Ed. 767; *Nicolson Pavement Co. v. Jenkins*, 14 Wall. 452, 456, 20 L. Ed. 777.

If it is apparent from several agreements for the license and sale of an invention that the inventor intended to convey the right to use a new invention in connection with former patents, under any renewal or extension of the former, the grantee or assignee is protected, though the improvement was never patented, and though the reissued patent was extended afterwards. *Hammond v. Mason, etc., Organ Co.*, 92 U. S. 724, 23 L. Ed. 767.

**39. Agreements for sale and license construed together.**—*Hammond v. Mason, etc., Organ Co.*, 92 U. S. 724, 23 L. Ed. 767.

**40. Parol evidence to impeach sealed contract to assign.**—*Hartshorn v. Day*, 19 How. 211, 15 L. Ed. 605. See the title PAROL EVIDENCE, ante, p. 12.

Evidence tending to show that an agreement between a patentee and his attorney, when about to apply for a renewal, to assign the renewed patent to him in case of success, had been produced by the fraudulent representations of the latter, in respect to transactions out of which the agreement arose, ought not to have been received, it being a sealed instrument. *Hartshorn v. Day*, 19 How. 211, 15 L. Ed. 605.

**41. Contract securing to patentee benefit of improvements made by purchaser.**—*Topliff v. Topliff*, 122 U. S. 121, 30 L. Ed. 1110.

thereafter stands in the place of the patentee, both as to right under the patent and future responsibility.<sup>42</sup>

b. *Rights of Transferee*.—(1) *General Rule*.—The assignees of a patent right take it subject to the legal consequences of the previous acts of the patentee.<sup>43</sup>

(2) *What Passes to Transferee*.—(a) *Title and Right to Control*.—Where the assignment of a patent is absolute and unconditional, the legal title thereby vests in the assignee, and the patentee has no rights with respect to the sale or management thereof,<sup>44</sup> and this rule is not affected by a clause in the contract giving the patentee a share of the net profits arising from the sale of the patent by the assignees.<sup>45</sup>

(b) *Extensions and Renewals*.—It is well settled that the title of an inventor to obtain an extension may be the subject of a contract of sale.<sup>46</sup> Whether the right to an extension or renewal passes by the contract of sale or assignment depends upon the nature of the rights sold and terms of the contract.<sup>47</sup> Where the conveyance is of an existing patent, apt words are required to show that the conveyance includes more than the term specified in the patent.<sup>48</sup> But where the

**42. Rights of assignee in general.**—*Moore v. Marsh*, 7 Wall. 515, 522, 19 L. Ed. 37.

**43. Assignee subject to previous acts of assignor.**—*McClurg v. Kingsland*, 1 How. 202, 11 L. Ed. 102; *Worley v. Tobacco Co.*, 104 U. S. 340, 344, 26 L. Ed. 821.

**44. Effect of assignment as vesting title in assignee.**—*Rude v. Westcott*, 130 U. S. 152, 32 L. Ed. 888; *Boesch v. Graff*, 133 U. S. 697, 701, 33 L. Ed. 787.

A clause in an instrument assigning the right of the patentee in his patent, and appointing the assignees attorneys of the grantor, with authority to use his name whenever they deemed proper in such management, does not restrict in any way the power of the assignees after the transfer of the property, nor require them to consult the assignor in its management. *Rude v. Westcott*, 130 U. S. 152, 32 L. Ed. 888.

Where an assignment is absolute in form it conveys the legal title, and the title is not divested by a condition of defeasance as to payment of money to the assignor, where the money is paid at the time agreed on. *Boesch v. Graff*, 133 U. S. 697, 701, 33 L. Ed. 787.

**45. Effect of clause giving patentee share of net profits.**—*Rude v. Westcott*, 130 U. S. 152, 32 L. Ed. 888; *Tilghman v. Proctor*, 125 U. S. 136, 143, 31 L. Ed. 664.

An instrument, amply full and expressive to convey the right of the patentee in his patent, is not rendered any less effective for this purpose by a provision therein that the net profits arising from sales, royalties, settlements or other source, shall be divided between the parties to the assignment so as to give the patentee one-fourth thereof. *Rude v. Westcott*, 130 U. S. 152, 32 L. Ed. 888.

Where the absolute title to a patent is assigned upon an agreement that the assignor shall be entitled to one-fourth of the net profits arising from the sales thereof, the assignees do not hold the property as trustees for the benefit of the property but are only trustees for him of

one-fourth of the profits. *Rude v. Westcott*, 130 U. S. 152, 32 L. Ed. 888; *Tilghman v. Proctor*, 125 U. S. 136, 143, 31 L. Ed. 664.

**46. Power of patentee to sell right to extension.**—*De La Vergne, etc., Machine Co. v. Featherstone*, 147 U. S. 209, 223, 37 L. Ed. 138; *Nicolson Pavement Co. v. Jenkins*, 14 Wall. 452, 456, 20 L. Ed. 777; *Gayler v. Wilder*, 10 How. 477, 13 L. Ed. 504.

**47. Whether right to extension passes depends on contract.**—*Railroad Co. v. Trimble*, 10 Wall. 367, 19 L. Ed. 948; *Nicolson Pavement Co. v. Jenkins*, 14 Wall. 452, 20 L. Ed. 777; *Mitchell v. Hawley*, 16 Wall. 544, 21 L. Ed. 322; *Hendrie v. Sayles*, 98 U. S. 546, 554, 25 L. Ed. 176.

**48. Conveyance of patent right.**—*Hendrie v. Sayles*, 98 U. S. 546, 554, 25 L. Ed. 176; *Mitchell v. Hawley*, 16 Wall. 544, 21 L. Ed. 322; *Paper-Bag Cases*, 105 U. S. 766, 771, 26 L. Ed. 959.

When the patentee assigns the patent to a purchaser, the assignee acquires only the exclusive right to make, use, and vend the patented improvement during the term for which the patent was granted, unless the instrument of assignment contains words showing that the parties intended that the instrument should be more comprehensive and include the extended term in case an extension should be granted by the commissioner. *Hendrie v. Sayles*, 98 U. S. 546, 550, 25 L. Ed. 176.

The franchise which the patent grants, consists altogether in the right to exclude every one from making, using, or vending the thing patented, without the permission of the patentee. This is all that he obtains by the patent. And when he sells the exclusive privilege of making or vending it for use in a particular place, the purchaser buys a portion of the franchise which the patent confers. He obtains a share in the monopoly, and that monopoly is derived from, and exercised under, the protection of the United States. And the interest he acquires, necessarily terminates at the time limited for its con-



conveyance is of the invention, whether before or after the patent is obtained, the rule is that the right to renewals or extensions passes, unless excepted from the transfer.<sup>49</sup> But even if the assignee cannot sell or vend the patent to others,

tinuance by the law which created it. The patentee cannot sell it for a longer time. And the purchaser buys with reference to that period; the time for which the exclusive privilege is to endure being one of the chief elements of its value. He therefore has no just claim to share in a further monopoly subsequently acquired by the patentee. He does not purchase or pay for it. *Bloomer v. McQuewan*, 14 How. 539, 549, 14 L. Ed. 532.

Assignees of the patent from the patentee can only sell and convey what they acquire by virtue of the instrument of assignment, and inasmuch as the presumption is that the grantor contracts to sell and convey only what is secured by the patent, the proper construction of the instrument limits the right conveyed to the term expressed in the patent, unless the instrument contains words to indicate a different intent. Holders of patents may not be the inventors, nor is it true in every case that the patent is issued to the inventor. On the other hand, the inventor is vested by law with the inchoate right to the exclusive use of the invention to every extent that the patent act accords, which he may perfect and make absolute by proceeding in the manner which the law requires. *Hendrie v. Sayles*, 98 U. S. 546, 551, 25 L. Ed. 176.

During the term for which the patent is granted the assignee of all the right, title, and interest of the patentee in the same may, himself sell, assign, and convey the patent for the residue of the term granted, or he may continue to hold the same during that period, and may make, use, and vend the patented improvement, but his title to the invention terminates when the term of the patent expires; nor will his assignee or grantee stand in any better condition, as the maxim *Nemo dat qui non habet* applies to the assignee of the patentee. *Hendrie v. Sayles*, 98 U. S. 546, 550, 25 L. Ed. 176.

A patentee of certain machines, whose original patent had still between six and seven years to run, conveyed to another person the "right to make and use and to license to others the right to make and use four of the machines" in two states "during the remainder of the original term of the letters-patent, provided, that the said grantee shall not in any way or form dispose of, sell, or grant any license to use the said machines beyond the said term." The patent having, towards the expiration of the original term, been extended for seven years, held, that an injunction by a grantee of the extended term would lie to restrain the use of the four machines, they being in use after the term of the original patent had expired.

*Mitchell v. Hawley*, 16 Wall. 544, 21 L. Ed. 322.

**49. Conveyance of invention.**—*Hendrie v. Sayles*, 98 U. S. 546, 554, 25 L. Ed. 176; *Railroad Co. v. Trimble*, 10 Wall. 367, 19 L. Ed. 948; *Nicolson Pavement Co. v. Jenkins*, 14 Wall. 452, 20 L. Ed. 777.

Where before the issue of letters-patent therefor, a party assigns his invention, and letters are lawfully issued to the assignee in his own name, the latter is entitled, where the instrument of assignment does not show a different intention, to obtain a renewal of them at the expiration of the original term. *Hendrie v. Sayles*, 98 U. S. 546, 25 L. Ed. 176.

Where the transfer is of an invention, unless there is something in the instrument to indicate a different intention, the rule is that a conveyance of the described invention carries with it all its incidents, and all the well-considered authorities concur that the inchoate right to obtain a renewal or extension of the patent is as much an incident of the invention as the inchoate right to obtain the original patent; and if so, it follows that both are included in the instrument which conveys the described invention, without limitation or qualification. *Hendrie v. Sayles*, 98 U. S. 546, 554, 25 L. Ed. 176.

A deed by which a patentee of an invention conveys all the right, title, and interest which he has in the "said invention," as secured to him by letters-patent, and also all "right, title, and interest, which may be secured to him from time to time," the same to be held by the assignee for his own use and for that of his legal representatives, "to the full end of the term for which said letters-patent are or may be granted," carries the entire invention and all alterations and improvements, and all patents whensoever issued and extensions alike, to the extent of the territory specified. *Railroad Co. v. Trimble*, 10 Wall. 367, 19 L. Ed. 948.

An assignment of a reissued patent, reciting the date and number of the reissue, and that the original patent had been "given for the term of fourteen years;" reciting that the assignee had agreed to purchase all the right, title, and interest which the patentee had "in the said invention as secured by the said letters-patent;" and transferring to the assignees all the right, title, and interest which the patentee has "in the said invention and letters-patent;" "the same to be held and enjoyed by the said party for the use and behoof of him and his legal representatives to the full end of the term for which the said letters-patent are or may be granted, as fully and effectively as the same would have been held and enjoyed

after the renewal, he may continue using the patented device.<sup>50</sup> A covenant by the patentee, made prior to the law authorizing extensions, that the covenantee should have the benefit of any improvement in the machinery, or alteration or renewal of the patent, did not include an extension by an administrator, under the act of 1836.<sup>51</sup>

(c) *Improvements*.—Whether the right to improvements subsequently made by the patentee passes under a contract for the sale or assignment of a patent depends on the terms of the contracts.<sup>52</sup>

by the assignor had the assignment never been made," will transfer an extension and renewal of the patent made under the acts of July 4th, 1836, and of May 27th, 1848; and this though the patent be re-issued subsequently to the assignment. *Nicolson Pavement Co. v. Jenkins*, 14 Wall. 452, 20 L. Ed. 777.

**50. Right to use patented device during term of renewal.**—*Wilson v. Rousseau*, 4 How. 646, 11 L. Ed. 1141; *Bloomer v. McQuewan*, 14 How. 539, 14 L. Ed. 532; *Chaffee v. Boston Belting Co.*, 22 How. 217, 16 L. Ed. 240; *Bloomer v. Millinger*, 1 Wall. 340, 17 L. Ed. 581; *Eunson v. Dodge*, 18 Wall. 414, 416, 21 L. Ed. 766; *Adams v. Burke*, 17 How. 453, 21 L. Ed. 700; *Mitchell v. Hawley*, 16 Wall. 544, 21 L. Ed. 322.

The patent for Woodworth's planing machine was extended from 1842 to 1843, by the board of commissioners. Under that extension, the federal supreme court decided, in *Wilson v. Rousseau*, 4 How. 646, 688, 11 L. Ed. 1141, that an assignee had a right to continue the use of the machine which he then had. In 1845, congress, by a special act, extended the time still further from 1849 to 1856. Under that extension, an assignee has still the same right. *Bloomer v. McQuewan*, 14 How. 539, 14 L. Ed. 532.

Patentees acquire the exclusive right to make and use, and vend to others to be used, their patented inventions for the period of time specified in the patent, but when they have made and vended to others to be used one or more of the things patented, to that extent they have parted with their exclusive right. They are entitled to but one royalty for a patented machine, and consequently when a patentee has himself constructed the machine and sold it, or authorized another to construct and sell it, or to construct and use and operate it, and the consideration has been paid to him for the right, he has then to that extent parted with his monopoly, and ceased to have any interest whatever in the machine so sold or so authorized to be constructed and operated. Where such circumstances appear, the owner of the machine, whether he built it or purchased it, if he has also acquired the right to use and operate it during the lifetime of the patent, may continue to use it until it is worn out, in spite of any and every extension subsequently obtained by the patentee or his assigns.

*Bloomer v. Millinger*, 1 Wall. 340, 350, 17 L. Ed. 581.

Where a person during the original term of a patent bought from one who had no right to sell it, a machine which was an infringement of the patent, and afterwards himself bought the patent for the county where he was using the machine, held that on an extension of the patent the owners of the extension could not recover against him for using the machine after the original term had expired; but that such purchase of the interest in the patent, removed, as to the purchaser, all disability growing out of the wrongful construction of the machine then used by him, and rendered the use of it legal. *Eunson v. Dodge*, 18 Wall. 414, 21 L. Ed. 766.

**51. Express covenant for renewal, made before act authorizing renewal.**—*Wilson v. Rousseau*, 4 How. 646, 11 L. Ed. 1141.

It must be construed to include only renewals obtained upon the surrender of a patent on account of a defective specification. Parties to contracts look to established and general laws, and not to special acts of congress. *Wilson v. Rousseau*, 4 How. 646, 11 L. Ed. 1141.

A plaintiff, therefore, who claims under an assignment from the administrator, can maintain a suit against a person who claims under the covenant. *Wilson v. Rousseau*, 4 How. 646, 11 L. Ed. 1141.

Such an extension does not enure to the benefit of assignees under the original patent, but to the benefit of the administrator (when granted to an administrator), in his capacity, as such. But those assignees who were in the use of the patented machine at the time of the renewal have still a right to use it. *Wilson v. Rousseau*, 4 How. 646, 11 L. Ed. 1141, followed in *Simpson v. Wilson*, 4 How. 709, 711, 11 L. Ed. 1169; *Wilson v. Turner*, 4 How. 712, 11 L. Ed. 1171; *Bloomer v. McQuewan*, 14 How. 539, 549, 14 L. Ed. 532 (but see *Id.*, 555); *Bloomer v. Millinger*, 1 Wall. 340, 351, 17 L. Ed. 581.

**52. Whether improvements pass depends on contracts.**—*Railroad Co. v. Trimble*, 10 Wall. 367, 19 L. Ed. 948 (where improvements were held to pass by the contract); *Littlefield v. Perry*, 21 Wall. 205, 22 L. Ed. 577; *Troy Iron, etc., Factory v. Corning*, 14 How. 193, 14 L. Ed. 383.

In 1834, Burden obtained a patent for a new and useful improvement in the machinery for manufacturing wrought nails

(d) *Reissués*.—If a reissue is obtained with the consent of an assignee, it enures at once to his benefit; if without, he has his election to accept or reject it.<sup>53</sup>

(e) *After-Acquired Title*.—Where assignees of a patent who have parted with their title, purport to make another conveyance thereof, and thereafter get title, the title thus subsequently acquired enures to their grantees.<sup>54</sup>

(i) *Right to Sue for Prior Infringement*.—The assignment of a patent for an invention does not carry a right of action for prior infringements.<sup>55</sup>

(3) *Assignee for Specific Territory*—(a) *Sale for Use Elsewhere*.—As between assignees of different parts of the territory, it is competent for one to sell the patented articles to persons who intend, with the knowledge of the vendor, to take them for use into the territory of the other,<sup>56</sup> and the purchaser acquires the right to use it anywhere, without reference to other assignments of territorial

and spikes which he assigned to the Troy Iron and Nail Factory, and also covenanted that he would convey to that company any improvement which he might thereafter make. In 1840, he made such an improvement, for making hook and brad-headed spikes, with a bending lever, which he assigned to the Troy Iron and Nail Factory in 1848. Before this last assignment, however, viz, in 1845, Burden made an assignment with Corning, Horner and Winslow, in which, amongst other things, it was agreed, that both parties might thereafter manufacture and vend spikes of such kind and character as they saw fit, notwithstanding their conflicting claims. Owing to the peculiar attitude of the parties to each other at the time of making this agreement, and the language used in it, it cannot be construed into a permission to Corning, Horner, and Winslow, to use the improved machinery patented by Burden in 1840; and the right to use it having passed to the Troy Iron and Nail Factory, a perpetual injunction upon Corning, Horner, and Winslow will be decreed. *Troy Iron, etc., Factory v. Corning*, 14 How. 193, 14 L. Ed. 383.

Where a person had a patent for "a coal burner so constructed as to produce combustion of the inflammable gases of anthracite coals," and had also a pending application for another improvement in stoves, devised "for the purpose of economizing and burning the gases generated by the combustion of anthracite coals," and afterwards executed a grant, which (after reciting that he held a patent "for a coal burner so construed as to produce combustion of the inflammable gases of anthracite coals," and that he had "made application for letters-patent securing to him a certain improvement in the invention so as aforesaid patented to him") then proceeded to assign all the right, title and interest which he then had, or might thereafter have, "in or to the aforesaid inventions, improvement, and patent, or the patent or patents that may be granted for said inventions or any improvement therein"—he will not be allowed—on his before mentioned "application" being re-

jected, and on his getting subsequently to the date of the grant and of the rejection, a patent for an improvement in stoves, so devised as "to burn the gaseous and more inflammable elements of the coal in contact with its more refractory portions, and thus secure a more complete combustion of them both," which his grantee asserts to be for the same thing essentially as was the rejected application, and so to have passed under the grant—to deny that the application was for an "improvement" on the first patent. He is estopped by his grant describing it as an improvement on the first patent, to do so. Accordingly, if the second patent be, in view of the court, for essentially the same thing as was the rejected application, it passes under the assignment as an "improvement" on the first patent. *Littlefield v. Perry*, 24 Wall. 205, 206, 22 L. Ed. 577.

53. *Right of assignee to reissue obtained without his consent*.—*Littlefield v. Perry*, 21 Wall. 205, 225, 22 L. Ed. 577.

54. *Subsequently acquired title as passing by grant*.—*Littlefield v. Perry*, 21 Wall. 205, 22 L. Ed. 577; *Gottfried v. Miller*, 104 U. S. 521, 26 L. Ed. 851.

Such grantee, or one claiming under him, may accordingly, as assignee, under the patent acts, sue in the federal courts to prevent an infringement upon his right. *Littlefield v. Perry*, 21 Wall. 205, 22 L. Ed. 577.

Where assignees of a patent grant to A., and afterwards, not regarding that grant, grant, though without warranty, to B., if A. reconvey to them, B. has the right by estoppel against his grantor. *Littlefield v. Perry*, 21 Wall. 205, 206, 22 L. Ed. 577.

55. *Right of assignee to sue for past infringement*.—*Moore v. Marsh*, 7 Wall. 515, 522, 19 L. Ed. 37; *United States v. Loughrey*, 172 U. S. 206, 212, 43 L. Ed. 420.

56. *Assignee for specific territory may sell for use elsewhere*.—*Keeler v. Standard Folding Bed Co.*, 157 U. S. 659, 39 L. Ed. 848; *Hobbie v. Jennison*, 149 U. S. 355, 37 L. Ed. 766; *Adams v. Burke*, 17 Wall. 153, 21 L. Ed. 700; *Boesch v. Graff*, 133 U. S. 677, 703, 33 L. Ed. 787.



rights by the same patentee.<sup>57</sup>

(b) *Sale Elsewhere of Product of Patented Machine*.—An assignment of an exclusive right to use a machine, and to vend the same to others for use, within a specified territory, authorizes the assignee to vend elsewhere, out of the said territory, the product of said machine.<sup>58</sup>

(c) *Action for Breach of Contract*—aa. *Right of Action*.—Where the owner of a patented article contracts to give exclusive privilege of sale within a certain territory to a certain person, and that he will not knowingly permit it to be sold there by others, the latter cannot sue for a breach of the contract without showing that the former knew of the sale of the article within that territory by other persons.<sup>59</sup>

bb. *Damages*.—Only actual damages can be recovered for the breach, by the owner of a patent, of a contract to give the plaintiff the exclusive right to sell the device within a certain described territory.<sup>60</sup> The profits which would have been realized had the contract been performed, and which have been prevented by its breach, are included in the damages to be recovered in every case where such profits are not open to the objection of uncertainty or of remoteness, or where from the express or implied term of the contract itself, or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into.<sup>61</sup> Damages not claimed in the pleadings cannot be recovered.<sup>62</sup>

(4) *Right to Replace Worn Out Parts*.—An assignee of a machine, having a right to use the patented machine, has a right to replace new parts for those which are worn out.<sup>63</sup>

(5) *Transfer of Contract by Assignee*.—If the assignee transfers his contract, the person to whom he transfers it is bound by the same equities which existed between the original parties to the contract, having purchased with a full knowledge of the state of things.<sup>64</sup>

c. *Liability of Assignee for Royalties*—(1) *In General*.—An assignee of a patent is liable to his assignor for royalties according to the terms of the contract providing therefor.<sup>65</sup>

(2) *Part of Claim Denied by Patent Office*.—Where a contract provides for the payment of royalties on an invention unless and until there is final adverse action by the patent office, a refusal of some of the inventor's claims does not dis-

**57. Purchaser of assignee for specified territory may use machine anywhere.**—*Adams v. Burke*, 17 Wall. 453, 21 L. Ed. 700; *Keeler v. Standard Folding Bed Co.*, 157 U. S. 659, 39 L. Ed. 848; *Birdsell v. Shaliol*, 112 U. S. 485, 28 L. Ed. 768; *Hobbie v. Jennison*, 149 U. S. 355, 363, 37 L. Ed. 766; *Boesch v. Graff*, 133 U. S. 697, 33 L. Ed. 787.

The right to the use of such machines or instruments stands on a different ground from the right to make and sell them, and inheres in the nature of a contract of purchase, which carries no implied limitation of the right of use within a given locality. *Adams v. Burke*, 17 Wall. 453, 21 L. Ed. 700.

**58. Assignee of machine for particular territory may vend products of machine anywhere.**—*Simpson v. Wilson*, 4 How. 709, 11 L. Ed. 1169.

The restriction upon the assignee is only that he shall use the machine within the specified territory. There is none as to the sale of the product. *Simpson v. Wilson*, 4 How. 709, 11 L. Ed. 1169.

**59. Right of action.**—*Cincinnati, etc.,*

*Gas Illuminating Co. v. Western, etc., Co.*, 152 U. S. 200, 38 L. Ed. 411.

**60. Actual damages only recoverable.**—*Cincinnati, etc., Gas Illuminating Co. v. Western, etc., Co.*, 152 U. S. 200, 38 L. Ed. 411.

**61. Loss of profits.**—*Cincinnati, etc., Gas Illuminating Co. v. Western, etc., Co.*, 152 U. S. 200, 38 L. Ed. 411, where the profits claimed were held to be too remote.

**62. Damages not claimed in pleadings.**—*Cincinnati, etc., Gas Illuminating Co. v. Western, etc., Co.*, 152 U. S. 200, 38 L. Ed. 411.

**63. Right of assignee to replace worn out parts.**—*Wilson v. Simpson*, 9 How. 109, 13 L. Ed. 66 (assignee held to have right to replace worn out cutters and knives on planing machine); *Mitchell v. Hawley*, 16 Wall. 544, 21 L. Ed. 322.

**64. Sale or transfer of interest by assignee.**—*Kinsman v. Parkhurst*, 18 How. 289, 15 L. Ed. 385.

**65. Liability for royalties.**—*Eclipse Bicycle Co. v. Farrow*, 199 U. S. 581, 50 L. Ed. 317.

charge the contract, and the defendant may be made to account for the use of devices embodying what remained of his claims.<sup>66</sup>

(3) *Estoppel to Impeach Patent*.—An assignee who has sold patented machines for the patentee, under his title and for his account, is estopped from alleging the invalidity of the patent, to protect himself from accounting for what was so collected. When sued for money received on such sales, he cannot be allowed to deny the title of the patentee and retain the profits of the sales to his own use.<sup>67</sup>

(4) *Accounting to Assignor for Share of Royalties Derived from Licenses*.—Where an assignee shares with the assignor in the royalties derived from licenses for use of the patent, he is not liable to the assignor for loss sustained by taking a note for royalties from one of the licensees,<sup>68</sup> nor for losses due to making with the knowledge and approval of the assignor, a settlement with one of the licensees, whereby it became necessary to make a new arrangement with certain other licensees, having the right to object.<sup>69</sup>

6. ACTIONS AGAINST TRANSFEREE—*a. Actions for Royalties*.—A declaration

66. Part of claim denied by patent office.—*Eclipse Bicycle Co. v. Farrow*, 199 U. S. 581, 50 L. Ed. 317.

67. Estoppel of assignee to deny validity of patent.—*Kinsman v. Parkhurst*, 18 How. 289, 293, 15 L. Ed. 385; *Eureka Co. v. Bailey Co.*, 11 Wall. 488, 20 L. Ed. 209; *United States v. Harvey Steel Co.*, 196 U. S. 310, 49 L. Ed. 492; *Eclipse Bicycle Co. v. Farrow*, 199 U. S. 581, 50 L. Ed. 317.

The assignee could not legally purchase the outstanding claim of a third person, and set it up against the patentee with whom he had an existing agreement, in the nature of a copartnership. *Kinsman v. Parkhurst*, 18 How. 289, 15 L. Ed. 385.

Even if the patent were invalid, yet that does not so taint with illegality the sales of the machines by the assignee, as to affect the claim of the assignor to an account of the sales. *Kinsman v. Parkhurst*, 18 How. 289, 15 L. Ed. 385.

Where suit is brought for royalties upon a contract for the use of a process for hardening armor plate, the United States cannot set up the invalidity of the patent under a clause providing that the payment of royalties shall cease upon judicial determination that the patent is bad, where there had been no decision to that effect. *United States v. Harvey Steel Co.*, 196 U. S. 310, 316, 49 L. Ed. 492.

When parties have, after long negotiation, with full opportunities for knowing what they are doing, entered into contracts for the use of inventions covered by rival patents, and no fraud or imposition is alleged, the case of a party sued on such a contract must be very clear, who denies the validity of the patent for which he has agreed to pay a royalty. *Eureka Co. v. Bailey Co.*, 11 Wall. 488, 20 L. Ed. 209.

And when such a party has furnished under the contract a model of the machines which he proposes to make, on which he agrees to pay a royalty, he cannot deny that such machine contains matter covered by the patent, unless he alleges and

proves circumstances which would set aside the contract for fraud, mistake, or surprise. *Eureka Co. v. Bailey Co.*, 11 Wall. 488, 20 L. Ed. 209.

One who takes an assignment of unpatented devices agreeing to pay royalties thereon on all sales made prior to adverse action by the patent office, cannot defeat his liability for royalties by showing want of novelty, so long as there has been no adverse action by the patent office. *Eclipse Bicycle Co. v. Farrow*, 199 U. S. 581, 50 L. Ed. 317.

One who purchases an unpatented device, takes an assignment of the vendor's right, title and interest, takes charge of his applications, stipulates to defend the invention against infringement and agrees to pay royalties on the "invention above referred to," takes the risk of its worth except as against what the patent office might do under a provision for the termination of the contract upon its final adverse action. The fact that the clause providing for royalties refers to the device as an "invention" does not require that the device be patentable, nor does want of novelty in the device defeat the plaintiff's claims for royalties so long as there is no adverse action by the patent office. *Eclipse Bicycle Co. v. Farrow*, 199 U. S. 581, 50 L. Ed. 317.

68. Liability of assignee to assignor to account for royalties.—*Thorn Wire Hedge Co. v. Washburn, etc., Mfg. Co.*, 159 U. S. 423, 448, 40 L. Ed. 205.

To occasionally take promissory notes from licensees in lieu of cash for accrued royalties would, if done in good faith, not be so far out of the course of ordinary business transactions as to render the assignee liable for losses occurring through the insolvency of any of the licensees, under a contract to pay to the assignor its share of royalties collected and received by the assignee. *Thorn Wire Hedge Co. v. Washburn*, 159 U. S. 423, 448, 40 L. Ed. 205.

69. *Thorn Wire Hedge Co. v. Wash-*

in covenant by a patentee, setting out a sealed contract by defendant to pay him a certain tariff in consideration of an exclusive right to use the patent within a certain district, is good.<sup>70</sup>

(b) *Actions for Purchase Money*.—Where the purchaser of a claim for a patent agrees that, as soon as the patent is issued, he will give his notes, payable at a future date, the fact that no patent has issued until after the day when the last note, if given, would have been payable, is no defense to assumpsit for not having given the notes; the patent having finally issued in form.<sup>71</sup>

7. *ACTIONS FOR FRAUDULENT PREVENTION OF SALE*.—A patentee may have a right of action for fraud against one who pretends to negotiate for the purchase of the patent, but whose real object is to obstruct the patentee in the sale or use of his patent in order that he may, in the meantime, use another invention in which he is largely interested.<sup>72</sup>

**B. Mortgages of Patent Rights**.—A patent right is incorporeal property, not susceptible of actual delivery or possession, and the recording of a mortgage thereof in the patent office, in accordance with the act of congress, is equivalent to a delivery of possession, and makes the title of the mortgagee complete towards all other persons, as well against the mortgagor.<sup>73</sup> Unless otherwise provided in the mortgage, the assignee must be held entitled to grant licenses, to receive license fees and royalties, and to have an account of profits or an award of damages against infringers.<sup>74</sup>

**C. Licenses**—1. *WHAT CONSTITUTES*.—A mere license to a party, without having his assigns or equivalent words to them, showing that it was meant to be assignable, is only the grant of a personal power to the licensees, and is not transferable by him to another.<sup>75</sup> A number of cases in which the question involved was whether a particular transfer created a license or not are set out in the notes.<sup>76</sup>

burn, etc., Mfg. Co., 159 U. S. 423, 447, 40 L. Ed. 205.

70. *Covenant lies on sealed contract*.—Heckers v. Fowler, 2 Wall. 123, 17 L. Ed. 759.

71. *Action for purchase money*.—Read v. Bowman, 2 Wall. 591, 17 L. Ed. 812.

72. *Fraudulent negotiations for purchase of patent obstructing sale*.—On a suit for damages by a patentee against a British corporation and its "managing agent," sent to this country, in having been fraudulently pretending in a series of negotiations to conclude an agreement with him, the patentee, to make use of his patent—the alleged real purpose having been through drafts of agreements and protracted consultations to keep the patentee from using his invention during a certain season, and so to get time to use another invention in which they were themselves largely interested—it is error to charge that if the corporation never gave any authority to the managing agent to assent to the draft of agreement in their behalf and in their name, and never sanctioned it as a corporate act, suit for such a fraud as above indicated could not be maintained. The suit not being on any contract, the corporation might be, notwithstanding, responsible for the fraud. Butler v. Watkins, 13 Wall. 456, 20 L. Ed. 629.

73. *Mortgages*.—Waterman v. Mackenzie, 138 U. S. 252, 34 L. Ed. 923; Root v. Railway Co., 105 U. S. 189, 212, 26 L. Ed. 975.

74. *Waterman v. Mackenzie*, 138 U. S. 252, 34 L. Ed. 923; Root v. Railway Co., 105 U. S. 189, 212, 26 L. Ed. 975.

75. *License defined*.—Troy Iron, etc., Factory v. Corning, 14 How. 193, 216, 14 L. Ed. 383.

76. *Transactions held to be licenses, or otherwise*.—A grant of "the exclusive right to make and use," but not to sell, patented machines within a certain district, is a mere license. Waterman v. Mackenzie, 138 U. S. 252, 256, 34 L. Ed. 923; Mitchell v. Hawley, 16 Wall. 544, 21 L. Ed. 322.

The grant of an exclusive right under the patent within a certain district, which does not include the right to make, and the right to use, and the right to sell, is not a grant of a title in the whole patent right within the district, and is therefore only a license. Waterman v. Mackenzie, 138 U. S. 252, 256, 34 L. Ed. 923.

A grant of "the full and exclusive right to make and vend" within a certain district, reserving to the grantor the right to make within the district, to be sold outside of it, is a license. Waterman v. Mackenzie, 138 U. S. 252, 256, 34 L. Ed. 923; Gayler v. Wilder, 10 How. 477, 13 L. Ed. 504.

A grant of an exclusive right to make, use and vend two patented machines within a certain district, is an assignment, and gives the grantee the right to sue in his own name for an infringement within the district, because the right, although



2. CREATION—*a. Necessity of Writing.*—A license to use a patent need not be in writing,<sup>77</sup> but no effect can be given to a verbal license to make and sell machines containing inventions covered by a patent, where the letters patent are subsequently assigned and there is nothing to show notice or knowledge on the part of the assignee of the licensee's interest.<sup>78</sup>

*b. Implied Licenses.*—(1) *In General.*—A license to use or sell a patented article may be implied from circumstances as well as created by express contract.<sup>79</sup> A license to use a process patent cannot be implied from the sale, to the person claiming the license, of a device used in carrying the process into effect.<sup>80</sup>

(2) *Inventions by Employees.*—Where an employee makes an invention in the course of his employment, and permits it to be used by his employer without compensation, or claim therefor, an implied license may arise in favor of his employer.<sup>81</sup> And there is an implied license in favor of the government for the use of an invention perfected by an employee during the course of his employment, and at the expense of the government.<sup>82</sup>

limited to making, using and vending two machines, excludes all other persons, even the patentee, from making, using or vending like machines within the district. *Waterman v. Mackenzie*, 138 U. S. 252, 256, 34 L. Ed. 923; *Wilson v. Rousseau*, 4 How. 646, 11 L. Ed. 1141.

An instrument granting "the sole right and privilege of manufacturing and selling" patented articles, and not expressly authorizing their use, is only a license because, though this might carry by implication the right to use articles made under the patent by the licensee, it certainly would not authorize him to use such articles made by others. *Waterman v. Mackenzie*, 138 U. S. 252, 256, 34 L. Ed. 923; *Hayward v. Andrews*, 106 U. S. 672, 27 L. Ed. 271; *Oliver v. Rumford Chemical Works*, 109 U. S. 75, 27 L. Ed. 862.

In *Waterman v. Mackenzie*, 138 U. S. 252, 34 L. Ed. 923, an agreement by which the owner of a patent granted to another "the sole and exclusive right and license to manufacture and sell" a patented article throughout the United States (not expressly authorizing him to use it), was held not to be an assignment, but a license, and to give the licensee no right to sue in his own name. *Pope Mfg. Co. v. Gormully, etc., Mfg. Co., No. 3*, 144 U. S. 248, 250, 36 L. Ed. 423.

77. License need not be in writing.—*Hagood v. Hewitt*, 119 U. S. 226, 30 L. Ed. 369; *Gill v. United States*, 160 U. S. 426, 480, 40 L. Ed. 480; *Lane, etc., Co. v. Locke*, 150 U. S. 193, 195, 37 L. Ed. 1049.

78. Verbal license invalid as against subsequent written assignment.—*Gates Iron Works v. Fraser*, 153 U. S. 332, 349, 38 L. Ed. 734.

79. Implied licenses.—*Solomons v. United States*, 137 U. S. 342, 34 L. Ed. 667; *Lane, etc., Co. v. Locke*, 150 U. S. 193, 37 L. Ed. 1049; *Gill v. United States*, 160 U. S. 426, 438, 40 L. Ed. 480; *Hagood v. Hewitt*, 119 U. S. 226, 30 L. Ed. 369.

80. License to use process not implied from sale of device.—*Lawther v. Hamilton*, 124 U. S. 1, 11, 31 L. Ed. 325.

81. Inventions by employees.—Mc-

*Clurg v. Kingsland*, 1 How. 202, 11 L. Ed. 102; *Gill v. United States*, 160 U. S. 426, 40 L. Ed. 480; *Solomons v. United States*, 137 U. S. 342, 34 L. Ed. 667; *Lane, etc., Co. v. Locke*, 150 U. S. 193, 37 L. Ed. 1049; *Keyes v. Eureka Consol. Min. Co.*, 158 U. S. 150, 39 L. Ed. 929. See ante, "As between Employer and Employee," IV, B.

A patentee has no right, either in law or morals, to persuade or encourage officers of the government to adopt his inventions, and look on while they are being made use of year after year without objection or claim for compensation, and then to set up a large demand, upon the ground that the government had impliedly promised to pay for their use. *Gill v. United States*, 160 U. S. 426, 437, 40 L. Ed. 480.

Where a patent is used without protest by the patentee save notice to the effect that the company could use the improvement while he remained in its employment but that afterwards he would require pay, an implied license is shown to use the invention without compensation while complainant continued in its employment and to use it afterwards for the same royalties charged other parties. *Keyes v. Eureka Consol. Min. Co.*, 158 U. S. 150, 152, 39 L. Ed. 929.

In *Keyes v. Eureka Consol. Min. Co.* 158 U. S. 150, 39 L. Ed. 929, it is held that no equitable jurisdiction was presented upon the facts where an invention had been used for more than seventeen years with the knowledge and assent of appellants and without any complaint on their part except that appellee had not paid royalties after complainants quit its employment.

82. Invention by government employee.—*Solomons v. United States*, 137 U. S. 342, 34 L. Ed. 667; *Gill v. United States*, 160 U. S. 426, 40 L. Ed. 480. See ante, "As between Employer and Employee," IV, B.

A patentee is bound to deal fairly with the government, and if he has a claim against it, to make such claim known openly and frankly, and not endeavor silently to raise up a demand in his favor

3. RIGHTS AND LIABILITIES OF LICENSEE—*a. License to Use Patent in "Own Establishment."*—A license to use an invention by a person only at "his own establishment," does not authorize a use at an establishment owned by himself and others.<sup>83</sup>

*b. Contract Prohibiting Sale of Competing Devices*—(1) *Validity of Contract.*—The patentee may prohibit the licensee from selling any other device similar to his own to which the license relates.<sup>84</sup>

(2) *Construction and Operation.*—A prohibition in a license against the sale by the licensee of other devices similar to those of the licensor does not prevent him from selling a device subsequently patented by himself,<sup>85</sup> nor render him liable for royalties on the sale of devices which supersede the licensor's without embodying its principles.<sup>86</sup>

*c. License for Specific Devices Obtained before Issuance of Patent.*—Under § 4899, Rev. Stat., providing for the sale or use of machines purchased from or constructed with the inventor's consent, prior to his application, after a machine has been constructed by any person with the inventor's knowledge and consent before the application for a patent, every other person who either sells or uses that machine is within the protection of the section, and needs no new consent or permission of the inventor.<sup>87</sup>

*d. Estoppel to Deny Use of Patent.*—Where the licensee of a process patent

by entrapping its officers to make use of his inventions. *Gill v. United States*, 160 U. S. 426, 437, 40 L. Ed. 480.

83. *License to use invention at licensee's "own establishment."*—*Rubber Co. v. Goodyear*, 9 Wall. 788, 19 L. Ed. 566.

84. *Prohibition against sale of similar devices by licensee.*—*Bement v. National Harrow Co.*, 186 U. S. 70, 46 L. Ed. 1058.

The general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few exceptions that any conditions which are not in their very nature illegal, with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal. *Bement v. National Harrow Co.*, 186 U. S. 70, 91, 46 L. Ed. 1058.

A provision imposed by the patentee upon the licensee not to manufacture or sell any other float spring tooth harrow, etc., than those which it had made under its patents before assigning them or which it was or might be licensed to manufacture by the plaintiff, was a reasonable prohibition for the defendant, who would thus be excluded from making such harrows as were made by others engaged in manufacturing and selling other machines under other patents. *Bement v. National Harrow Co.*, 186 U. S. 70, 46 L. Ed. 1058.

85. *Right of licensee to sell devices made under his own patent.*—*Bement v. National Harrow Co.*, 186 U. S. 70, 46 L. Ed. 1058.

86. *Right of licensee to sell devices made under patent of another.*—*Eclipse Bicycle Co. v. Farrow*, 199 U. S. 581, 50

L. Ed. 317; *Thorn Wire Hedge Co. v. Washburn, etc., Mfg. Co.*, 159 U. S. 423, 450, 40 L. Ed. 205.

An agreement in a contract for the sale of an invention, to pay royalties "on all the devices made or sold embodying the invention" and to "use due business diligence in the manufacture of the devices embodied in said letters-patent and push the sale by all proper and legitimate enterprise," does not preclude the defendant from using any later invention, which supersedes without embodying the plaintiff's, nor render him accountable for royalties on the new machine. *Eclipse Bicycle Co. v. Farrow*, 199 U. S. 581, 50 L. Ed. 317.

The provision in a contract that the assignee shall pay royalty on all barb wire fence which shall be made "under said several letters-patent" does not disable the assignee from making wire under another patent or require the payment of royalty for use of such patent. *Thorn Wire Hedge Co. v. Washburn, etc., Mfg. Co.*, 159 U. S. 423, 450, 40 L. Ed. 205.

87. *License of specific devices before patent obtained.*—*Wade v. Metcalf*, 129 U. S. 202, 205, 32 L. Ed. 661; *Dable Grain Shovel Co. v. Flint*, 137 U. S. 41, 42, 34 L. Ed. 618.

The implied license conferred by § 4899, Rev. Stat., sets the specific machine free from the monopoly of the patent in the hands of any person, just as if that person were the lawful assignee of one holding the machine under a purchase or an express and unrestricted license from the inventor. *Wade v. Metcalf*, 129 U. S. 202, 205, 32 L. Ed. 661. See, also, *McClurg v. Kingsland*, 1 How. 202, 11 L. Ed. 102; *Bloomer v. McQuewan*, 14 How. 539, 549, 14 L. Ed. 532; *Bloomer v. Millinger*, 1 Wall. 340, 17 L. Ed. 581; *Adams v. Burke*, 17 Wall. 453, 21 L. Ed. 700; *Bird-*

uses the process, and the contract for royalties relates to the process as used, the licensee cannot show that the process as used differs from that described in the patent.<sup>88</sup>

4. **TRANSFER OF LICENSE.**—As a general rule, a license of a patent right is not transferrable.<sup>89</sup> but its nonassignability is waived if the patentee ratifies the transfer of the license by treating the assignee as the licensee was entitled to be treated.<sup>90</sup>

5. **DURATION OF LICENSE.**—Where there is no limitation on the face of a license, it continues until the expiration of the patent.<sup>91</sup>

6. **TERMINATION OF LICENSE**—a. *Death of Licensee.*—A license is terminated by the death of the licensee.<sup>92</sup>

b. *Dissolution of Corporation Holding License.*—An implied license to a corporation to use a patent obtained by one of its employees, is terminated on the dissolution of the corporation.<sup>93</sup>

c. *Revocation.*—In the absence of a stipulation providing for its revocation, a license is not revocable except by mutual consent or by the fault of the other party.<sup>94</sup>

7. **SPECIFIC PERFORMANCE OF LICENSEE'S CONTRACT.**—A court of equity will not decree the specific performance of an oppressive or illegal contract entered into by a licensee of a patent right.<sup>95</sup>

sell *v.* Shaliol, 112 U. S. 485, 487, 28 L. Ed. 768.

Where machines were constructed and put in use in the defendants' grain elevators by the inventor himself, and with his knowledge and consent, while he was in their employment as superintendent of machinery, and before his application for a patent, the defendants had the right to continue to use these specific machines without paying any compensation to him or his assigns, whether asked for or not. *Dable Grain Shovel Co. v. Flint*, 137 U. S. 41, 42, 34 L. Ed. 618.

88. **Estoppel of licensee to deny use of patent.**—*United States v. Harvey Steel Co.*, 196 U. S. 310, 315, 49 L. Ed. 492.

Where a patent for a process of hardening armor plate properly construed is restricted to the use of a greater degree of heat than that actually used, the United States cannot be allowed to set up as a defense to a suit for royalties that it has not used the patent properly construed, where it is not denied that it has used the process communicated to it, and where the contract manifests on its face that it is dealing with the process actually in use. *United States v. Harvey Steel Co.*, 196 U. S. 310, 315, 49 L. Ed. 492.

89. **License not transferrable.**—*Troy Iron, etc., Factory v. Corning*, 14 How. 193, 216, 14 L. Ed. 383; *Hapgood v. Hewitt*, 119 U. S. 226, 30 L. Ed. 369; *Hammond v. Mason, etc., Organ Co.*, 92 U. S. 724, 23 L. Ed. 767; *Lane, etc., Co. v. Locke*, 150 U. S. 193, 196, 37 L. Ed. 1049.

Where an employee is not expressly required by his contract of employment to exercise his inventive faculties for the benefit of his employer but he permits his employer to use the invention during the contract of service, the employer's right to use the invention is a mere personal license and not transferrable. *Hapgood v. Hewitt*, 119 U. S. 226, 30 L. Ed. 369.

90. **Waiver by patentee of nonassignability.**—*Lane, etc., Co. v. Locke*, 150 U. S. 193, 196, 37 L. Ed. 1049; *Hammond v. Mason, etc., Organ Co.*, 92 U. S. 724, 23 L. Ed. 767.

91. **Duration of license.**—*St. Paul Plow Works v. Starling*, 140 U. S. 184, 195, 35 L. Ed. 404.

92. **Death of licensee as terminating license.**—*Oliver v. Rumford Chemical Works*, 109 U. S. 75, 27 L. Ed. 862. See, also, *Lane, etc., Co. v. Locke*, 150 U. S. 193, 195, 37 L. Ed. 1049; *Troy Iron, etc., Factory v. Corning*, 14 How. 193, 14 L. Ed. 383.

93. **Dissolution of corporation terminates license to it.**—*Hapgood v. Hewitt*, 119 U. S. 226, 30 L. Ed. 369. See, also, *Lane, etc., Co. v. Locke*, 150 U. S. 193, 195, 37 L. Ed. 1049; *Troy Iron, etc., Factory v. Corning*, 14 How. 193, 14 L. Ed. 383.

Where an employee does not agree to give his employer the benefit of any invention he may make while in his service, but the invention is used by the employer, a corporation, while the employee is in his service, whatever right the employer has to the invention is a mere license to make and sell the article as a part of its business, which is personal and not transferable, and is extinguished with the dissolution of the corporation. *Hapgood v. Hewitt*, 119 U. S. 226, 30 L. Ed. 369.

94. **Revocation.**—*St. Paul Plow Works v. Starling*, 140 U. S. 184, 196, 35 L. Ed. 404.

95. **Specific performance against licensee.**—*Pope Mfg. Co. v. Gormully*, 144 U. S. 224, 232, 36 L. Ed. 414.

A court of equity cannot be called upon to decree the specific performance of a contract, wherein the defendant, in consideration of receiving a license to use certain patents belonging to the plaintiff during the life of such patents, agrees



**D. Right of Purchaser of Specific Patented Articles.**—One who buys patented articles of manufacture from one authorized to sell them becomes possessed of an absolute property in such articles, unrestricted in time or place.<sup>96</sup> This rule applies as well to one who purchases from a licensee of the patentee as one who purchases from the purchaser or assignee of the patent right.<sup>97</sup> The owner of a patented article or machine may repair it or improve upon it as he pleases, in same manner as if dealing with property of any other kind.<sup>98</sup>

**E. Power of State to Regulate or Prohibit Sale of Patented Articles.**—  
1. **GENERAL RULE.**—Where, by the application of the invention or discovery for which letters-patent have been granted by the United States, tangible property comes into existence, its use is, to the same extent as that of any other species of property, subject, within the several states, to the control which they may respectively impose in the legitimate exercise of their powers over their purely domestic affairs, whether of internal commerce or of police.<sup>99</sup>

2. **PROHIBITING SALE.**—A state may, in the exercise of its police power, prohibit the sale within its limits of a patented article, the use of which is attended with danger.<sup>1</sup>

never to import, manufacture or sell any machines or devices covered by certain other patents, unless permitted in writing so to do, nor to dispute or contest the validity of such patents or plaintiff's title thereto, and further to aid and morally assist the plaintiff in maintaining public respect for and preventing infringements upon the same; and further agrees that if, after the termination of his license, he shall continue to make, sell or use any machine or part thereof containing such patented inventions the plaintiff shall have the right to treat him as an infringer, and to sue out an injunction against him without notice. *Pope Mfg. Co. v. Gormully*, 144 U. S. 224, 232, 36 L. Ed. 414.

96. **Right of purchaser of patent device or article.**—*Keeler v. Standard Folding Bed Co.*, 157 U. S. 659, 666, 39 L. Ed. 848; *Wilson v. Rousseau*, 4 How. 646, 11 L. Ed. 1141; *Birdsell v. Shaliol*, 112 U. S. 485, 28 L. Ed. 768; *Paper-Bag Cases*, 105 U. S. 766, 770, 26 L. Ed. 959; *Chaffee v. Boston Belting Co.*, 22 How. 217, 223, 16 L. Ed. 240; *Adams v. Burke*, 17 Wall. 453, 456, 21 L. Ed. 700; *Mitchell v. Hawley*, 16 Wall. 544, 546, 21 L. Ed. 322; *Bloomer v. Millinger*, 1 Wall. 340, 350, 17 L. Ed. 581; *Bloomer v. McQuewan*, 14 How. 539, 549, 14 L. Ed. 532; *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.*, 152 U. S. 425, 432, 38 L. Ed. 500; *Hobbie v. Jennison*, 149 U. S. 355, 363, 37 L. Ed. 766.

Complete title to the implement or machine purchased becomes vested in the vendee by the sale and purchase, but he acquires no portion of the franchise, as the machine, when it rightfully passes from the patentee to the purchaser, ceases to be within the limits of the monopoly. *Mitchell v. Hawley*, 16 Wall. 544, 548, 21 L. Ed. 322.

Where the patentee has not parted, by assignment, with any of his original rights, but chooses himself to make and vend a patented article of manufacture, it is ob-

vious that a purchaser can use the article in any part of the United States, and, unless restrained by contract with the patentee, can sell or dispose of the same. It has passed outside of the monopoly, and is no longer under the peculiar protection granted to patented rights. *Keeler v. Standard Folding Bed Co.*, 157 U. S. 659, 661, 39 L. Ed. 848.

**Right to use article elsewhere than in territory where purchased.**—As to right of purchaser from assignee for particular territory to use machine or article elsewhere than in that territory, see ante, "Sale for Use Elsewhere," XII, A, 5, b, (3), (a).

**Right to use article during period of extension or renewal.**—As to right to purchaser of specific device or article to use it during period of extension or renewal, see ante, "Extensions and Renewals," XII, A, 5, b, (2), (b).

97. **Right of one purchasing specific device from licensee.**—*Birdsell v. Shaliol*, 112 U. S. 485, 487, 28 L. Ed. 768. See, also, *Adams v. Burke*, 17 Wall. 453, 21 L. Ed. 700.

98. **Right to repair or improve machine.**—*Mitchell v. Hawley*, 16 Wall. 544, 548, 21 L. Ed. 322; *Wilson v. Simpson*, 9 How. 109, 13 L. Ed. 66; *Chaffee v. Boston Belting Co.*, 22 How. 217, 223, 16 L. Ed. 240.

99. **Control of sale or use of patented articles.**—*Patterson v. Kentucky*, 97 U. S. 501, 24 L. Ed. 1115; *Leisy v. Hardin*, 135 U. S. 100, 121, 34 L. Ed. 128; *Webber v. Virginia*, 103 U. S. 344, 26 L. Ed. 565; *Bement v. National Harrow Co.*, 186 U. S. 70, 90, 46 L. Ed. 1058; *Minnesota v. Barber*, 136 U. S. 313, 327, 34 L. Ed. 455; *Bloomer v. McQuewan*, 14 How. 539, 14 L. Ed. 532; *Wilson v. Sanford*, 10 How. 99, 13 L. Ed. 344. See the title **POLICE POWER**.

1. **Prohibiting sale of patented articles.**—*Patterson v. Kentucky*, 97 U. S. 501, 24 L. Ed. 1115.

A party to whom such letters-patent were, in the usual form, issued for "an im-

3. **REQUIRING LICENSE OF PERSONS SELLING PATENTED ARTICLES.**—A state may require an agent for the sale of patented articles manufactured in another state to obtain and pay for a license to sell the same, and exempt agents of local manufacturers of patented articles from such license.<sup>2</sup>

4. **REGULATING FORM AND REQUISITES OF CONTRACT FOR SALE OF PATENT RIGHTS.**—See ante, "Compliance with State Statutes," XII, A, 4, b, (6).

### XIII. Infringement.

**A. What Constitutes**—1. **DEFINITIONS.**—Infringement involves substantial identity; it is a copy of the thing described in the specification of the patentee, either without variation, or with such variations as are consistent with its being in substance the same thing.<sup>3</sup> To constitute an infringement, the thing used by the defendant must be such as substantially to embody the patentee's mode of operation, and thereby to attain the same kind of result as was reached by his invention.<sup>4</sup>

2. **IDENTITY**—a. *Identity of Principle*—(1) *Necessity for Identity of Principle.*—Infringement cannot be made out unless there is a substantial identity in the principle of the two devices or articles.<sup>5</sup> But if the principle of a patent is adopted substantially by the defendants, in order to accomplish the same purpose, they are guilty of infringement,<sup>6</sup> and this rule applies with special force where the patent claimed to be infringed is a pioneer.<sup>7</sup> On the other hand where there is a

proved burning oil," whereof he claimed to be the inventor, was convicted in Kentucky for there selling that oil. It had been condemned by the state inspector as "unsafe for illuminating purposes," under a statute requiring such inspection, and imposing a penalty for selling or offering to sell within the state oils or fluids, the product of coal, petroleum, or other bituminous substances, which can be used for such purposes, and which have been so condemned. It was admitted on the trial that the oil could not, by any chemical combination described in the specification annexed to the letters-patent, be made to conform to the standard prescribed by that statute. Held, that the enforcement of the statute interfered with no right conferred by the letters-patent. *Patterson v. Kentucky*, 97 U. S. 501, 24 L. Ed. 1115. See, also, *Webber v. Virginia*, 103 U. S. 344, 348, 26 L. Ed. 565.

2. **Requiring license of persons selling patented article.**—*Webber v. Virginia*, 103 U. S. 344, 26 L. Ed. 565. See, also, *Patterson v. Kentucky*, 97 U. S. 501, 24 L. Ed. 1115.

3. **Infringement defined.**—*Burr v. Duryee*, 1 Wall. 531, 572, 17 L. Ed. 650; *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 569, 42 L. Ed. 1136.

4. *Sewall v. Jones*, 91 U. S. 171, 183, 23 L. Ed. 275; *Winans v. Denmead*, 15 How. 330, 14 L. Ed. 717.

5. **Necessity for identity of principle.**—*Ball, etc., Fastener Co. v. Kraetzer*, 150 U. S. 111, 37 L. Ed. 1019; *Carver v. Hyde*, 16 Pet. 513, 519, 10 L. Ed. 1051; *Singer Mfg. Co. v. Cramer*, 192 U. S. 265, 285, 48 L. Ed. 437; *Crescent Brewing Co. v. Gottfried*, 128 U. S. 158, 32 L. Ed. 390; *Brooks v. Fiske*, 15 How. 212, 14 L. Ed. 665; *Cimiotti Unhairing Co. v. American Fur Ref. Co.*, 198 U. S. 399, 414, 49 L. Ed. 1100; *Kokomo Fence Machine Co. v. Kitselman*,

189 U. S. 8, 47 L. Ed. 689; *Werner v. King*, 96 U. S. 218, 230, 24 L. Ed. 613; *Burr v. Duryee*, 1 Wall. 531, 17 L. Ed. 650.

6. **Substantial reproduction as infringement.**—*Sewall v. Jones*, 91 U. S. 171, 183, 23 L. Ed. 275; *The Corn-Planter Patent*, 23 Wall. 181, 182, 23 L. Ed. 161; *Whiteley v. Kirby*, 11 Wall. 678, 20 L. Ed. 32; *Potts v. Creager*, 155 U. S. 597, 609, 39 L. Ed. 275; *Cawood Patent*, 94 U. S. 695, 24 L. Ed. 238; *O'Reilly v. Morse*, 15 How. 62, 14 L. Ed. 601; *Eames v. Andrews*, 122 U. S. 40, 30 L. Ed. 1064; *Yale Lock Mfg. Co. v. Sargent*, 117 U. S. 536, 29 L. Ed. 954; *Morey v. Lockwood*, 8 Wall. 230, 19 L. Ed. 339.

A patent for an improved method of constructing artesian wells is infringed by boring instead of driving until the water-bearing stratum is reached, then, making use of the patent, driving a tube downward into the water-bearing stratum, so as to secure those conditions of an air-tight connection between the point of the tube and the surrounding earth, which constitute the principle of the "driven-well" patent. *Eames v. Andrews*, 122 U. S. 40, 30 L. Ed. 1064.

7. **Substantial identity with pioneer patent.**—Where an invention is one of a primary character, and the mechanical functions performed by the machine are, as a whole, entirely new, all subsequent machines which employ substantially the same means to accomplish the same result are infringements. *Morley Sewing Machine Co. v. Lancaster*, 129 U. S. 263, 32 L. Ed. 715; *Miller v. Eagle Mfg. Co.*, 151 U. S. 186, 207, 38 L. Ed. 121; *Royer v. Schultz Belting Co.*, 135 U. S. 319, 34 L. Ed. 214; *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 42 L. Ed. 1136; *Cimiotti Unhairing Co. v. American Fur Ref. Co.*, 198 U. S. 399, 406, 49 L. Ed. 1100; *Sewall v. Jones*, 91 U. S. 171, 184, 23 L.



substantial difference in the principle of two devices, one will not be held to be an infringement of the other.<sup>8</sup>

Ed. 275; *Hobbs v. Beach*, 180 U. S. 383, 400, 45 L. Ed. 586.

**8. Substantial difference prevents infringement.**—*Electric Gas-Lighting Co. v. Boston Electric Co.*, 139 U. S. 481, 35 L. Ed. 250; *Werner v. King*, 96 U. S. 218, 24 L. Ed. 613; *Western Tel. Co. v. Penniman*, 21 How. 460, 16 L. Ed. 191; *Pope Mfg. Co. v. Gormully, etc.*, Mfg. Co., No. 2, 144 U. S. 238, 36 L. Ed. 420; *McClain v. Ortmyer*, 141 U. S. 419, 35 L. Ed. 800; *Fletcher v. Blake*, 131 U. S., appx. cxcvii, 26 L. Ed. 156; *Burns v. Meyer*, 100 U. S. 671, 25 L. Ed. 738; *Hubbell v. United States*, 179 U. S. 77, 45 L. Ed. 95; *Western Tel. Co. v. Magnetic Tel. Co.*, 21 How. 456, 16 L. Ed. 189; *Brooks v. Fiske*, 15 How. 212, 14 L. Ed. 665; *Gordon v. Warder*, 150 U. S. 47, 37 L. Ed. 992; *Olin v. Timken*, 155 U. S. 141, 155, 39 L. Ed. 100; *Hartshorn v. Saginaw Barrel Co.*, 119 U. S. 664, 30 L. Ed. 539; *Electric R. Signal Co. v. Hall R. Signal Co.*, 114 U. S. 87, 29 L. Ed. 96; *McCormick v. Graham*, 129 U. S. 1, 32 L. Ed. 593; *Schumacher v. Cornell*, 96 U. S. 549, 24 L. Ed. 676; *Worden v. Searls*, 121 U. S. 14, 30 L. Ed. 853; *Pattee Plow Co. v. Kingman*, 129 U. S. 294, 32 L. Ed. 700; *Crescent Brewing Co. v. Gottfried*, 128 U. S. 158, 32 L. Ed. 398; *Fay v. Cordesman*, 109 U. S. 408, 27 L. Ed. 979; *Grier v. Wilt*, 120 U. S. 412, 30 L. Ed. 712; *Stimpson v. Baltimore, etc.*, R. Co., 10 How. 328, 13 L. Ed. 441.

**A patent for a sweat pad for horse collars** which is fastened to the collar by means of double springs embracing both the fore and after wales of the collar, is not infringed by one secured to the collar by a simple hook made of wire arranged to clasp the front wale or roll only. *McClain v. Ortmyer*, 141 U. S. 419, 35 L. Ed. 800.

**Patent for revenue stamp.**—An essential characteristic of plaintiff's revenue stamp was a flap, originally a distinct piece of paper, but, when used, to be loosely attached to the face of the body of the stamp. A further characteristic was that upon the piece, thus loosely attached, appeared a portion of the vignette, design, or printed matter required to be engraved or printed on the face of revenue stamps. The defendant's stamp had no such characteristics, but was one continuous paper, containing upon it the required printed matter, with no flap loosely attached to its face, which might be subsequently torn off. Neither the red slip of unprinted paper across the back of the defendant's stamp, and which was to adhere to the barrel, nor that portion of the stamp which did not adhere to the barrel, answered the same purposes as the flap of plaintiff's stamp. Held, that there was no infringement. *Fletcher v. Blake*, 131 U. S., appx. cxcvii, cc, 26 L. Ed. 156.

**Saddles.**—A held letters-patent for mak-

ing side saddle trees. The tree, composed of side bars, cantle behind, and crook before, is first made, and the seat constructed separately on a rim and fastened to the tree by screws, resting on the crook, and on supports attached to the side bars in the middle and at the rear. This construction, it was claimed, simplifies and cheapens the manufacture, and leaves a space for air under the seat. The claim is as follows: "As a new article of manufacture, a side saddle tree, having the side bars and seat made separate and then united, substantially as and for the purpose shown and specified." The side saddle tree constructed according to the letters-patent subsequently granted to B does not have the side bars and seat made separate and then united. Tough strips of wood, steamed and bent to a proper shape, are attached to the tree, as a part thereof, forming side rails for the seat; that on the right or off side extending from the cantle to the crook, and that on the left or near side, from the cantle to a point on the near side bar some distance back of the crook. The seat is stretched over these strips or side rails. Held, that the advantage of separate construction claimed by A was not attained by B's letters-patent, and that the invention of the latter is not an infringement of A's letters-patent. *Burns v. Meyer*, 100 U. S. 671, 25 L. Ed. 738.

**Supports for scroll saws.**—The combination of an anti-friction wheel to support the back or thin edge of a scroll saw, with lateral adjustment, presenting different points to wear so that different points of the periphery of the wheel may be brought into contact with the saw from time to time, is not infringed by the use of a wheel for a band saw with two grooves for the saw to run in, the wheel being adjusted laterally so that it may be made to run in either one of the grooves, where both the groove and the lateral adjustment were old. *Fay v. Cordesman*, 109 U. S. 408, 27 L. Ed. 979.

A patent for an anti-friction guide for a scroll saw which is so adjustable as to accommodate different thicknesses of saw blades, and to compensate for wear, in combination with the upper portion of a web saw blade, and the combination of the anti-friction saw support and guide with an adjustable guide or its equivalent, which patent contemplates the use of the improvement only in connection with the saw blade the upper end of which is free from any suspender or sash and the lower end of which is so connected with mechanism as to obtain the desired motion in the saw—a reciprocating one, actuated from below and alternately pushed and pulled—is not infringed by an endless band saw passing over the wheels and constantly running in one direction. *Fay v.*



(2) *What Constitutes*—(a) *In General*.—One thing is substantially the same as another, if it performs substantially the same function in substantially the same way to obtain the same result; and it differs from another, in the sense of

Cordesman, 109 U. S. 408, 27 L. Ed. 979.

**Fruit drier.**—A patent for a crane with suspending ropes attached to the lowermost of several trays in a fruit drier for the purpose of raising the trays and inserting other trays underneath, the lowermost tray while being raised necessarily carrying on it the weight of all the trays and fruit above it, is not infringed by an apparatus by which each tray can be lifted independently of the others, and each tray is supported independently, so that the weight of the series of trays does not rest entirely on the lowermost one. *Grier v. Wilt*, 120 U. S. 412, 30 L. Ed. 712.

**A patent for an apparatus for forcing heated air into a barrel or cask** consisting of a furnace and blower and a pipe, the pipe being provided with a handle by which it can be removed or adjusted in place, without liability of burning the hands, is not infringed by a machine performing the same service in which the handle is securely fastened to the furnace, is not removable while the machine is in use, and is cast separately from the furnace, for convenience in removal in case of breakage of either it or the furnace. *Crescent Brewing Co. v. Gottfried*, 128 U. S. 158, 32 L. Ed. 390.

**Vehicle springs.**—No infringement of a patent for an improvement in "springs for vehicles" is shown where the complainant's sections have their heels attached at the sides of the wagon bed; cross the entire bottom to reach the opposite side bar; cross each other like the letter X, and have their heels fastened independently and far apart below the wagon bed, by bolts passing through perforations in the springs, the flexible portions of the sections comprising the entire distance between the shackle bar and the first attaching bolt, while in defendant's structure the heels of the sections attach at about the centre of the wagon bed and do not cross the entire bottom to reach the opposite side bar; the sections do not cross each other; the heels are attached closely contiguous to each other, by a rigid clip, secured by bolts and clips, the flexion of the section being limited to a length extending from the shackle end of the section to a point some distance nearer the shackle end than the bolt perforation through the section. *Olin v. Timken*, 155 U. S. 141, 155, 39 L. Ed. 100.

**A patent for a shade roller** in which the pawl or detent is upon the roller, moving with it, and the ratchet or engaging part is separated by being placed upon a journal box or bracket, or other fixed part of the mechanism, is not infringed by one in which the pawl and the ratchet are both upon one end of the roller, the pawl being upon the revolving part and the ratchet upon the fixed part, and in which the pawl

and ratchet are of a different form. *Hartshorn v. Saginaw Barrel Co.*, 119 U. S. 664, 30 L. Ed. 539.

**Electric signal device.**—Plaintiff's patent, the object of which was to operate with one battery instead of with several, along the line of a railroad, an electric circuit, divisible into a subsidiary circuit for the display of signals at many stations, by means of circuit closers operated automatically by passing trains, which made use of the insulated track as a circuit closer, used two metallic conductors attached to the positive and negative poles of the battery, and the circuits were of unequal size and resistance, and required for successful practical use the equalization of the resistance thus created by means of independent and additional devices. The defendant's device did not use the insulated track as circuit closers, used the earth for the return current instead of using a wire, and was so arranged that the circuits were equalized as to resistance. It was held that there was no infringement. *Electric R. Signal Co. v. Hall R. Signal Co.*, 114 U. S. 87, 29 L. Ed. 96.

**Reaper.**—Where the defendant's machine differs from the plaintiff's patent, in that its finger-beam cannot be raised at all at its rear by the lifting lever, and cannot be positively moved downward by that lever, as the finger-beam in the defendants' machine, does not have the motion which results from the combination of the elements specified in the first claim of the plaintiff's patent, and does not "rock forward and backward" in the sense of that claim, or in the sense described in the specification of the plaintiff's patent, it does not infringe such first claim. *McCormick v. Graham*, 129 U. S. 1, 18, 32 L. Ed. 593.

In *McCormick v. Graham*, 129 U. S. 1, 18, 32 L. Ed. 593, it is held that on a proper construction of the claims of the plaintiff's patent, the defendants were not infringers for the arm in the plaintiff's patent, has a rigid connection with the vibratable link to which it is attached, and through such arm the finger-beam is made to rock backward or forward by positive action, in either direction; while in the defendants' machine there is no such rigid arm, but only a connection by which the front of the finger-beam can be lifted, while it falls by its own weight when released, instead of being positively forced down, as in the plaintiff's patent, which species of lifting device was old.

**A patent for a whip socket** with a device on the inside thereof for holding the whip in place, is not infringed by a whip socket consisting of two sectional halves, each like the other, and each a cone shaped half cylinder, and bilged, with an ear-shaped hinge on each section, a rivet

the patent law, when it performs different functions or in a different way, or produces a substantially different result.<sup>9</sup>

(b) *Device Outside of Patentee's Claim*—aa. *In General*.—As a general rule, a device not within the scope of the patentee's claim is no infringement.<sup>10</sup>

bb. *Omission of Essentials of Claim*.—Where one of the essential elements of a patented device is not reproduced, there is no infringement.<sup>11</sup> This rule has

connecting the two ears and thus forming the hinge. *Worden v. Searls*, 121 U. S. 14, 30 L. Ed. 853.

**A patent for an improvement in cultivators** is not infringed by a machine which does not have the wheel spindles or draft plates of the patent, nor the arched axle with side plates, nor the parallelism of the wheels maintained by the draft devices, nor retained in the line of progression by the draft of the animals; but turn as the animals may pull. *Pattee Plow Co. v. Kingman*, 129 U. S. 294, 32 L. Ed. 700.

#### 9. What constitutes substantial identity.

—*Bates v. Coe*, 98 U. S. 31, 42, 25 L. Ed. 68; *Machine Co. v. Murphy*, 95 U. S. 120, 125, 24 L. Ed. 935; *Cantrell v. Wallick*, 117 U. S. 689, 695, 29 L. Ed. 1017.

"In determining the question of infringement, the court or jury, as the case may be, are not to judge about similarities or differences by the names of things, but are to look at the machines or their several devices or elements in the light of what they do or what office or function they perform." *Machine Co. v. Murphy*, 95 U. S. 120, 125, 24 L. Ed. 935; *Cantrell v. Wallick*, 117 U. S. 689, 29 L. Ed. 1017; *Bates v. Coe*, 98 U. S. 31, 42, 25 L. Ed. 68.

#### 10. Device not within scope of claim.

—*Gates Iron Works v. Fraser*, 153 U. S. 332, 38 L. Ed. 734; *Railroad Co. v. Mellon*, 104 U. S. 112, 26 L. Ed. 639; *McClain v. Ortmyer*, 141 U. S. 419, 424, 35 L. Ed. 800; *Vance v. Campbell*, 1 Black 427, 17 L. Ed. 168; *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274, 24 L. Ed. 344; *Coupe v. Royer*, 155 U. S. 565, 577, 39 L. Ed. 263; *Bussey v. Excelsior Mfg. Co.*, 110 U. S. 131, 137, 28 L. Ed. 95; *Sargent v. Burgess*, 129 U. S. 19, 35, 32 L. Ed. 604; *Clark v. Beecher Mfg. Co.*, 115 U. S. 79, 97, 29 L. Ed. 352; *McCarty v. Lehigh Valley R. Co.*, 160 U. S. 110, 116, 40 L. Ed. 358.

Where the patentee expressly limits himself to the combination of soft metal pins with the driving gear of a grinding mill, no infringement would be shown by defendant's use of a hard cast iron pin, the use of safety wooden break pins being old. *Gates Iron Works v. Fraser*, 153 U. S. 332, 347, 38 L. Ed. 734.

A patent for an improvement in the manufacture of blanks for carriage thill shackles, is not infringed by a blank in which the arms are not bent in an oblique direction, its body is not curved and the parts where the arms join the body are not rounded, since, in view of the state of the art, and the terms of his patent, the plaintiff must be confined to a curved body, rounded corners and oblique arms,

or, at least, to a shape which, for practical use, in subsequent manipulation, has a disposition of metal, which causes a sharp corner to be formed in substantially the same way as by the use of his blank. *Clark v. Beecher Mfg. Co.*, 115 U. S. 79, 87, 29 L. Ed. 352.

A patent for a diving flue cooking stove with the exit flue so constructed as to inclose on the sides and bottom the culinary boiler or hot water reservoir, which is limited to a structure in which the front of the reservoir has no air space in front of it, and in which the exit flue does not extend into a chamber at the bottom of the reservoir, and in which the vertical part of the exit flue does not pass up through the reservoir, is not infringed by a stove the exit flue of which beneath the reservoir is co-extensive with the entire surface of the bottom of the reservoir, and in which the vertical passage is through the reservoir, and in which the heat does not come in direct contact with the front of the reservoir, there being a dead air space between the rear plate of the flue and the front of the reservoir. *Bussey v. Excelsior Mfg. Co.*, 110 U. S. 131, 137, 28 L. Ed. 95.

In view of the state of the art and the course of proceeding in the patent office on the application for the Graham patent for a washboard protector, a claim of that patent cannot be so construed as to cover a protector which does not have the resilient function, is not accompanied by a spring, nor constructed to fold down in the manner of the Graham protector. *Sargent v. Burgess*, 129 U. S. 19, 25, 32 L. Ed. 604.

#### 11. Essentials not reproduced.—

Consolidated Roller Mill Co. v. Walker, 138 U. S. 124, 133, 34 L. Ed. 920; Consolidated Safety-Valve Co. v. Kunkle, 119 U. S. 45, 30 L. Ed. 302; *Fornbrook v. Root*, 127 U. S. 176, 180, 32 L. Ed. 97; *Computing Scale Co. v. Automatic Scale Co.*, 204 U. S. 609, 699, 51 L. Ed. 615; *Hoffheins v. Russell*, 107 U. S. 132, 27 L. Ed. 332; *Black Diamond Coal Min. Co. v. Excelsior Coal Co.*, 156 U. S. 611, 39 L. Ed. 553; *National Meter Co. v. Yonkers Water Comm'rs*, 149 U. S. 48, 37 L. Ed. 644; *Crescent Brewing Co. v. Gottfried*, 128 U. S. 158, 32 L. Ed. 390; *Worden v. Searls*, 121 U. S. 14, 30 L. Ed. 853; *Dashiell v. Grosvenor*, 162 U. S. 425, 40 L. Ed. 1025; *Ball, etc., Fastener Co. v. Kraetzer*, 150 U. S. 111, 37 L. Ed. 1019; *Bragg v. Fitch*, 121 U. S. 478, 30 L. Ed. 1008; *Dunham v. Dennison Mfg. Co.*, 154 U. S. 103, 38 L. Ed. 924; *Gates Iron Works v. Fraser*, 153 U. S. 332, 38 L. Ed. 734; *Cimiotti*



been applied to patents for harvesting machines,<sup>12</sup> stone crushing machines,<sup>13</sup> fur clipping machines,<sup>14</sup> automatic car brakes,<sup>15</sup> cultivators,<sup>16</sup> cultivator teeth,<sup>17</sup> water meters,<sup>18</sup> coal screens and coal chutes,<sup>19</sup> machines for the stretching of

Unhairing Co. v. American Fur Ref. Co., 198 U. S. 399, 49 L. Ed. 1110; Shepard v. Carrigan, 116 U. S. 593, 29 L. Ed. 723; Westinghouse v. Boyden Power Brake Co., 170 U. S. 537, 42 L. Ed. 1136; Pattee Plow Co. v. Kingman, 129 U. S. 294, 303, 32 L. Ed. 700; Voss v. Fisher, 113 U. S. 213, 28 L. Ed. 975; Sargent v. Hall Safe, etc., Co., 114 U. S. 63, 29 L. Ed. 67; Rowell v. Lindsay, 113 U. S. 97, 28 L. Ed. 906; Sharp v. Riessner, 119 U. S. 631, 30 L. Ed. 507.

**12. Harvesting machine.**—Where a yielding belt-tightener is an element of a patent for a harvesting machine, the patent is not infringed by a machine which does not employ any device which performs the function of tightening the belt. Hoffheins v. Russell, 107 U. S. 132, 27 L. Ed. 332.

**13. A patent for a stone crushing machine,** an essential element of which is a concave breaking head into which the shell or trough extends, is not infringed by a machine in which the breaking head is not so formed. Gates Iron Works v. Fraser, 153 U. S. 332, 348, 38 L. Ed. 734.

**14. Fur clipping machine.**—A machine for clipping the long hairs from furs or pelts, one of the essential features of which is a stationary "stretcher bar," is not infringed by another machine which performs the same service, merely because the latter also contains a "stretcher bar," where that on the latter machine is not stationary, but movable, and is operated by entirely different mechanism, and the latter machine is capable of performing a much larger amount of work in a given time than the former. Cimiotti Unhairing Co. v. American Fur Ref. Co., 198 U. S. 399, 49 L. Ed. 1100.

A patent for an improvement upon machines for clipping the long hairs from furs or pelts, issued in pursuance of a claim which made a "stationary card" for holding or pressing down the fine fur while the machine cuts the long hairs an essential part of the mechanism, is not infringed by another containing no such "stationary card" merely because the latter has a compression bar which performs the same service. Cimiotti Unhairing Co. v. American Fur Ref. Co., 198 U. S. 399, 49 L. Ed. 1100.

**15. A patent for an automatic car brake,** an essential feature of which is an auxiliary valve; not in the line of travel between the auxiliary reservoir and the brake cylinder, which admits train pipe air only, is not infringed by a device employing a poppet instead of a slide valve, in the line of travel both from the auxiliary reservoir and from the train pipe, which admits both currents of air to the brake cylinder and which in addition employs

a partition separating the valve chamber from the piston chamber which opens the feed valve by maintaining a higher pressure upon the outside than the inside and thus admits a full volume of train pipe air upon the brake cylinder. Westinghouse v. Boyden Power Brake Co., 170 U. S. 537, 42 L. Ed. 1136.

**16. Cultivators.**—A patent for an improvement in cultivators in which the invention consists in the use of runners which, having the wheel spindle for their fixed point of support, are necessarily rigid and unyielding and work automatically, their rear ends being raised by the pulling of the team and lowered by the weight of the plow beams, is not infringed by a machine which lacks the essential characteristics of the patent, i. e., the rigidity of the runners and the resulting automatic action. Pattee Plow Co. v. Kingman, 129 U. S. 294, 303, 32 L. Ed. 700.

**17. Cultivator tooth.**—A patent for an improved cultivator tooth, the invention consisting in a curved support applied to the shank of the tooth and passing through a mortise in the frame of the cultivator, the purpose of which was to accomplish the double object of clamping the tooth in any required position, and adjusting it to any inclination and at the same time allowing it to yield without breaking when the tooth encounters immovable objects, is not infringed by a tooth so constructed as to yield when encountering immovable objects, but which lacks the quality of adjustability and which can not be clamped at any required position, as in the former device. Rowell v. Lindsay, 113 U. S. 97, 28 L. Ed. 906.

**18. Water meter.**—A patent for a water meter, the essential feature of which is a piston having a side rocking movement across the center of the cylinder, upon successive bearing points made by the contact of a projection on the piston with a recess in the cylinder or conversely, the piston rotates upon its own axis, so that each projection comes successively into each recess of the cylinder, is not infringed by a meter having no side rocking or rotary motion, and in which each projection of the piston always operates in connection with one particular corresponding recess in the cylinder, and never leaves that cylinder. National Meter Co. v. Yonkers Water Comm'rs, 149 U. S. 48, 37 L. Ed. 644.

**19. Coal screens and chutes.**—A patent for "an improvement in coal screens and chutes" which makes the screens or a metal blank in lieu thereof, an essential element, and only discloses invention in the introduction of a reservoir beneath the hoppers, is not infringed by a device



various hides,<sup>20</sup> breech loading cannons,<sup>21</sup> time locks,<sup>22</sup> oil cooking stoves,<sup>23</sup> safety valves,<sup>24</sup> computing scales,<sup>25</sup> honey frames,<sup>26</sup> snap hooks for harness,<sup>27</sup> envelopes,<sup>28</sup> skirt protectors,<sup>29</sup> and neck pad for horses.<sup>30</sup>

cc. *Device within Letter, but Not within Principle, of Claim.*—The patentee may bring the defendant within the letter of his claims, but if the latter has so far changed the principle of the device that the claims of the patent, literally construed, have ceased to represent his actual invention, he is as little subject to be adjudged an infringer as one who has violated the letter of a statute has to be convicted, when he has done nothing in conflict with its spirit and intent.<sup>31</sup>

in which screens, false bottom and reservoir are all wanting. *Black Diamond Coal Min. Co. v. Excelsior Coal Co.*, 156 U. S. 611, 616, 39 L. Ed. 553.

**20. A patent for a machine for stretching hides** by means of which the hide was stretched both longitudinally and transversely at the same time, is not infringed by a hide stretching machine which only stretches the hide in one direction at a time and which requires the hide to be changed and stretched the other way. *Weatherhead v. Coupe*, 147 U. S. 322, 37 L. Ed. 188.

**21. A patent for an improvement in breech loading cannon**, in which the patentee restricts himself to a retractor hinged to the breech separate from the carrier, strictly construed as demanded by the state of the art, is not infringed by a device in which the retractor is not hinged to the breech at all, but is hinged to and a part of the carrier. *Dashiell v. Grosvenor*, 162 U. S. 425, 433, 40 L. Ed. 1025.

**22. A patent for a combination time lock** having a turning or revolving bolt or bearing which has the quality of receiving the pressure of the bolt work, when locked, is not infringed by a lock having a sliding bolt. *Sargent v. Hall Safe, etc., Co.*, 114 U. S. 63, 29 L. Ed. 67.

**23. A patent for an oil cooking stove** one of the essential features of which is a perforated top plate permitting the passage of air into a water vessel, so that it escapes through a hot air cylinder, is not infringed by a stove which lacks such a plate and which has no equivalent therefor. *Sharp v. Riessner*, 119 U. S. 631, 30 L. Ed. 507.

**24. Safety valves.**—A safety valve in which a huddling chamber and strictured orifice, leading from the huddling chamber to the open air, are essential parts, is not infringed by one which lacks these parts. *Consolidated Safety-Valve Co. v. Kunkle*, 119 U. S. 43, 30 L. Ed. 302.

**25. Computing scales.**—Where the essential element of an invention for an improvement in computing scales was a cylinder revolving rod with its connections by means of which the computing cylinder was rotated by the downward movement of the load when placed upon the scale, the invention was held not to be infringed by an improvement in which the cylinder revolving rod and its connections were wanting, although in the

second invention as well as in the first the downward movement of the load served to rotate the computing cylinder. *Computing Scale Co. v. Automatic Scale Co.*, 204 U. S. 609, 51 L. Ed. 645.

**26. Honey frames.**—A patent for honey frames formed of a single piece of wood, an essential element of which is a longitudinal groove in one side of the frame when formed which makes a secure point of attachment for the honey combs, when the bees begin to build, is not infringed by a device which lacks this groove and which has no substitute or equivalent for it. *Forncrook v. Root*, 127 U. S. 176, 180, 32 L. Ed. 97.

**27. Snap hooks for harness.**—Where the only novel feature for a snap hook for horses is a peculiar solid pivot or fulcrum pin to which the form and arrangement of the tongue and spring were specially adapted, and requisite to its beneficial use, a snap hook which lacks these features is not an infringement. *Bragg v. Fitch*, 121 U. S. 478, 483, 30 L. Ed. 1008.

**28. Envelopes.**—Where the essential element of a patent for an improvement in envelopes is a scheme by which the envelope can be opened, and the contents taken out without tearing the envelope or removing the fastenings, the patent is not infringed by an envelope which cannot be opened without injury to the flap or envelope. *Dunham v. Dennison Mfg. Co.*, 154 U. S. 103, 111, 38 L. Ed. 924.

**29. A patent for a skirt protector** having a plaited or fluted border is not infringed by the sale of a protector having neither plaited nor fluted bands or borders. *Shepard v. Carrigan*, 116 U. S. 593, 29 L. Ed. 723.

**30. Neck pad for horses.**—A patent for a neck pad to go underneath the top part of a horse collar consisting of a combination of a stuffed pad, having an inner lining of crimped leather with straps attached to fasten it to the collar, is not infringed by a neck pad which has not the stuffed pad nor any equivalent therefor, but which consists of a single piece of crimped leather having a piece of sheet metal so shaped as to fit it riveted to its upper side, in order to stiffen it and preserve its crimped form, and provided with straps to fasten to the collar. *Voss v. Fisher*, 113 U. S. 213, 28 L. Ed. 975.

**31. Device within patentee's claim, but not within principle.**—*Westinghouse v.*

dd. *Colorable Avoidance of Claim*.—If the difference in the claim of the second patent and the first is only a colorable one, for the purpose of avoiding the first, the charge of infringement may be made out, though the letter of the former claim be avoided.<sup>32</sup>

(c) *Formal Variations*—aa. *General Rule*.—As a general rule, where the substance of the patent is reproduced, formal variations are not sufficient to defeat a suit for infringement of patent.<sup>33</sup> Thus a change in the shape or physical form of a device,<sup>34</sup> in similarities of or differences in its name,<sup>35</sup> in its mechan-

Boyden Power Brake Co., 170 U. S. 537, 568, 42 L. Ed. 1136; The Incandescent Lamp Patent, 159 U. S. 465, 476, 40 L. Ed. 221.

To hold that one, who had discovered that a certain fibrous or textile material answered the required purpose of an incandescing conductor, should obtain the right to exclude everybody from the whole domain of fibrous and textile materials, and thereby shut out any further efforts to discover a better specimen of that class than the patentee had employed, would be an unwarranted extension of his monopoly, and operate rather to discourage than to promote invention. The Incandescent Lamp Patent, 159 U. S. 465, 476, 40 L. Ed. 221.

The patentees supposed they had discovered in carbonized paper the best material for an incandescent conductor, and made a claim for every fibrous or textile material. It was held that while if the patentees had discovered in fibrous and textile substances a quality common to them all as distinguishing them from other materials, and such quality adopted therein peculiarly to incandescent conductors, such claim might not be too broad, as there was no generic quality in vegetable fibres which adapted them to this purpose, the claim could not be sustained to cover the use for incandescing conductors of bamboo strips selected because of certain peculiarities in its fibrous substance. The Incandescent Lamp Patent, 159 U. S. 465, 40 L. Ed. 221.

**32. Colorable evasion of first claim by second.**—Westinghouse v. Boyden Power Brake Co., 170 U. S. 537, 568, 42 L. Ed. 1136; Machine Co. v. Murphy, 97 U. S. 120, 24 L. Ed. 935; Ives v. Hamilton, 92 U. S. 426, 431, 23 L. Ed. 494; Morey v. Lockwood, 8 Wall. 230, 19 L. Ed. 339; Elizabeth v. Pavement Co., 97 U. S. 126, 137, 24 L. Ed. 1000; Sessions v. Romadka, 145 U. S. 29, 36 L. Ed. 609; Hoyt v. Horne, 145 U. S. 302, 36 L. Ed. 713.

**33. Formal variations.**—Machine Co. v. Murphy, 97 U. S. 120, 24 L. Ed. 935; Westinghouse v. Boyden Power Brake Co., 170 U. S. 537, 569, 42 L. Ed. 1136; O'Reilly v. Morse, 15 How. 62, 123, 14 L. Ed. 601; Winans v. Denmead, 15 How. 330, 14 L. Ed. 717; Eddy v. Dennis, 95 U. S. 560, 24 L. Ed. 363; Werner v. King, 96 U. S. 218, 24 L. Ed. 613; Machine Co. v. Murphy, 97 U. S. 120, 125, 24 L. Ed. 935; Potts v. Creager, 155 U. S. 597, 609, 39 L. Ed. 275; The Corn-Planter Patent, 23 Wall.

181, 182, 23 L. Ed. 161; Sewall v. Jones, 91 U. S. 171, 184, 23 L. Ed. 275; Garratt v. Seibert, 98 U. S. 75, 25 L. Ed. 84; Whiteley v. Kirby, 11 Wall. 678, 20 L. Ed. 32; Hobbs v. Beach, 180 U. S. 383, 45 L. Ed. 586; Lehnbeuter v. Holthaus, 105 U. S. 94, 99, 26 L. Ed. 939.

"Although a particular geometrical form is best for a certain purpose, yet other forms, giving substantially the same result, are infringements. The result need not be the same in degree if it be the same in kind." Eddy v. Dennis, 95 U. S. 560, 569, 24 L. Ed. 363; Winans v. Denmead, 15 How. 330, 344, 14 L. Ed. 717.

**34. Change in shape or form.**—Winans v. Denmead, 15 How. 330, 340, 14 L. Ed. 717; The Corn-Planter Patent, 23 Wall. 181, 182, 23 L. Ed. 161; Lehnbeuter v. Holthaus, 105 U. S. 94, 26 L. Ed. 939.

Where a comparison of two show cases makes it clear that the latter is a servile copy of the former, excepting a slight inclination backwards, hardly perceptible to the naked eye, of the glass constituting the front of the elevated portions of the case, infringement is clearly established. Lehnbeuter v. Holthaus, 105 U. S. 94, 96, 26 L. Ed. 939.

**35. Change in name immaterial.**—Machine Co. v. Murphy, 97 U. S. 120, 24 L. Ed. 935; Bates v. Coe, 98 U. S. 31, 42, 25 L. Ed. 68; Cantrell v. Wallick, 117 U. S. 689, 29 L. Ed. 1017.

In determining the question of infringement, the court or jury, as the case may be, are not to judge about similarities or differences by the names of things, but are to look at the machines or their several devices or elements in the light of what they do, or what office or function they perform, and how they perform it, and to find that one thing is substantially the same as another, if it performs substantially the same function in substantially the same way to obtain the same result, always bearing in mind that devices in a patented machine are different in the sense of the patent law when they perform different functions or in a different way, or produce a substantially different result. Machine Co. v. Murphy, 97 U. S. 120, 125, 24 L. Ed. 935.

The combination, consisting of a fixed knife with a striker and the other means employed to raise the striker and let it fall to perform the cutting function, embraced by letters-patent No. 146, 774, issued Jan. 27, 1874, to Merrick Murphy, for an improvement in paper bag machines,

ism,<sup>36</sup> in the arrangement of the same elements of a combination,<sup>37</sup> or in the mode of applying the same principle,<sup>38</sup> does not defeat infringement where the substance is reproduced.

bb. *When Form Material Element of Patent*.—But where the form of the device is a material element of the patent, a change or variation in form avoids infringement.<sup>39</sup> This is true where the patentable feature of the machine

is substantially the same thing as the ascending and descending cutting device embraced by letters-patent No. 24, 734 issued July 12, 1859, to William Goodale. *Machine Co. v. Murphy*, 97 U. S. 120, 24 L. Ed. 935.

**36. Change in mechanism.**—*Hobbs v. Beach*, 180 U. S. 383, 45 L. Ed. 586; *Lake Shore, etc., R. Co. v. National Car-Brake Shoe Co.*, 110 U. S. 229, 28 L. Ed. 129; *Ives v. Hamilton*, 92 U. S. 426, 23 L. Ed. 494.

Where two machines perform their primary functions, which are the same, in practically the same way, subordinate differences in mechanism of the latter from the former are not sufficient to prevent it from being an infringement. *Hobbs v. Beach*, 180 U. S. 383, 45 L. Ed. 586.

A patent consisting of the same parts, differing only in form, the parts performing the same office in the two devices, and the mechanical difference being merely formal, is an infringement. *Lake Shore, etc., R. Co. v. National Car-Brake Shoe Co.*, 110 U. S. 229, 28 L. Ed. 129.

Where the principal difference between two devices for applying stays to the corner of boxes consists in the details of the mechanism, and in the fact that the stay strip is fed by one machine by a back feed and by the other by a side feed and both accomplish not only the same results, but by the employment of the same combination of the same elements, the latter is an infringement of the former. *Hobbs v. Beach*, 180 U. S. 383, 45 L. Ed. 586.

A patent for a brake shoe for railroad cars contained two claims. The first was for a shoe and sole so constructed that the sole could have a lateral rocking movement on the shoe so that they might fit the wheels of the car at all times and adjust themselves to the lateral movement of the axles, as the wheels traversed the curves of the track. The second claim was for a means of fastening the brake shoe to the brake beam, "substantially as specified." It was held that the second claim was infringed where that means of fastening the shoe to the beam were used, although the shoe, when so fastened, did not have a lateral rocking movement. *Lake Shore, etc., R. Co. v. National Car-Brake Shoe Co.*, 110 U. S. 229, 28 L. Ed. 129.

It is not a change in principle to pivot the lower end of the saw to the pitman below the cross head, and, by a reverse motion of the crank or driving wheel, produce the same motion of the saw as when

the pitman is pivoted above the cross head. *Ives v. Hamilton*, 92 U. S. 426, 23 L. Ed. 494.

**37. Different arrangement of elements of combination.**—*Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 568, 42 L. Ed. 1136; *The Corn-Planter Patent*, 23 Wall. 181, 23 L. Ed. 161; *Consolidated Safety-Valve Co. v. Crosby Steam Gauge Valve Co.*, 113 U. S. 157, 28 L. Ed. 939.

A patent for safety valve for steam engines is infringed by a valve which accomplishes the same purpose, which involves the same principles, and practically the same parts, although the parts are arranged and located differently. *Consolidated Safety-Valve Co. v. Crosby Steam Gauge Valve Co.*, 113 U. S. 157, 28 L. Ed. 939.

A change in the position of a hinge on a corn planter a little more or less backward or forward held not to change the substantial identity where the office, purpose, operation and effect on both machines was the same. *The Corn-Planter Patent*, 23 Wall. 181, 182, 23 L. Ed. 161; *Garratt v. Seibert*, 98 U. S. 75, 77, 25 L. Ed. 84.

**38. Change in mode of applying same principle.**—*Sewall v. Jones*, 91 U. S. 171, 184, 23 L. Ed. 275; *The Corn-Planter Patent*, 23 Wall. 181, 182, 23 L. Ed. 161; *Potts v. Creager*, 155 U. S. 597, 609, 39 L. Ed. 275.

If he has taken the same plan and applied it to the same purpose, notwithstanding he may have varied the process of the application, his manufacture will be substantially identical with that of the patentee. *Sewall v. Jones*, 91 U. S. 171, 184, 23 L. Ed. 275.

Two machines for disintegrating clay being substantially the same in construction, and being identical in operation and accomplishing the same results by the same means, infringement is not avoided by minor changes in construction. *Potts v. Creager*, 155 U. S. 597, 609, 39 L. Ed. 275.

**39. Where form material element of patent.**—*Thompson v. Boisselier*, 114 U. S. 1, 29 L. Ed. 76; *Carver v. Hyde*, 16 Pet. 513, 10 L. Ed. 1051; *Winans v. Denmead*, 15 How. 330, 14 L. Ed. 717; *Washing Machine Co. v. Tool Co.*, 20 Wall. 342, 22 L. Ed. 303; *McCarty v. Lehigh Valley R. Co.*, 160 U. S. 110, 40 L. Ed. 358; *Werner v. King*, 96 U. S. 218, 230, 24 L. Ed. 613; *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274, 24 L. Ed. 344.

A patent was taken out for making the body of a burden railroad car of sheet



consists only of its form,<sup>40</sup> where the patent is limited by the claim to one particular form,<sup>41</sup> or where, because of the prior state of the art, the patentee's device must, in order to be sustained, be limited to the particular device described.<sup>42</sup>

(d) *As Dependent on Scope of Patent*—aa. *Pioneer Patents*.—A pioneer patent being entitled to a broad and liberal construction is much easier to infringe than a patent for an infringement or combination, the rule being that if one inventor precedes all the rest, and strikes upon something which includes and underlies all that they produce, he acquires a monopoly, and subjects them

iron, the upper part being cylindrical, and the lower part in the form of a frustum of a cone, the under edge of which has a flange secured upon it, to which flange a movable bottom is attached. The claim was this: "What I claim as my invention and desire to secure by letters-patent, is, making the body of a car for the transportation of coal, etc., in the form of a frustum of a cone, substantially as herein described, whereby the force exerted by the weight of the load presses equally in all directions, and does not tend to change the form thereof, so that every part resists its equal proportion, and by which also the lower part is so reduced as to pass down within the truck frame and between the axles, to lower the centre of gravity of the load without diminishing the capacity of the car as described. I also claim extending the body of the car below the connecting pieces of the truck frame and the line of draught, by passing the connecting bars of the truck frame and the draught bar, through the body of the car substantially described." This patent was not for merely changing the form of a machine, but by means of such change to introduce and employ other mechanical principles or natural powers, or a new mode of operation, and thus attain a new and useful result. Hence, where, in a suit brought by the patentee against persons who had constructed octagonal and pyramidal cars, the district judge ruled that the patent was good for conical bodies, but not for rectilinear bodies, this ruling was erroneous. The structure, the mode of operation, and the result attained, were the same in both, and the specification claimed in the patent covered the rectilinear cars. With this explanation of the patent, it should have been left to the jury to decide the question of infringement as a question of fact. *Winans v. Denmead*, 15 How. 330, 14 L. Ed. 717.

**40. Form patentable feature of invention.**—*Thompson v. Boisselier*, 114 U. S. 1, 29 L. Ed. 76; *McCarty v. Lehigh Valley R. Co.*, 160 U. S. 110, 40 L. Ed. 358.

Where the novelty of an improvement for car trucks consists, not in resting the ends of bolsters generally upon springs by means of a guide plate, but in so locating the ends of a bolster of a particular construction, the employment of a different means of locating it, although it accomplishes the same purpose, avoids the charge of infringement. *McCarty v. Le-*

*high Valley R. Co.*, 160 U. S. 110, 120, 40 L. Ed. 358.

**41. Patent limited by claim.**—*Winans v. Denmead*, 15 How. 330, 340, 14 L. Ed. 717; *Lehigh Valley R. Co. v. Kearney*, 158 U. S. 461, 465, 39 L. Ed. 1055; *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274, 24 L. Ed. 344; *Dobson v. Cubley*, 149 U. S. 117, 37 L. Ed. 671.

The manufacture of round or cylindrical bars flattened and drilled at the eye, for use in the lower chords of iron truss bridges, is not an infringement of letters-patent for an improvement in such bridges where the claim in the specification describes the patented invention as consisting in the use of wide and thin drilled eye bars applied on edge. *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274, 24 L. Ed. 344.

Plaintiffs had two patents for banjos. In one of them a dome shaped ring composed of metal, was interposed between the parchment and a wooden rim, the novel feature claimed being the ring, in combination with the wooden rim and parchment. In the other there was a metal ring formed with two downwardly projecting flanges, interposed between the parchment head and the rim composed of wood and metal, the outer flange passing down outside of the ring and the inner one projecting down inside the ring, free from contact with other parts of the instrument so as to be capable of unrestrained vibration, and imparting a bell-like tone to the instrument. It was held that neither of these patents was infringed by a banjo in which the parchment rested directly upon the rim, which consists of a metallic shell formed by turning over both edges of a piece of sheet metal and constituting a hollow rim or case, the effect of which was to impart a distinct musical quality to the instrument. *Dobson v. Cubley*, 149 U. S. 117, 37 L. Ed. 671.

A patent for a spark arrester consisting of a grating of vertical bars with fixed apertures, is not infringed by a spark arrester with vertical elongated slots, where the slots do not run the height of the arrester and are not spaces formed between and by vertical bars arranged together. *Lehigh Valley R. Co. v. Kearney*, 158 U. S. 461, 39 L. Ed. 1055.

**42. Form limited to that claimed by state of art.**—*Duff v. Sterling Pump Co.*, 107 U. S. 636, 27 L. Ed. 517; *Field v. De*

to tribute.<sup>43</sup> When a party has invented some mode of carrying into effect a law of natural science or a rule of practice, it is the application of that law or rule which constitutes the peculiar feature of the invention, and is entitled to protect himself from all other modes of making the same application; and every question of infringement will present the question, whether the different mode, be it better or worse, is in substance an application of the same principle.<sup>44</sup>

*bb. Patents for Improvements.*—Where, in view of the prior state of the art, a patent is to be narrowly construed and limited to the particular device or mechanism claimed and described, a device which accomplished the same result by means of different mechanism is not an infringement.<sup>45</sup> This rule has been applied to patents for wire fabric machines,<sup>46</sup> steam bell ringer,<sup>47</sup> permutation

Comeau, 116 U. S. 187, 29 L. Ed. 597; Boyd v. Janesville Hay Tool Co., 158 U. S. 260, 39 L. Ed. 973; Pope Mfg. Co. v. Gormully, etc., Mfg. Co., No. 2, 144 U. S. 238, 36 L. Ed. 420.

Where both the patentee and the alleged infringer got the idea of closing the wrists of gloves by springs from others and each carries out the idea in his own particular mode, the form, mode of operation and result of defendant's spring being different, there is no infringement. Field v. De Comeau, 116 U. S. 187, 190, 29 L. Ed. 597.

**43. Infringement of pioneer patents—In general.**—Railway Co. v. Sayles, 97 U. S. 554, 24 L. Ed. 1053; Morley Sewing Machine Co. v. Lancaster, 129 U. S. 263, 274, 32 L. Ed. 715; Sewall v. Jones, 91 U. S. 171, 184, 23 L. Ed. 275; Clough v. Barker, 106 U. S. 166, 177, 27 L. Ed. 134; Duff v. Sterling Pump Co., 107 U. S. 636, 27 L. Ed. 517; Westinghouse v. Boyden Power Brake Co., 170 U. S. 537, 42 L. Ed. 1136; Singer Mfg. Co. v. Cramer, 192 U. S. 265, 276, 48 L. Ed. 437; Cimiotti Unhairing Co. v. American Fur Ref. Co., 198 U. S. 399, 406, 49 L. Ed. 1110; Royer v. Schultz Belting Co., 135 U. S. 319, 34 L. Ed. 214; Miller v. Eagle Mfg. Co., 151 U. S. 186, 38 L. Ed. 121; Hobbs v. Beach, 180 U. S. 383, 400, 45 L. Ed. 586.

A party who invents a new machine never used before, and procures letters-patent therefor, acquires a monopoly as against all merely formal variations thereof. Railway Co. v. Sayles, 97 U. S. 554, 24 L. Ed. 1053.

The first person who applied a valve regulation to a gas burner to regulate the flow of gas is entitled to hold as infringements all valve regulations, applied to such a combination, which perform the same office in substantially the same way as, and were known equivalents for, his form of valve regulation. Clough v. Barker, 106 U. S. 166, 177, 27 L. Ed. 134; Duff v. Sterling Pump Co., 107 U. S. 636, 639, 27 L. Ed. 517; Morley Sewing Machine Co. v. Lancaster, 129 U. S. 263, 275, 32 L. Ed. 715.

**44.** Sewall v. Jones, 91 U. S. 171, 184, 23 L. Ed. 275.

**45. Accomplishment of same result by different mechanism.**—Garneau v. Dozier, 102 U. S. 230, 26 L. Ed. 133; Kokomo

Fence Machine Co. v. Kitselman, 189 U. S. 8, 47 L. Ed. 689; Newton v. Furst, etc., Co., 119 U. S. 373, 30 L. Ed. 442; Duff v. Sterling Pump Co., 107 U. S. 636, 27 L. Ed. 517; Gordon v. Warder, 150 U. S. 47, 37 L. Ed. 992; Ashcroft v. Railroad Co., 97 U. S. 189, 24 L. Ed. 982; Hoff v. Iron Clad Mfg. Co., 139 U. S. 326, 35 L. Ed. 179; Crawford v. Heysinger, 123 U. S. 589, 31 L. Ed. 269; Thompson v. Boisselier, 114 U. S. 1, 29 L. Ed. 76; Matthews v. Ironclad Mfg. Co., 124 U. S. 347, 31 L. Ed. 477; Yale Lock Mfg. Co. v. Sargent, 117 U. S. 373, 29 L. Ed. 950; Dryfoos v. Wiese, 124 U. S. 32, 31 L. Ed. 362; Snow v. Lake Shore, etc., R. Co., 121 U. S. 617, 30 L. Ed. 1004; Joyce v. Chillicothe Foundry, 127 U. S. 557, 32 L. Ed. 171; Hendy v. Golden State, etc., Iron Works, 127 U. S. 370, 32 L. Ed. 207.

If the advance towards the thing desired is gradual, and proceeds step by step, so that no one can claim the complete whole, then each is entitled only to the specific form of device which he produces, and every other inventor is entitled to his own specific form, so long as it differs from those of his competitors, and does not include theirs. Morley Sewing Machine Co. v. Lancaster, 129 U. S. 263, 274, 32 L. Ed. 715; Railway Co. v. Sayles, 97 U. S. 554, 24 L. Ed. 1053.

A machine seeking to effect the same end as a prior patent but by a different device cannot be deemed to infringe a claim, which in the light of previous inventions, is not entitled to protection as a pioneer invention, covering the achievement of the desired result in its widest form, unlimited by specific details. Gordon v. Warder, 150 U. S. 47, 54, 37 L. Ed. 992.

**46. Wire fabric machine.**—In Kokomo Fence Machine Co. v. Kitselman, 189 U. S. 8, 47 L. Ed. 689, it was held, in an action for infringement of various patents for improvements in wire fabric machines, that, since the patents sued on did not embody a pioneer invention, being merely improvements on the prior art and to be construed in that light, the defendant's machine was so differentiated from either of the others that there was no infringement.

**47. Steam bell ringer.**—A specification for a patent for a steam bell ringer stated



locks,<sup>48</sup> soda fountains,<sup>49</sup> safety valves,<sup>50</sup> coal hods,<sup>51</sup> baker's ovens,<sup>52</sup> gang plows,<sup>53</sup>

that its object was to prevent any apparent leakage either of water or steam without resorting to the use of stuffing boxes. The description of the device stated that the piston was disconnected from its rod to prevent any lateral strain being communicated to it, thereby decreasing to some extent the wear of the piston in the cylinder. It was held that the device was not infringed by a steam bell ringer in which the piston was not detached from its rod. *Snow v. Lake Shore, etc., R. Co.*, 121 U. S. 617, 30 L. Ed. 1004.

**48. Permutation lock.**—In *Yale Lock, Mfg. Co. v. Sargent*, 117 U. S. 373, 29 L. Ed. 950, the claim of the patent, which was for an improvement in permutation locks, claimed the arrangement of two or more rollers, of varying eccentricity, resting upon the periphery of a cam, for the purpose of preventing the picking of the lock. In the defendant's lock, the rollers were identical with each other in eccentricity and shape, but it was claimed by the plaintiff that, when in revolution, they varied in eccentricity in reference to the cam which operated them, so that, in action, their eccentricity varied, and the same result was produced. It was held that the description in the patent, and the claim, required that the variation of eccentricity should be between the rollers themselves, and not a variation in action in reference to the cam; that, although the same result might be produced, it was not produced by the same means; and that there was no infringement. *Dryfoos v. Wiese*, 124 U. S. 32, 37, 31 L. Ed. 362.

**49. Soda fountain.**—Where by the terms of the specification and claim, in the then existing state of the art, and according to the intention of the patentee, his patent was limited to a soda fountain in which the caps were connected with the outer cylinder by pure tin solder, without rivets or flanges, his patent was not infringed by a fountain in which the caps are fastened to the body at both ends by a solder of half tin and half lead, as well as by rivets, and in which there are vertical flanges at one end, through which the rivets pass. *Matthews v. Ironclad Mfg. Co.*, 124 U. S. 347, 31 L. Ed. 477.

**50. Safety valve.**—Reissued letters-patent No. 3737, granted by the United States, Nov. 9, 1869, to Edward H. Ashcroft, assignee of William Naylor, for an improvement in steam safety valves, being a reissue of original letters No. 58, 962, granted to Naylor Oct. 16, 1866, cannot, in view of the disclaimer of said Naylor in his specification, upon which English letters-patent, No. 1830 were sealed to him Jan. 19, 1864, and of the prior state of the art, be construed to embrace a combination, in every form of spring safety valve, of a projecting, overhanging, downward curved lip or periphery, with

an annular recess or chamber surrounding the valve seat, into which a portion of the steam is deflected as it issues between the valve and its seat, but must be limited to a combination of the other elements of his device, with such an annular recess of the precise form, and operating in the manner described, so far as such recess, separately or in combination, differs in construction or mode of operation from those which preceded it. Said reissued letters, thus limited, are not infringed by the use of a steam safety valve made in substantial compliance with the specification of letters-patent, No. 58, 294, granted Sept. 25, 1866, to George W. Richardson. *Ashcroft v. Railroad Co.*, 97 U. S. 189, 24 L. Ed. 982.

**51. Coal hod.**—In view of the state of the art a patent for forming a coal hod by turning an edge of a metallic cylinder for the formation of an entire bottom of the crimped material, resulting in an increase of thickness, is not infringed by one in which the bottom is partially formed by turning in the metal by forming the body, and in which a cap is used to complete the bottom. *Hoff v. Iron Clad Mfg. Co.*, 139 U. S. 326, 35 L. Ed. 179.

**52. Baker's oven.**—Reissued letters-patent, No. 6397, granted April 20, 1875, to Duncan McKenzie for a new and useful improvement in baker's ovens, must, in view of the state of the art at the time the original letters were granted, be so construed as to limit the element of the combination which relates to the communication between the furnace or fireplace and the interior of the oven, to the peculiar structural arrangement, whereby the products of combustion are admitted into the baking chamber through openings in the arch or top of the furnace, and through the floor of the oven that separates it from the fire chamber along the flues extending rearward from the furnace to the back part of the oven. There is, therefore, no infringement of the reissued letters where the bottom of the baking chamber is not separated by any partition or diaphragm from the fire chamber or furnace, and there are no flues to conduct the generated heat into the chamber. *Garneau v. Dozier*, 102 U. S. 230, 26 L. Ed. 133.

**53. Gang plow.**—Where, prior to the issuance to the plaintiff of a patent for device by which a gang plow is lifted by the power of the team through a brake or friction clutch, devices had been used in agricultural implements for utilizing by means of a brake the motion of the carrying wheel, through a crank axle, in raising operative parts of the machine from the ground, which devices were so alike in structure and so analogous in use as to require a limited construction of the plaintiff's claim, it was held that his patent was



wash boards,<sup>54</sup> and lever-jacks.<sup>55</sup>

(e) *Use of Equivalents*—aa. *General Rule*.—It is well settled that a patent is as much infringed by the use of equivalents therefor, as if the patented device or article had itself been reproduced.<sup>56</sup>

bb. *Range of Equivalents*.—The range of equivalents to which a patentee is entitled depends upon the character of his invention. The patentee of a pioneer invention is entitled to a broad and liberal range of equivalents,<sup>57</sup> while a patentee of an improvement of a known machine,<sup>58</sup> or of a combination of old

not infringed by a device which accomplished the same result, but in which the mechanism was different. *Newton v. Furst, etc., Co.*, 119 U. S. 373, 30 L. Ed. 442.

**54. Washboard.**—A patent for a sheet metal washboard with a rubbing face longitudinally and transversely corrugated is not infringed by a washboard of sheet metal formed with a series of raised diamond shaped projections, since the former not being a pioneer cannot be construed to cover substantial departure. *Duff v. Sterling Pump Co.*, 107 U. S. 636, 27 L. Ed. 517.

**55. Lever-jack.**—A patent for a lever-jack which relates to the pawls of such jacks and the object of which is to substitute the weight of the pawl, sliding in inclined slots, grooves, or guides, and limited by the claim to pawls moved by gravity alone, is not infringed by a lever-jack the pawl of which does not operate by gravity alone. *Joyce v. Chillicothe Foundry*, 127 U. S. 557, 32 L. Ed. 171.

**56. Use of equivalents as infringement.**—*Tyler v. Boston*, 7 Wall. 327, 19 L. Ed. 93; *Machine Co. v. Murphy*, 97 U. S. 120, 24 L. Ed. 935; *McCormick v. Talcott*, 20 How. 402, 405, 15 L. Ed. 930; *Burr v. Duryee*, 1 Wall. 531, 17 L. Ed. 650; *Sewall v. Jones*, 91 U. S. 171, 181, 23 L. Ed. 275; *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33; *Ives v. Hamilton*, 92 U. S. 426, 23 L. Ed. 494; *Royer v. Schultz Belting Co.*, 135 U. S. 319, 34 L. Ed. 214; *Morley Sewing Machine Co. v. Lancaster*, 129 U. S. 263, 32 L. Ed. 715; *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 42 L. Ed. 1136; *Miller v. Eagle Mfg. Co.*, 151 U. S. 186, 38 L. Ed. 121; *Cimiotti Unhairing Co. v. American Fur Ref. Co.*, 198 U. S. 399, 406, 49 L. Ed. 1110; *United States v. Berdan Fire-Arms Mfg. Co.*, 156 U. S. 552, 39 L. Ed. 530; *Consolidated Safety-Valve Co. v. Crosby Steam Gauge Valve Co.*, 113 U. S. 157, 179, 28 L. Ed. 939; *National Cash Register Co. v. Boston, etc., Recorder Co.*, 156 U. S. 502, 39 L. Ed. 511; *Hobbs v. Beach*, 180 U. S. 383, 400, 45 L. Ed. 586; *Schumacher v. Cornell*, 96 U. S. 549, 24 L. Ed. 676; *O'Reilly v. Morse*, 15 How. 62, 123, 14 L. Ed. 601; *Hoyt v. Horne*, 145 U. S. 302, 36 L. Ed. 713; *DuBois v. Kirk*, 158 U. S. 58, 39 L. Ed. 895; *Keystone Mfg. Co. v. Adams*, 151 U. S. 139, 38 L. Ed. 103; *Hyndman v. Roots*, 97 U. S. 224, 24 L. Ed. 975.

The substantial equivalent of a thing is,

in the sense of the patent law, the same as the thing itself. Two devices which perform the same function in substantially the same way, and accomplish substantially the same result, are therefore the same, though they may differ in name or form. *Machine Co. v. Murphy*, 97 U. S. 120, 24 L. Ed. 935.

Where, although the details of the alleged infringing machine are quite different from that of the complainant, the underlying principle is precisely the same, and the means adopted to secure the desired operation not being different means of accomplishing the same result, but well-known equivalents for each other, a charge of infringement is made out. *National Cash Register Co. v. Boston, etc., Recorder Co.*, 156 U. S. 502, 517, 39 L. Ed. 511.

**57. Range of equivalents of pioneer patent.**—*Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 42 L. Ed. 1136; *Singer Mfg. Co. v. Cramer*, 192 U. S. 265, 276, 48 L. Ed. 437; *Cimiotti Unhairing Co. v. American Fur Ref. Co.*, 198 U. S. 399, 406, 49 L. Ed. 1100; *Clough v. Barker*, 106 U. S. 166, 27 L. Ed. 134; *Railway Co. v. Sayles*, 97 U. S. 554, 24 L. Ed. 1053; *Royer v. Schultz Belting Co.*, 135 U. S. 319, 34 L. Ed. 214; *Morley Sewing Machine Co. v. Lancaster*, 129 U. S. 263, 32 L. Ed. 715; *Miller v. Eagle Mfg. Co.*, 151 U. S. 186, 38 L. Ed. 121; *Hobbs v. Beach*, 180 U. S. 383, 400, 45 L. Ed. 586.

It is well settled that a greater degree of liberality and a wider range of equivalents are permitted where the patent is of a pioneer character than when the invention is simply an improvement, maybe the last and successful step, in the art theretofore partially developed by other inventors in the same field. *Cimiotti Unhairing Co. v. American Fur Ref. Co.*, 198 U. S. 399, 406, 49 L. Ed. 1100.

The range of equivalents depends upon the extent and nature of the invention. If the invention is broad or primary in its character, the range of equivalents will be correspondingly broad, under the liberal construction which the courts give to such invention. *Miller v. Eagle Mfg. Co.*, 151 U. S. 186, 38 L. Ed. 121.

**58. Range of equivalents of patent for improvement.**—*McCormick v. Talcott*, 20 How. 402, 405, 15 L. Ed. 930; *Burr v. Duryee*, 1 Wall. 531, 17 L. Ed. 650; *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33; *Morley Sewing Machine Co. v. Lancaster*, 129 U. S. 263, 32 L. Ed. 715. See, also,

elements,<sup>59</sup> is only entitled to a narrow range of equivalents, his invention being construed and limited by the prior state of the art. The employment in the claim of the words "substantially as described or set forth" do not limit the patentee to the exact mechanism described in his specification, or prevent recovery against infringers who have adapted mechanical equivalents for such mechanism, though perhaps if a doubt arose upon the question whether the infringing machine was the mechanical equivalent of the patent device, it would be resolved against the patentee where the claims contain these words.<sup>60</sup>

cc. *What Constitutes*—(aa) *Chemical Equivalent*.—The term "equivalent," when used with regard to the chemical action of such fluids, as can be discovered only by experiment, means equally good.<sup>61</sup>

(bb) *Mechanical Equivalent*.—The term "equivalent" when used with respect to machines, has a certain and definite meaning,<sup>62</sup> and embraces such mechanical devices as were known substitutes for the patented device at the time the patent was obtained.<sup>63</sup> Every combination of devices in a machine which is used to produce the same result, is not necessarily an equivalent for any other combination used for the same purpose.<sup>64</sup> Interchangeability or noninterchangeability is an important test in determining the question of infringement.<sup>65</sup> The

Gage v. Herring, 107 U. S. 640, 27 L. Ed. 601; McCormick v. Talcott, 20 How. 402, 15 L. Ed. 930; Zane v. Soffe, 110 U. S. 200, 28 L. Ed. 119.

"If the invention claimed be itself but an improvement or a known machine by a mere change of form or combination of parts, the patentee cannot treat another as an infringer who has improved the original machine by use of a different form, or combination performing the same functions. The inventor of the first improvement cannot invoke the doctrine of equivalents to suppress all other improvements which are not colorable invasions of the first." Burr v. Duryee, 1 Wall. 531, 573, 17 L. Ed. 650.

Where, in view of the prior state of the art, a patent for a self-closing faucet, consisting of a combination of the valve with a screw follower, must be limited to the particular mechanism described, the patent is not infringed by a faucet which uses a cam instead of a screw follower, especially where faucets operating by means of cams were in existence before the date of the patent. Zane v. Soffe, 110 U. S. 200, 28 L. Ed. 119.

59. *Range of equivalents for combination patent*.—Seymour v. Osborne, 11 Wall. 516, 20 L. Ed. 33; Gill v. Wells, 22 Wall. 1, 22 L. Ed. 699.

60. *Where claim is for patent "substantially as described."*—Hobbs v. Beach, 180 U. S. 383, 400, 45 L. Ed. 586.

61. *Chemical equivalent*.—Tyler v. Boston, 7 Wall. 327, 19 L. Ed. 93.

*Substance held equivalent for plaster of paris*.—Hyndman v. Roots, 97 U. S. 224, 24 L. Ed. 975.

62. *"Equivalent" has certain and definite meaning*.—Tyler v. Boston, 7 Wall. 327, 330, 19 L. Ed. 93.

63. *Mechanical devices used as known substitutes for those employed on the patented machine are "equivalents" as the*

term is used in reference to pioneer inventions. Morley Sewing Machine Co. v. Lancaster, 129 U. S. 263, 290, 32 L. Ed. 715.

An equivalent for the ingredient of a combination, consisting wholly of parts that are old, must be one which was known at the date of the original patent as a proper substitute for the ingredient left out. Gill v. Wells, 22 Wall. 1, 2, 22 L. Ed. 699.

*Use of equivalent for one element of combination*.—See post, "Equivalent for Omitted Element," XIII, A, 4, d, (2), (a), bb, (bb).

64. *Means to accomplish same result*.—Westinghouse v. Boyden Power Brake Co., 170 U. S. 537, 42 L. Ed. 1136; Burr v. Duryee, 1 Wall. 531, 572, 17 L. Ed. 650; Dryfoos v. Wiese, 124 U. S. 32, 31 L. Ed. 362.

The plaintiff contended that as his assignor was the first person to devise a combination in quilting machines the gist of which was a feed feeding faster at one end than at the other, with a laterally moving gang or series of needles, and an intermittent feed when the needles were out of the stitches, he was entitled to cover all variations in the form of the feed, so long as by any means it operates to feed faster at one end than at the other, and that where the result was accomplished by different mechanism, such mechanism must be deemed equivalent to the plaintiff's. It was held that his patent was not infringed by different mechanism which produces the same result in a different way. Dryfoos v. Wiese, 124 U. S. 32, 31 L. Ed. 362.

65. *Interchangeability as test of equivalent*.—Miller v. Eagle Mfg. Co., 151 U. S. 186, 208, 38 L. Ed. 121; Prouty v. Draper, 16 Pet. 336, 10 L. Ed. 985; Brooks v. Pike, 15 How. 212, 11 L. Ed. 665; Eames v. Godfrey, 1 Wall. 78, 17 L. Ed. 547.



cases in which particular devices were considered are given in the notes.<sup>66</sup>

(f) *Accidental Adoption of Immaterial Feature*.—An accidental adoption of

**66. Human instead of mechanical power.**—The accomplishment of a result by manual labor cannot be construed as an equivalent, in the sense of the patent law, for an automatic device. *Gage v. Herring*, 107 U. S. 640, 27 L. Ed. 601.

**Mechanical equivalent.**—*Morley Sewing Machine Co. v. Lancaster*, 129 U. S. 263, 290, 32 L. Ed. 715; *Carver v. Hyde*, 16 Pet. 513, 514, 10 L. Ed. 1051; *Brooks v. Fiske*, 15 How. 212, 14 L. Ed. 663; *Stimpson v. Baltimore, etc., R. Co.*, 10 How. 328, 329, 13 L. Ed. 441; *Prouty v. Draper*, 16 Pet. 336, 341, 10 L. Ed. 985; *Gould v. Rees*, 15 Wall. 187, 194, 21 L. Ed. 39; *Gill v. Wells*, 22 Walk. 1, 28, 22 L. Ed. 699; *Rowell v. Lindsay*, 113 U. S. 97, 28 L. Ed. 906.

A patent for an improvement in cooling and drying meal, in which a convey or shaft in the dust room is an element, is not infringed by a device having no mechanism to perform the same function, but which accomplishes the result by manual labor. *Gage v. Herring*, 107 U. S. 640, 27 L. Ed. 601.

Where a lever, or its equivalent, as a mechanical instrument, is made an essential element in a claim, dispensing with the lever, and using instead the human hand, is not the use of an equivalent, although in the plaintiffs' machine the hand is applied to work the lever. *Brown v. Davis*, 116 U. S. 237, 249, 29 L. Ed. 659. See, also, *Water-Meter Co. v. Desper*, 101 U. S. 332, 337, 25 L. Ed. 1024; *Gage v. Herring*, 107 U. S. 640, 648, 27 L. Ed. 601; *Fay v. Cordesman*, 109 U. S. 408, 420, 421, 27 L. Ed. 979; *Sargent v. Hall Safe, etc., Co.*, 114 U. S. 63, 86, 29 L. Ed. 67.

**Guides for saws in sawmills.**—Where an improvement in sawmills, for which letters-patent were issued, consists of the combination of the saw with a pair of curved guides at the upper end of the saw, and a lever, connecting rod or pitman, straight guides, pivoted cross head, and slides or blocks and crank pin, or their equivalents, at the opposite end, whereby the toothed edge of the saw is caused to move unequally forward and backward at its two ends while cutting, and the claim is, "giving to the saw in its downward movement a rocking or rolling motion by means of the combination of the cross head working in the curved guides at the upper end of the saw, the lower end of which is attached to a cross head, working in straight guides and pivoted to the pitman below the saw, with the crank pin substantially as described," the use by another party of guides consisting of two straight lines representing two consecutive cords of the curve of the guides of the patentee, and arranged in other respects in the same manner as this curve, is clearly the employment of a me-

chanical equivalent, and is an infringement of the patent. *Ives v. Hamilton*, 92 U. S. 426, 23 L. Ed. 494.

**Devices not performing all of offices of original.**—Devices performing one but not all of the offices of a perforated top plate of an oil cooking stove are not equivalents for such plate. *Sharp v. Riessner*, 119 U. S. 631, 30 L. Ed. 507.

**Use of cam or toggle joint for a lever is equivalent.**—*Burr v. Duryee*, 1 Wall. 531, 17 L. Ed. 650.

**Set screw instead of rod.**—A patent for an improvement in roller mills, which is not a pioneer, is not infringed by a device in which the vertical adjustment is secured by a set screw instead of an eccentric and horizontal adjustment secured by an upright rod, encircled by a spiral spring at each end of the adjustable roller which is in no way a mechanical equivalent for a horizontal rod, located above the rollers, connecting the bearings and provided with a strap and holding device. *The Roller Mill Patent*, 156 U. S. 261, 270, 39 L. Ed. 417.

**Use of wedge instead of cam is equivalent.**—*Burr v. Duryee*, 1 Wall. 531, 17 L. Ed. 650.

**Spiral instead of flat spring.**—One who makes use of an invention which differs from a patented shell ejector only in the substitution of a spiral for a flat spring, which "performs the same office and attains the same result in the same way," is liable to an action of infringement. *United States v. Berdan Fire-Arms Mfg. Co.*, 156 U. S. 552, 566, 39 L. Ed. 530.

**Chain and sprocket instead of belt-tightener.**—A chain the links of which engage positively with the teeth on the sprocket wheels so as to dispense with a tight friction band and with a tightening pulley, is not an equivalent in mechanism or functions for a yielding belt-tightener. *Hoffheins v. Russell*, 107 U. S. 132, 142, 27 L. Ed. 332.

**One instead of two supporting posts.**—The use of one post and a supporting frame attached thereto in a reaping machine, is an obvious equivalent for two posts specifically mentioned in a prior patent. *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33.

**Wax in honey frame instead of groove.**—The use of a piece of wax on the inside of a honey frame for the purpose of forming a place for the attachment of the honey comb when the bees begin to build, is not an equivalent for a longitudinal groove on the inside of such frame, and a patent in which the latter is an essential element is not infringed by a device in which the wax is used. *Forncrook v. Root*, 127 U. S. 176, 180, 32 L. Ed. 97.

**Feeder for corn sheller.**—An invention described as "the combination with a corn



an immaterial feature of a patented device, will not constitute infringement.<sup>67</sup>

(g) *Effect of Superiority or Inferiority of Later Device*—aa. *Superiority*.—Where an invention is one of a primary character, and the mechanical functions performed by the machine are, as a whole, entirely new, all subsequent machines which employ substantially the same means to accomplish the same result are infringements, although the subsequent machine may contain improvements in the separate mechanisms which go to make up the machine.<sup>68</sup>

bb. *Inferiority*.—The fact that the device claimed to be an infringement is inferior in point of construction or usefulness will not defeat the infringement, where the substance is the same as that of the patentee.<sup>69</sup>

b. *Identity of Result*.—Similarity of result is alone sufficient to constitute an infringement, even of a pioneer patent, but the result must be reached by substantially the same or similar means.<sup>70</sup>

sheller of a series of wings, wheels or projections, so arranged on a shaft as to revolve in the same direction which the corn is running and so placed relative to the throat as to force into the machine all misplaced or hesitating ears" is infringed by a device which uses a spiked shaft at the entrance to the throat of the machine, revolving in the same direction which the corn is running for the purpose of compelling the ears to enter the sheller. *Keystone Mfg. Co. v. Adams*, 151 U. S. 139, 145, 38 L. Ed. 103.

The substitution of a vertical for a horizontal mid-feather at the inoperative end of the tub in an engine for reducing rags to pulp is merely the use of an old and well-known mechanical equivalent, and obviously intended to evade the wording of the claims of the Hoyt patent. *Hoyt v. Horne*, 145 U. S. 302, 309, 36 L. Ed. 713.

**67. Accidental adoption of immaterial feature.**—*Ball, etc., Fastener Co. v. Kraetzer*, 150 U. S. 111, 37 L. Ed. 1019.

A patent for an improvement in glove fasteners is not infringed by a device which lacks the imperforated button head, an element of complainant's patent and which has not the hollow socket, but one depending for its elasticity not upon the inwardly projecting wings of the prior patent, but upon a ring concealed within its walls, although it, like the patented device, squeezes the leather up into the button head. *Ball, etc., Fastener Co. v. Kraetzer*, 150 U. S. 111, 37 L. Ed. 1019.

**68. Where later machine is an improvement.**—*Morley Sewing Machine Co. v. Lancaster*, 129 U. S. 263, 273, 32 L. Ed. 715; *Royer v. Schultz Belting Co.*, 135 U. S. 319, 34 L. Ed. 214; *Hobbs v. Beach*, 180 U. S. 383, 400, 45 L. Ed. 586; *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 42 L. Ed. 1136; *Miller v. Eagle Mfg. Co.*, 151 U. S. 186, 38 L. Ed. 121; *Cimiotti Unhairing Co. v. American Fur Ref. Co.*, 198 U. S. 399, 406, 49 L. Ed. 1100; *O'Reilly v. Morse*, 15 How. 62, 123, 14 L. Ed. 601; *McCormick v. Talcott*, 20 How. 402, 405, 15 L. Ed. 930; *Blake v. Robertson*, 94 U. S. 728, 733, 24 L. Ed. 245; *Tilghman v. Proctor*, 102 U. S. 707,

26 L. Ed. 279; *Cantrell v. Wallick*, 117 U. S. 689, 29 L. Ed. 1017.

Where the invention is functional, and the defendant's device differs from that of the patentee only in form, or in a rearrangement of the same elements of a combination, he would be adjudged an infringer, even if, in certain particulars, his device be an improvement upon that of the patentee. *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 568, 42 L. Ed. 1136.

A pioneer patent for an automatic button sewing machine, which unites in one organization mechanism for performing three functions, is infringed by a machine in which such three sets of mechanism are combined, provided each mechanism, individually considered, is a proper equivalent for the corresponding mechanism in the prior patent; and it makes no difference that, in the infringing machine, the button-feeding mechanism is more simple, and the sewing mechanism and the mechanism for feeding the fabric are different in mechanical construction, so long as they perform each the same function as the corresponding mechanism in the pioneer machine, in substantially the same way, and are combined to produce the same result. *Morley Sewing Machine Co. v. Lancaster*, 129 U. S. 263, 284, 32 L. Ed. 715.

**69. Inferiority of infringing device immaterial.**—*Cawood Patent*, 94 U. S. 695, 24 L. Ed. 238; *Sewall v. Jones*, 91 U. S. 171, 23 L. Ed. 275; *Winans v. Denmead*, 15 How. 330, 344, 14 L. Ed. 717; *Eddy v. Dennis*, 95 U. S. 560, 569, 24 L. Ed. 363. It is not necessary that the defendant should employ the plaintiff's invention to as good advantage as he employed it, or that the result should be the same in degree; but it must be the same in kind. *Winans v. Denmead*, 15 How. 330, 14 L. Ed. 717; *Sewall v. Jones*, 91 U. S. 171, 183, 23 L. Ed. 275.

**70. Similarity of result.**—*Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 569, 42 L. Ed. 1136; *Burr v. Duryee*, 1 Wall. 531, 17 L. Ed. 650; *Werner v. King*, 96 U. S. 218, 230, 24 L. Ed. 613; *Singer Mfg. Co. v. Cramer*, 192 U. S. 265,

c. *Application of Patented Device to New Use*.—While the promotion of an old device to a new sphere of action, in which it performs a new function, is not an infringement, the transfer or adoption of the same device to a similar sphere of action, where it performs substantially the same function is an infringement.<sup>71</sup>

3. PARTICULAR ACTS AS CONSTITUTING INFRINGEMENT.—a. *Use of Old Part of Patented Device*.—The use of a part of a patented invention which is old, is not an infringement.<sup>72</sup>

b. *Use of Device on Foreign Vessels in Domestic Ports*.—The right of property and exclusive use granted to a patentee do not extend to a foreign vessel lawfully entering one of our ports; and the use of such improvement in the construction, fitting out, or equipment, of such vessel, while she is coming into or going out of a port of the United States, is not an infringement of the rights of an American patentee, provided it was placed upon her in a foreign port, and authorized by the laws of the country to which she belongs.<sup>73</sup>

c. *Use of Patented Improvements by Original Patentee*.—The original patentee is liable for infringement where he makes use of patented improvements without the consent of the patentee thereof.<sup>74</sup>

d. *Use of Original Patent by Patentee of Improvements*.—A party who subsequently discovers a new mode of carrying out a patented process, and obtains letters-patent therefor, is not entitled to use the process without the consent of the patentee thereof.<sup>75</sup>

e. *Sale in United States of Patented Article Purchased Abroad*.—The sale in

285, 48 L. Ed. 437; *Brooks v. Fiske*, 15 How. 212, 14 L. Ed. 665; *Cimiotti Unhairing Co. v. American Fur Ref. Co.*, 198 U. S. 399, 414, 49 L. Ed. 1100; *Crescent Brewing Co. v. Gottfried*, 128 U. S. 158, 32 L. Ed. 390; *Carver v. Hyde*, 16 Pet. 513, 519, 10 L. Ed. 1051.

Even if the patent for a machine be a pioneer, the alleged infringer must have done something more than reach the same result. He must have reached it by substantially the same or similar means, or the rule that the function of a machine cannot be patented is of no practical value. To say that the patentee of a pioneer invention for a new mechanism is entitled to every mechanical device which produces the same result is to hold, in other language, that he is entitled to patent his function. Mere variations of form may be disregarded, but the substance of the invention must be there. *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 569, 42 L. Ed. 1136.

A patent for a new and improved sewing machine treadle is not infringed by a device essentially unlike in construction which serves the same purpose. *Singer Mfg. Co. v. Cramer*, 192 U. S. 265, 48 L. Ed. 437. See post, "Identity of Result," XIII, A, 2, b.

71. *Application of device to new use*.—*Winans v. Denmead*, 15 How. 330, 14 L. Ed. 717; *Western Electric Co. v. LaRue*, 139 U. S. 601, 35 L. Ed. 294; *Sewall v. Jones*, 91 U. S. 171, 23 L. Ed. 275.

Where a claim in a patent is for the combination, in a telegraph key, of a lever fulcrumed upon a torsional spring, with adjusting screws for regulating its movement, the patent is infringed by the

use of a similar combination in connection with a telegraph sounder, or instrument used at the receiving office for delivering or enunciating the message. *Western Electric Co. v. LaRue*, 139 U. S. 601, 605, 35 L. Ed. 294.

"The application of the patented device to another use, where such new application does not involve the exercise of the inventive faculty, is as much an infringement as though the new machine were an exact copy of the old. *Sewall v. Jones*, 91 U. S. 171, 183, 23 L. Ed. 275." *Western Electric Co. v. LaRue*, 139 U. S. 601, 606, 35 L. Ed. 294.

72. *Use of old part of patented device*.—*Jones v. Morehead*, 1 Wall. 155, 17 L. Ed. 662.

This part of the invention known as the Janus faced lock, not being original, no action lies by Sherwood or his assignees, for using it in combination with other inventions not patented by that person; nor can persons so using it be made infringers by an argument which, assuming the validity of Sherwood's invention, mingles it with these other parts, and then treats the whole as a unit, and gives to him or his assignees damages equivalent to the net profits on the manufacture of the entire lock. *Jones v. Morehead*, 1 Wall. 155, 156, 17 L. Ed. 662.

73. *Use of device on foreign vessel in domestic port*.—*Brown v. Duchesne*, 19 How. 183, 15 L. Ed. 595.

74. *Use of patented improvements by original patentee*.—*Cantrell v. Wallick*, 117 U. S. 689, 29 L. Ed. 1017; *Blake v. Robertson*, 94 U. S. 728, 733, 24 L. Ed. 245.

75. *Use of original invention by patentee of improvements*.—*Tilghman v. Proctor*,

the United States of a patented article purchased in a foreign country from one having the right to sell is an infringement of the right of the domestic patentee.<sup>76</sup>

*f. Repair or Reconstruction of Patented Article*—(1) *Articles Licensed for Use Once Only*.—Where a patented article is licensed for use once only, one who after such use repairs it or uses its parts to construct another device, and then uses or sells the repaired or reconstructed article, is an infringer.<sup>77</sup>

(2) *Replacing Worn Out Parts*.—See post, "Replacing Worn Out Parts," XIII, A, 4, a, (4).

4. INFRINGEMENT OF PARTICULAR KINDS OF PATENTS—*a. Patent for Machine*—(1) *In General*.—A patent for a machine will be infringed by a machine which incorporates in its structure and operation the substance of the invention; that is, by an arrangement of mechanism which performs the same service or produces the same effect in the same way, or substantially the same way.<sup>78</sup>

(2) *Identity of Principle*.—The principle or substance of the two machines must be the same.<sup>79</sup> The principle of a machine is properly defined to be its mode of operation, or that peculiar combination of devices which distinguish it from other machines.<sup>80</sup>

(3) *Identity of Result*.—Identity of result is not sufficient to constitute infringement, where the principle of the two machines are substantially different.<sup>81</sup> But if the substance of a machine is taken, the result or product need not be precisely the same in order to make out a case of infringement.<sup>82</sup>

(4) *Replacing Worn Out Parts*.—A person having a right to use a machine may replace worn out parts.<sup>83</sup>

102 U. S. 707, 26 L. Ed. 279; *Cantrell v. Wallick*, 117 U. S. 689, 29 L. Ed. 1017.

An improver is liable for infringement where he makes use of an existing patented device without the consent of the patentee. *Cantrell v. Wallick*, 117 U. S. 689, 29 L. Ed. 1017.

**76. Sale in United States of patented article purchased in foreign country.**—*Boesch v. Graff*, 133 U. S. 697, 33 L. Ed. 787.

A dealer residing in the United States cannot purchase in another country articles patented there, from a person authorized to sell them, and import them to and sell them in the United States, without the license or consent of the owners of the United States patent. *Boesch v. Graff*, 133 U. S. 697, 33 L. Ed. 787.

**77. Repairing and selling patented article licensed for use once only.**—*Cotton-Tie Co. v. Simmons*, 106 U. S. 89, 93, 27 L. Ed. 79; *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.*, 152 U. S. 425, 433, 38 L. Ed. 500.

The owner of a patent for a metallic cotton bale tie, each tie consisting of a buckle and band, granted no licenses to manufacture the ties, but supplied the market with them, and stamped upon the metal of each buckle the words, "Licensed to use once only." After the bands had been once used and severed, defendants, who had bought the bands and the buckles as scrap iron, rolled and straightened the pieces of the bands, and rivetted together their ends. They then cut them into proper lengths, and sold them with the buckles, to be used as ties, nothing having been done to the buckles. It was

held that they thereby infringed the patent. *Cotton-Tie Co. v. Simmons*, 106 U. S. 89, 93, 27 L. Ed. 79. See, also, *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.*, 152 U. S. 425, 433, 38 L. Ed. 500.

**78. Patent for machine.**—*Burr v. Duryee*, 1 Wall. 531, 572, 17 L. Ed. 650; *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 569, 42 L. Ed. 1136; *Potts v. Creager*, 155 U. S. 597, 39 L. Ed. 275; *Machine Co. v. Murphy*, 97 U. S. 120, 24 L. Ed. 935; *Bates v. Coe*, 98 U. S. 31, 42, 25 L. Ed. 68.

**79. Necessity for identity of principle.**—*Burr v. Duryee*, 1 Wall. 531, 17 L. Ed. 650; *Sewall v. Jones*, 91 U. S. 171, 191, 23 L. Ed. 275; *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 42 L. Ed. 1136. See ante, "Identity of Principle," XIII, A, 2, a.

**80. "Principle" of machine defined.**—*Burr v. Duryee*, 1 Wall. 531, 17 L. Ed. 650.

**81. Identity of result in machines insufficient.**—*Burr v. Duryee*, 1 Wall. 531, 17 L. Ed. 650; *Werner v. King*, 96 U. S. 218, 230, 24 L. Ed. 613; *Dryfoos v. Wiese*, 124 U. S. 32, 31 L. Ed. 362; *Hubbell v. United States*, 179 U. S. 77, 45 L. Ed. 95; *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 42 L. Ed. 1136.

**82. Substantial identity of result.**—*Winans v. Denmead*, 15 How. 330, 14 L. Ed. 717; *Sewall v. Jones*, 91 U. S. 171, 23 L. Ed. 275.

**83. Replacing worn out parts.**—*Wilson v. Simpson*, 9 How. 109, 13 L. Ed. 66, where it was held no infringement to replace worn cutters or knives in a planing machine.



(5) *Sale of Product of Machine*.—Dealing in the product of a patented machine is not an infringement.<sup>84</sup>

b. *Patent for Process*.—In order to constitute an infringement of a process, the defendant must be shown to have followed substantially the same process, the same mode of reaching the result, as is described in the specifications.<sup>85</sup> But if the principle of the process is taken, there is infringement,<sup>86</sup> although there are formal differences in the two processes,<sup>87</sup> or in the means used to carry them into effect.<sup>88</sup> A process omitting one or more of the essentials of

**84. Dealing in product of patented machine.**—*Keplinger v. DeYoung*, 10 Wheat. 358, 6 L. Ed. 341; *Merrill v. Yeomans*, 94 U. S. 568, 24 L. Ed. 235.

A. having obtained a patent for a new and useful improvement, to wit, a machine for making watch chains, brought an action, under the 3d section of the patent act of 1800, c. 179, for a violation of his patent right against B.; and on the trial an agreement was proved, made by the defendant with C., to purchase of him all the watch chains, not exceeding five gross a week, which he might be able to manufacture within six months, and an agreement on the part of C. to devote his whole time and attention to the manufacture of the watch chains, and not to sell or dispose of any of them, so as to interfere with the exclusive privilege secured to the defendant of purchasing the whole quantity which it might be practicable for C. to make. And it was proved that the machine used by C. with the knowledge and consent of the defendant in the manufacture was the same with that invented by the plaintiff, and that all the watch chains thus made by C. were delivered to the defendant according to the contract. Held, that if the contract were real and not colorable, and if the defendant had no other connection with C. than that which grew out of the contract, it did not amount to a breach of the plaintiff's patent right. *Keplinger v. DeYoung*, 10 Wheat. 358, 6 L. Ed. 341.

Such a contract, connected with evidence from which the jury might legally infer, either that the machine which was to be employed in the manufacture of the patented article was owned wholly or in part by the defendant, or that it was hired to the defendant for six months, under color of a sale of the articles to be manufactured with it, and with intent to invade the plaintiff's patent right, would amount to a breach of his right. *Keplinger v. DeYoung*, 10 Wheat. 358, 6 L. Ed. 341.

**85. Infringement of process patents.**—*Royer v. Coupe*, 146 U. S. 524, 36 L. Ed. 1073; *Carnegie Steel Co. v. Cambria Iron Co.*, 185 U. S. 403, 439, 46 L. Ed. 968; *Mowry v. Whitney*, 14 Wall. 620, 20 L. Ed. 860.

**Patent for purifying middlings before regrinding** held to be infringed. *Cochrane v. Deener*, 94 U. S. 780, 24 L. Ed. 139.

**86. Following principle of process.**—*Carnegie Steel Co. v. Cambria Iron Co.*,

185 U. S. 403, 46 L. Ed. 968.

A process for mixing molten iron to secure greater uniformity of product by means of a reservoir or mixer intermediate between the blast furnace and the converter, covered and lined, and so constructed that it cannot be emptied of its contents, whereby a dominant pool of molten iron as a basis for gradual unification of the products of several blast furnaces is always left, is infringed by a covered and lined mixer, so constructed that it can be emptied but never is, a dominant pool being maintained to produce a graduated nonabrupt product. Since its principal of construction is similar and its operation is identical, the infringement is clear in both letter and spirit. *Carnegie Steel Co. v. Cambria Iron Co.*, 185 U. S. 403, 439, 46 L. Ed. 968.

Where a patent covers the process of drawing water from the earth by means or a "driven well," the use of a well so constructed is a continuing infringement, although the defendant may not have paid for driving the well or have procured it to be driven. *Beedle v. Bennett*, 122 U. S. 71, 78, 30 L. Ed. 1074; *Andrews v. Hovey*, 124 U. S. 694, 31 L. Ed. 557.

**87. Colorable change made to evade patent.**—*Tilghman v. Proctor*, 102 U. S. 707, 26 L. Ed. 279; *Eames v. Andrews*, 122 U. S. 40, 30 L. Ed. 1064. But see *Mitchell v. Tilghman*, 19 Wall. 287, 22 L. Ed. 125.

A discovered a process of decomposing fats by mixing them with water, and heating the mixture to a high temperature under a pressure that prevented the formation of steam. It is a new process, never known before. The defendants seeing the utility of the process, and believing that they could use a method somewhat similar without infringing, put a little lime into the mixture, and found that it helped the operation, and that they did not have to use so high a degree of heat as would otherwise be necessary. Still, the degree of heat required was very high, at least a hundred degrees above the boiling point; and a strong boiler or vessel was used in order to restrain the water from rising into steam. Held, they were liable for infringement. *Tilghman v. Proctor*, 102 U. S. 707, 733, 26 L. Ed. 279. But see *Mitchell v. Tilghman*, 19 Wall. 287, 22 L. Ed. 125.

**88. Use of different means to carry process into effect.**—*Cochrane v. Deener*, 94 U. S. 780, 24 L. Ed. 139; *Tilghman*

another, is not an infringement,<sup>89</sup> unless it substitutes equivalents for the omitted features or steps.<sup>90</sup> Similarity of product is not sufficient to show infringement.<sup>91</sup>

*c. Patent for Design.*—If, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other, the first one patented is infringed by the other.<sup>92</sup>

*v. Proctor*, 102 U. S. 707, 26 L. Ed. 279; *Morley Sewing Machine Co. v. Lancaster*, 129 U. S. 263, 32 L. Ed. 715; *New Process Fermentation Co. v. Maus*, 122 U. S. 413, 432, 30 L. Ed. 1193.

A process requires that certain things should be done with certain substances, and in a certain order, but the tools to be used in doing this may be of secondary consequence. *Cochrane v. Deener*, 94 U. S. 780, 788, 24 L. Ed. 139.

If one of the steps of a process be that a certain substance is to be reduced to powder, it may not be at all material, what instrument or machinery is used to effect that object, whether a hammer, a pestle and mortar, or a mill. Either may be pointed out, but if the patent is not confined to that particular tool or machine, the use of the others would be an infringement, the general process being the source. *Cochrane v. Deener*, 94 U. S. 780, 788, 24 L. Ed. 139.

A person who subsequently discovers a new mode of carrying out the patented process is not entitled to use the process without the consent of the patentee. *Morley Sewing Machine Co. v. Lancaster*, 129 U. S. 263, 277, 32 L. Ed. 715; *Tilghman v. Proctor*, 102 U. S. 707, 26 L. Ed. 279.

**89. Omission of essentials.**—*California Paving Co. v. Schalick*, 119 U. S. 401, 30 L. Ed. 471; *Goodyear Dental Vulcanite Co. v. Davis*, 102 U. S. 222, 26 L. Ed. 149; *Royer v. Coupe*, 146 U. S. 524, 36 L. Ed. 1073.

A patent for a concrete pavement in which the blocks are substantially separate, made so by the permanent or temporary interposition of a separating medium or a cutting instrument, so that one block could upheave or be removed without disturbing the adjoining blocks, is not infringed by a pavement laid in one mass and marked crosswise with a blunt marker to the depth of one-sixteenth of an inch, where the mark is only for ornamentation, and produced no free joints between the blocks. *California Paving Co. v. Schalick*, 119 U. S. 401, 30 L. Ed. 471.

**90. Use of equivalent for omitted step in process.**—*Hurlbut v. Schillinger*, 130 U. S. 456, 32 L. Ed. 1011. See, also, *Goodyear Dental Vulcanite Co. v. Davis*, 102 U. S. 222, 26 L. Ed. 149.

A patent for concrete pavements which consists in an invention for dividing a pavement into blocks, so that one block can be removed without injury to the rest

of the pavement, the division between the blocks being effected by interposing, permanently or temporarily between them, in the process of their formation, tar paper or its equivalent, is infringed by a process for dividing such a pavement into blocks by a trowel run partially or wholly through the outer course of the pavement while it is plastic, in a line coincident with the joints in the lower layer. *Hurlbut v. Schillinger*, 130 U. S. 456, 32 L. Ed. 1011.

**91. Similarity of product.**—*Plummer v. Sargent*, 120 U. S. 442, 30 L. Ed. 737; *Bene v. Jeantet*, 129 U. S. 683, 32 L. Ed. 803.

**92. Infringement of design patent.**—*Gorham Co. v. White*, 14 Wall. 511, 528, 20 L. Ed. 731; *Smith v. Whitman Saddle Co.*, 148 U. S. 674, 682, 37 L. Ed. 606.

In design patents it is the appearance to the eye that constitutes mainly, if not entirely, the contribution to the public which the law deems worthy of recompense, and identity of appearance, or sameness of effect upon the eye, is the main test of substantial identity of design. *Gorham Co. v. White*, 14 Wall. 511, 20 L. Ed. 731.

It is not essential to identity of design that the appearance should be the same to the eye of an expert. If, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same—if the resemblance is such as to deceive such an observer, and sufficient to induce him to purchase one, supposing it to be the other—the one first patented is infringed by the other. *Gorham Co. v. White*, 14 Wall. 511, 20 L. Ed. 731; *Smith v. Whitman Saddle Co.*, 148 U. S. 674, 679, 37 L. Ed. 606.

A patent for a design for a saddle is not infringed where the difference between the saddles is so marked that they could not be mistaken for each other. *Smith v. Whitman Saddle Co.*, 148 U. S. 674, 682, 37 L. Ed. 606.

**Sufficiency of evidence.**—Where the testimony of one witness was to the effect that, from his experience as a seller of carpets, he thought it would be almost impossible for any one who had not seen the two carpets together to tell them apart; and that of another witness was that, in his opinion, not one customer in twenty-five would know the difference; and there was other testimony tending to the same result, it was held that while there was evidence contradictory of this

d. *Combinations*—(1) *General Rule*.—To constitute infringement of a patent for a combination of known elements, the elements combined in both cases must be the same, and combined in the same way, so that each element shall perform the same function.<sup>93</sup> While a combination is not an infringement of another because it is intended to obtain the same result,<sup>94</sup> especially where the specific elements of which each is compared are different,<sup>95</sup> yet it will be held

the court could not in the absence of ocular inspection, take it upon itself to say that the circuit court erred in finding infringement. *Dobson v. Dornan*, 118 U. S. 10, 16, 30 L. Ed. 63.

**93. Combinations.**—*Shepard v. Carrigan*, 116 U. S. 593, 597, 29 L. Ed. 723; *Sutter v. Robinson*, 119 U. S. 530, 541, 30 L. Ed. 492; *McClain v. Ortmyer*, 141 U. S. 419, 425, 35 L. Ed. 800; *Wright v. Yuengling*, 155 U. S. 47, 39 L. Ed. 64; *Black Diamond Coal Min. Co. v. Excelsior Coal Co.*, 156 U. S. 611, 617, 39 L. Ed. 553; *Cimiotti Unhairing Co. v. American Fur Ref. Co.*, 198 U. S. 399, 410, 49 L. Ed. 1100; *Silsby v. Foote*, 14 How. 218, 14 L. Ed. 394; *Eames v. Godfrey*, 1 Wall. 78, 17 L. Ed. 547; *Electric R. Signal Co. v. Hall R. Signal Co.*, 114 U. S. 87, 29 L. Ed. 96; *McCormick v. Talcott*, 20 How. 402, 403, 15 L. Ed. 930; *Jones v. Morehead*, 1 Wall. 155, 17 L. Ed. 662; *McMurray v. Mallory*, 111 U. S. 97, 103, 28 L. Ed. 365; *Rowell v. Lindsay*, 113 U. S. 97, 102, 28 L. Ed. 906; *Wicke v. Ostrum*, 103 U. S. 461, 26 L. Ed. 409; *Washing Machine Co. v. Tool Co.*, 20 Wall. 342, 22 L. Ed. 303; *Weatherhead v. Coupe*, 147 U. S. 322, 37 L. Ed. 188; *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33; *Dunbar v. Myers*, 94 U. S. 187, 24 L. Ed. 34; *Fuller v. Yentzer*, 94 U. S. 288, 24 L. Ed. 103; *Hailes v. Van Wormer*, 20 Wall. 353, 22 L. Ed. 241; *Gage v. Herring*, 107 U. S. 640, 27 L. Ed. 601; *Peters v. Active Mfg. Co.*, 129 U. S. 530, 32 L. Ed. 738; *The Corn-Planter Patent*, 23 Wall. 181, 23 L. Ed. 161; *Reedy v. Scott*, 23 Wall. 352, 23 L. Ed. 109; *Fay v. Cordesman*, 109 U. S. 408, 27 L. Ed. 979; *Blake v. San Francisco*, 113 U. S. 679, 681, 28 L. Ed. 1070; *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.*, 152 U. S. 425, 38 L. Ed. 500; *Gould v. Rees*, 15 Wall. 187, 194, 21 L. Ed. 39; *Carver v. Hyde*, 16 Pet. 513, 514, 10 L. Ed. 1051; *Vance v. Campbell*, 1 Black 427, 17 L. Ed. 168; *Brooks v. Fiske*, 15 How. 242, 219, 14 L. Ed. 665; *Stimpson v. Baltimore*, etc., R. Co., 10 How. 328, 13 L. Ed. 441; *Prouty v. Draper*, 16 Pet. 336, 341, 10 L. Ed. 985; *Barrett v. Hall*, 1 Mason 477; *Morley Sewing Machine Co. v. Lancaster*, 129 U. S. 263, 32 L. Ed. 715; *United States v. Berdan Fire-Arms Mfg. Co.*, 156 U. S. 552, 39 L. Ed. 530.

To constitute identity of invention, and therefore infringement, not only must the result attained be the same, but in case the means used for its attainment is a combination of known elements, the elements combined in both cases must be the same, and combined in the same way, so that each element shall perform the

same function, provided, however, that the differences alleged are not merely colorable, according to the rule forbidding the use of known equivalents. *Electric R. Signal Co. v. Hall R. Signal Co.*, 114 U. S. 87, 96, 29 L. Ed. 96.

Where the claim of a patent is for the combination of several elements, a device may be sustained which does not infringe the entire combination. *Gage v. Herring*, 107 U. S. 640, 27 L. Ed. 601.

The patent was for a combination, and the improvement consisted in arranging different portions of the plough, and combining them together in the manner stated in the specification, for the purpose of producing a certain effect; none of the parts referred to were new; and none were claimed as new; nor was any portion of the combination, less than the whole, claimed as new, or stated to produce any given result. The end in view was proposed to be accomplished by the union of all, arranged and combined together in the manner described; and this combination, composed of all the parts mentioned in the specification, and arranged with reference to each other, and to other parts of the plough, in the manner therein described, was stated to be the improvement, and was the thing patented. The use of any two of these parts only, or of two combined with a third, which was substantially different in the form, or in the manner of its arrangement and connection with the others, was, therefore, not the thing patented; it was not the same combination, if it substantially differed from it in any of its parts. *Prouty v. Draper*, 16 Pet. 336, 10 L. Ed. 985.

A patent for a combination is not infringed by a machine which differs in principle as well as in form and combination. *McCormick v. Talcott*, 20 How. 402, 403, 15 L. Ed. 930.

**94. Combination not infringed by different mechanism performing same result.**—*Hubbell v. United States*, 179 U. S. 77, 86, 45 L. Ed. 95; *Burr v. Duryee*, 1 Wall. 531, 17 L. Ed. 650.

What must be considered is not whether the end sought to be effected is the same, but whether the devices or mechanical means by which the desired result is secured are the same. *Hubbell v. United States*, 179 U. S. 77, 86, 45 L. Ed. 95.

**95. Where specific elements are different.**—*Boyd v. Janesville Hay Tool Co.*, 158 U. S. 260, 267, 39 L. Ed. 973.

Since one, coming in the train of inventions which have been patented and put into practical use, is only entitled to the precise devices described and claimed



to infringe where it performs the same function by substantially the same means, and in substantially the same way.<sup>96</sup>

(2) *Use of Less or More Elements than Used in First Combination*—(a) *Use of Less than All Elements of First Combination*—aa. *General Rule*.—A patent for a combination of several known elements is not infringed by a device in which less than all of them are used,<sup>97</sup> even though the element omitted from the second device was immaterial, and totally unnecessary to the successful opera-

in his patent, it follows that where the defendants' specific devices are different from complainant's, no combination of such devices could be deemed an infringement of any combination claimed by complainant. *Boyd v. Janesville Hay Tool Co.*, 158 U. S. 260, 267, 39 L. Ed. 973.

**96. Performance of same function in same way.**—*Mason v. Graham*, 23 Wall. 261, 23 L. Ed. 86.

The patent of E. H. Graham, of October 16th, 1860, reissued May 28th, 1867, for "picker staff motion in looms," has no relation to the mere form of a journal bearing arm, nor does it consist in arranging a journal bearing arm in a slot in the rocker. It embraces every combination of a rocker with a bed and loose journal bearing arms, arranged so as to produce the result described in the specification as effected by the combination. Inasmuch as the defendant (who was alleged to infringe this invention of Graham) employed a combination of a rocker with a bed by loose journals projecting on each side the picker staff, and the combination was effected by means of a journal bearing arm, it was held, to be unimportant that the form of his journal bearing arm was unlike that of the complainant's, or that its mode of attachment was different, so long as it performed the same function in substantially the same way. *Mason v. Graham*, 23 Wall. 261, 23 L. Ed. 86.

**97. Use of less than all of elements of combination.**—*Electric R. Signal Co. v. Hall R. Signal Co.*, 114 U. S. 87, 96, 29 L. Ed. 96; *Cimiotti Unhairing Co. v. American Fur Ref. Co.*, 198 U. S. 399, 410, 49 L. Ed. 1100; *Shepard v. Carrigan*, 116 U. S. 593, 29 L. Ed. 723; *Sutter v. Robinson*, 119 U. S. 530, 30 L. Ed. 492; *McClain v. Ortmyer*, 141 U. S. 419, 35 L. Ed. 800; *Wright v. Yuengling*, 155 U. S. 47, 39 L. Ed. 64; *Black Diamond Coal Min. Co. v. Excelsior Coal Co.*, 156 U. S. 611, 617, 39 L. Ed. 553; *Wicke v. Ostrum*, 103 U. S. 461, 26 L. Ed. 409; *McMurray v. Mallory*, 111 U. S. 97, 103, 28 L. Ed. 365; *Washing Machine Co. v. Tool Co.*, 20 Wall. 342, 22 L. Ed. 303; *McCormick v. Talcott*, 20 How. 402, 403, 15 L. Ed. 930; *Silsby v. Foote*, 14 How. 218, 14 L. Ed. 394; *Carver v. Hyde*, 16 Pet. 513, 10 L. Ed. 1051; *Peters v. Active Mfg. Co.*, 129 U. S. 530, 541, 32 L. Ed. 738; *Prouty v. Draper*, 16 Pet. 336, 10 L. Ed. 985; *Phoenix Caster Co. v. Spiegel*, 133 U. S. 360, 33 L. Ed. 663; *Hailes v. Van Wormer*, 20 Wall. 353, 22 L. Ed. 241; *Gage v. Herring*, 107

U. S. 640, 27 L. Ed. 601; *Fay v. Cordesman*, 109 U. S. 408, 27 L. Ed. 979; *Blake v. San Francisco*, 113 U. S. 679, 681, 28 L. Ed. 1070; *Rowell v. Lindsay*, 113 U. S. 97, 28 L. Ed. 906; *Gould v. Rees*, 15 Wall. 187, 21 L. Ed. 39; *Brooks v. Fiske*, 15 How. 212, 14 L. Ed. 665; *Water-Meter Co. v. Desper*, 101 U. S. 332, 25 L. Ed. 1024; *Royer v. Coupe*, 146 U. S. 524, 36 L. Ed. 1073; *Eddy v. Dennis*, 95 U. S. 560, 24 L. Ed. 363; *Garratt v. Seibert*, 131 U. S., appx. cxv, 21 L. Ed. 956; *Rowell v. Lindsay*, 113 U. S. 97, 102, 28 L. Ed. 906; *Stimpson v. Baltimore, etc., R. Co.*, 10 How. 328, 329, 13 L. Ed. 441; *Eames v. Godfrey*, 1 Wall. 78, 17 L. Ed. 547; *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33; *Dunbar v. Myers*, 94 U. S. 187, 24 L. Ed. 34; *Fuller v. Yentzer*, 94 U. S. 288, 24 L. Ed. 103; *Vance v. Campbell*, 1 Black 427, 17 L. Ed. 168; *Schumacher v. Cornell*, 96 U. S. 549, 554, 24 L. Ed. 676.

Where three elements are claimed in a patent, in combination, the use of two of the elements only does not infringe the patent. *Gould v. Rees*, 15 Wall. 187, 21 L. Ed. 39; *Brooks v. Fiske*, 15 How. 212, 14 L. Ed. 665.

Where a patent is for a combination of distinct and designated parts, it is not infringed by a combination which varies from that patented, in the omission of one of the operative parts and the substitution therefor of another part substantially different in its construction and operation, but serving the same purpose. *Eames v. Godfrey*, 1 Wall. 78, 17 L. Ed. 547.

One of the specifications of the patent being for a combination of certain parts of mechanism necessary to produce the desired result, it was proper for the court to instruct the jury that the defendants had not infringed the patent, unless they had used all the parts embraced in the plaintiffs' combination; and the jury were to find what those parts were, and whether the defendants had used them. *Silsby v. Foote*, 14 How. 218, 14 L. Ed. 394.

An improved process, consisting of several old elements in combination, is not infringed by a process which omits one of the essential elements of the combination. *Royer v. Coupe*, 146 U. S. 524, 36 L. Ed. 1073.

A claim for a sheath composed of grooved bars, bolts and washers, whereby the sheath is rendered capable of adjustment to contain moldings of different diameters, is not infringed by an apparatus in which no washers are used for

tion of the first combination, since neither the patentee nor the court can declare an element, made a material part of a claim, to be immaterial.<sup>98</sup>

*bb. Substitution of Element for One Omitted*—(aa) *New Element or Element Performing New Service*.—Where the defendant in constructing his machine omits entirely one of the elements of a combination, if he substitutes another in the place of the one omitted, which is new or which performs a substantially different function, or which is old, but which was not known at the date of the plaintiff's invention as a proper substitute for the omitted in-

adjustment. *Peters v. Active Mfg. Co.*, 129 U. S. 530, 541, 32 L. Ed. 738.

A patent for a machine for driving several nails at one time, consisting of a combination of old elements, and which drives the nails vertically, is not infringed by one which does not contain some of the elements of the first machine and which drives the nails horizontally. *Wicke v. Ostrum*, 103 U. S. 461, 26 L. Ed. 409.

The reissued letters-patent (No. 2829) for a new and improved clothes wringer, granted to Sylvanus Walker, assignee, on the 31st day of December, 1867, construed to be for a U-shaped yoke or frame for supporting a wringing machine, and for the combination of such a yoke with a clamping device, when employed to hold a clothes wringer to the side of a wash tub, and the U-form of the frame is essential to it. The use of a portable support for a wringing mechanism which has some of the features of the patentee's device, but which has not the U-formed yoke, or frame, is, therefore, no infringement of the patent. *Washing Machine Co. v. Tool Co.*, 20 Wall. 342, 22 L. Ed. 303.

McCormick not being the original inventor of the machine called a divider, but the patentee of only an improvement for a combination of mechanical devices, could not hold as an infringer one who used only a part of the combination. *McCormick v. Talcott*, 20 How. 402, 15 L. Ed. 930.

The plaintiffs, in the circuit court, claimed damages for the infringement of their patent for "a new and useful improvement in the construction of a plough;" the claim of the patentees was for the combination of certain parts of the plough, not for the parts separately. The circuit court charged the jury, that unless it was proved, that the whole combination was substantially used in the defendant's ploughs, it was not a violation of the plaintiff's patent; although one or more of the parts specified in the letters-patent might be used in combination by the defendant; the plaintiffs, by their specification and summing up, treated the parts described as essential parts of their combination, for the purpose of brace and draft; and the use of either alone by the defendant would not be an infringement of the combination patented. Held, that the instructions of the circuit court were cor-

rect. *Prouty v. Draper*, 16 Pet. 336, 10 L. Ed. 985.

The alleged new and useful improvement in mechanism for marking cloth in sewing machines, for which letters-patent No. 28,633, bearing date June 5, 1860, were issued to Henry W. Fuller and Anthony W. Goodell, consists only of a combination of old elements or ingredients constituting an apparatus for affecting the results described in the specification. The rights of the holder of such a patent are not infringed, unless it appears that, without his authority, the entire combination is made, used, or sold. *Fuller v. Yentzer*, 94 U. S. 288, 24 L. Ed. 103.

**Sale of one element of combination as infringement.**—Even if mechanism which has for its object the delivery of a perishable article of manufacture involves patentable novelty, and the fixture and the article to be delivered constitute a valid combination, the sale of one element of such combination with the intent that it shall be used with the other element is not an infringement. *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.*, 152 U. S. 425, 432, 38 L. Ed. 500.

"There are doubtless many cases to the effect that the manufacture and sale of a single element of a combination, with intent that it shall be united to the other elements, and so complete the combination, is an infringement. But we think these cases have no application to one where the element made by the alleged infringer is an article of manufacture perishable in its nature, which it is the object of the mechanism to deliver, and which must be renewed periodically, whenever the device is put to use." *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.*, 152 U. S. 425, 433, 38 L. Ed. 500.

**98. Omission of immaterial part.**—*Wright v. Yuengling*, 155 U. S. 47, 52, 39 L. Ed. 64; *Vance v. Campbell*, 1 Black 427, 17 L. Ed. 168; *Water-Meter Co. v. Desper*, 101 U. S. 332, 25 L. Ed. 1024; *Gage v. Herring*, 107 U. S. 640, 27 L. Ed. 601; *Gould v. Rees*, 15 Wall. 187, 21 L. Ed. 39; *Brown v. Davis*, 116 U. S. 237, 29 L. Ed. 659; *Schumacher v. Cornell*, 96 U. S. 549, 24 L. Ed. 676; *Snow v. Lake Shore, etc., R. Co.*, 121 U. S. 617, 30 L. Ed. 1004; *McClain v. Ortmyer*, 141 U. S. 419, 35 L. Ed. 800; *Fay v. Cordesman*, 109 U. S. 408, 27 L. Ed. 979; *Hubbell v. United States*, 179 U. S. 77, 45 L. Ed. 95.

gredient, he does not infringe.<sup>99</sup>

(bb) *Equivalent for Omitted Element*.—The rule that the use of less than all of the elements of a combination does not constitute infringement is subject to the qualification that they must not be used in connection with a known equivalent for the omitted element.<sup>1</sup> By an equivalent in such a case it is meant that the ingredient substituted for the one withdrawn performs the same function as the other, and that it was well known at the date of the patent securing the invention as a proper substitute for the one omitted in the patented combination.<sup>2</sup> The inventor of a combination cannot invoke the doc-

**99. New element or element performing new service.**—*Gould v. Rees*, 15 Wall. 187, 21 L. Ed. 39; *Seymour v. Osborne*, 11 Wall. 516, 555, 20 L. Ed. 33; *Eames v. Godfrey*, 1 Wall. 78, 17 L. Ed. 547; *McMurray v. Mallory*, 111 U. S. 97, 28 L. Ed. 365; *Electric R. Signal Co. v. Hall R. Signal Co.*, 114 U. S. 87, 29 L. Ed. 96; *Sharp v. Riessner*, 119 U. S. 631, 30 L. Ed. 507; *Carver v. Hyde*, 16 Pet. 513, 514, 10 L. Ed. 1051; *Brooks v. Fiske*, 15 How. 212, 14 L. Ed. 665; *Stimpson v. Baltimore, etc., R. Co.*, 10 How. 328, 329, 13 L. Ed. 441; *Prouty v. Draper*, 16 Pet. 336, 341, 10 L. Ed. 985; *Gill v. Wells*, 22 Wall. 1, 28, 22 L. Ed. 699; *Fuller v. Yentzer*, 94 U. S. 288, 24 L. Ed. 103; *United States v. Berdan Fire-Arms Mfg. Co.*, 156 U. S. 552, 39 L. Ed. 530.

**1. Use of equivalent for omitted element.**—*Electric R. Signal Co. v. Hall R. Signal Co.*, 114 U. S. 87, 96, 29 L. Ed. 96; *Gould v. Rees*, 15 Wall. 187, 192, 21 L. Ed. 39; *Seymour v. Osborne*, 11 Wall. 516, 555, 20 L. Ed. 33; *Gage v. Herring*, 107 U. S. 640, 27 L. Ed. 601; *Gill v. Wells*, 22 Wall. 1, 28, 22 L. Ed. 699; *Fuller v. Yentzer*, 94 U. S. 288, 300, 24 L. Ed. 103; *Water-Meter Co. v. Desper*, 101 U. S. 332, 335, 25 L. Ed. 1024; *Imhaeuser v. Buerk*, 101 U. S. 647, 25 L. Ed. 945; *Rowell v. Lindsay*, 113 U. S. 97, 102, 28 L. Ed. 906.

Bona fide inventors of a combination are as much entitled to equivalents, as the inventors of other patentable improvements; by which is meant that a patentee in such a case may substitute another ingredient for any one of the ingredients of his invention if the ingredient substituted performs the same function as the one omitted and was well known at the date of his patent as a proper substitute for the one omitted in the patented combination. *Gould v. Rees*, 15 Wall. 187, 194, 21 L. Ed. 39; *Imhaeuser v. Buerk*, 101 U. S. 647, 655, 25 L. Ed. 945.

Unquestionably the withdrawal of one ingredient in a patented combination and the substitution of another which was well known at the date of the patent as a proper substitute for the one withdrawn, is a mere formal alteration of the combination; and if the ingredient substituted performs substantially the same function as the one withdrawn it would be correct to instruct the jury that such a substitution of one ingredient for another would not avoid the charge of

infringement. *Gould v. Rees*, 15 Wall. 187, 193, 21 L. Ed. 39.

A party who merely substitutes another old ingredient for one of the ingredients of a patented combination is an infringer, if the substitute performs the same function as the ingredient for which it was substituted, and was well known at the date of the patent as a proper substitute for the omitted ingredient. *Gill v. Wells*, 22 Wall. 1, 28, 22 L. Ed. 699.

Mere formal alterations of a combination in letters-patent do not constitute any defense to the charge of infringement, as the inventor of a combination is as much entitled to suppress every other combination of the same ingredients to produce the same result, not substantially different from what he has invented and caused to be patented, as the inventor of any other patented improvement. Such inventors may claim equivalents as well as any other class of inventors, and they have the same right to suppress every other subsequent improvement, not substantially different from what they have invented and secured by letters-patent. *Gould v. Rees*, 15 Wall. 187, 192, 21 L. Ed. 39; *Seymour v. Osborne*, 11 Wall. 516, 555, 20 L. Ed. 33.

The extent to which either the inventor of a device or of an entire machine, or of a mere combination, can invoke the aid of the doctrine of equivalents, is the same, except that a combination is not infringed unless by a machine containing all the material ingredients patented, or proper substitutes for one or more of such ingredients, well-known to be such at the time when the patent was granted. *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33.

**2. Meaning of equivalent.**—*Carver v. Hyde*, 16 Pet. 513, 514, 10 L. Ed. 1051; *Brooks v. Fiske*, 15 How. 212, 14 L. Ed. 665; *Stimpson v. Baltimore, etc., R. Co.*, 10 How. 328, 329, 13 L. Ed. 441; *Prouty v. Draper*, 16 Pet. 336, 341, 10 L. Ed. 985; *Gould v. Rees*, 15 Wall. 187, 194, 21 L. Ed. 39; *Gill v. Wells*, 22 Wall. 1, 28, 22 L. Ed. 699; *Fuller v. Yentzer*, 94 U. S. 288, 300, 24 L. Ed. 103; *Rowell v. Lindsay*, 113 U. S. 97, 103, 28 L. Ed. 906.

**What constitutes "equivalent."**—See ante, "What Constitutes," XIII, A, 2, a, (2), (e), cc.



trine of equivalents to suppress all other improvements which are not mere colorable invasions of his invention.<sup>3</sup>

(b) *Use of More Elements than Used in First Combination.*—Upon the same principle, the use of all of the elements of a patented combination, all of the elements of which were old, in connection with another and new element, does not constitute an infringement.<sup>4</sup>

(3) *Combination of Both New and Old Elements.*—Where a patented invention embraces both old and new elements, and the patentee obtains a patent both for the combination and for the new elements, the use of the new element either by itself or in connection with one or more of the other elements of the plaintiffs combination, will constitute an infringement.<sup>5</sup>

e. *Product or Manufacture.*—A patent for a product made in a way pointed out in the specification, is not infringed by a product made by a different process, as the process is as much a part of the first patent as the product itself.<sup>6</sup> If a product itself is the subject of a valid patent, it is an infringe-

3. *McCormick v. Talcott*, 20 How. 402, 405, 15 L. Ed. 930; *Morley Sewing Machine Co. v. Lancaster*, 129 U. S. 263, 274, 32 L. Ed. 715; *Burr v. Duryee*, 1 Wall. 531, 17 L. Ed. 650.

If he be the original inventor of the device or machine, he will have a right to treat as infringers all who make machines operating on the same principle, and performing the same functions by analogous means or equivalent combinations, even though the infringing machine may be an improvement of the original, and patentable as such. But if the invention claimed be itself but an improvement on a known machine by a mere change of form or combination of parts, the patentee cannot treat another as an infringer who has improved the original machine by use of a different form or combination performing the same functions. *McCormick v. Talcott*, 20 How. 402, 405, 15 L. Ed. 930.

4. *Use of more than all of elements.*—*United States v. Berdan Fire-Arms Mfg. Co.*, 156 U. S. 552, 565, 39 L. Ed. 530; *Vance v. Campbell*, 1 Black 427, 17 L. Ed. 168; *Schumacher v. Cornell*, 96 U. S. 549, 554, 24 L. Ed. 676.

If more or less than the whole of his ingredients are used by another, such party is not liable as an infringer, because he has not used the invention or discovery patented. With the change of the elements the identity of the product disappears. *Vance v. Campbell*, 1 Black 427, 17 L. Ed. 168; *Schumacher v. Cornell*, 96 U. S. 549, 554, 24 L. Ed. 676.

5. *Combination of both new and old elements.*—*Seymour v. Osborne*, 11 Wall. 516, 541, 20 L. Ed. 33.

6. *Patent for product made according to defined process.*—*Goodyear Dental Vulcanite Co. v. Davis*, 102 U. S. 222, 26 L. Ed. 149; *Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 486, 23 L. Ed. 952; *Cochrane v. Badische, etc., Soda Fabrik*, 111 U. S. 293, 28 L. Ed. 433; *Plummer v. Sargent*, 120 U. S. 442, 30 L. Ed. 737. See, also, *Bene v. Jeantet*, 129 U. S. 683, 32 L. Ed. 803.

A patent for producing a chemical compound by a certain process is not infringed by a process which produces, by another method, the same compound, except that it includes other chemicals. *Cochrane v. Badische, etc., Soda Fabrik*, 111 U. S. 293, 28 L. Ed. 433.

A patent for bronzing iron by coating it with oil and then causing a joint oxidation of the iron and oil by heat, and for the product so produced, is not infringed by a process in which the heat applied is sufficient only to cause oxidation of the oil, although the product when produced is substantially the same as that produced by the first process. *Plummer v. Sargent*, 120 U. S. 442, 30 L. Ed. 737.

The invention for which reissued letters-patent No. 1904, dated March 21, 1865, were granted to the Goodyear Dental Vulcanite Company, was a set of artificial teeth, as a new article of manufacture, consisting of a plate of hard rubber with teeth, or teeth and gums, secured thereto in the manner described in the specification, by embedding the teeth and pins in a vulcanizable compound, so that it shall surround them while it is in a soft state, before it is vulcanized, and so that when it has been vulcanized the teeth are firmly and inseparably secured in the vulcanite, and a tight joint is effected between them, the whole constituting but one piece. Held, that the invention being a product or manufacture made in a defined manner, and not the product alone, separated from the process by which it is created, the process is as much a part of the invention as is the material of which the plate or product is composed. Those letters are not infringed otherwise than by using the material and the process or their equivalents. A plate made of celluloid is not, therefore, an infringement, as celluloid is not an equivalent for hard rubber, and in preparing it for that purpose the process, which is inseparable from the invention, cannot be employed. *Goodyear Dental Vulcanite Co. v. Davis*, 102 U. S. 222, 26 L. Ed. 149.

"When a product arrived at by certain

ment of the patent to purchase such product of another than the patentee.<sup>7</sup>

**B. Remedies for Infringement**—1. JURISDICTION—*a. In What Courts Jurisdiction Vested.*—This question is treated in another title.<sup>8</sup>

*b. Effect of Expiration of Patent Pending Suit.*—Where the patent is in force at the time a bill in equity is filed, and the complainants are entitled to a preliminary injunction at that time, the jurisdiction of the court is not defeated by the expiration of the patent by lapse of time before final decree.<sup>9</sup>

*c. Equity Jurisdiction.*—Where sufficient grounds for equitable interposition exist,<sup>10</sup> redress for the infringement of a patent may be sought by a suit in equity as well as by an action at law,<sup>11</sup> and the recovery of judgment at law is not a prerequisite to the exercise of such jurisdiction.<sup>12</sup> Where the patentee is infringing the rights of his own assignee, the latter may, it seems, have a

defined stages or processes is patented, only those things can be considered equivalents for the elements of the manufacture which perform the same function in substantially the same way. The same result may be reached by different processes, each of them patentable, and one process is not infringed by the use of any number of its stages less than all of them. In view of these considerations, we are constrained to rule that a celluloid dental plate is not an infringement of the Cummings patent. Celluloid is not an equivalent for the material which the patent makes essential to the invention, and in the use of it for a dental plate, the process which is inseparable from the invention is not, and cannot be, employed." *Goodyear Dental Vulcanite Co. v. Davis*, 102 U. S. 222, 230, 26 L. Ed. 149.

7. *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.*, 152 U. S. 425, 433, 38 L. Ed. 500.

But if a product be unpatentable, it is giving to the patentee of the machine the benefit of a patent upon the product, by requiring such product to be bought of him. *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.*, 152 U. S. 425, 433, 38 L. Ed. 500.

8. **In what courts jurisdiction vested.**—As to jurisdiction of United States circuit courts, see the title COURTS, vol. 4, p. 916. As to jurisdiction of court of claims over claims of patentee against United States for use of patent, whether the claim is one of contract or for infringement, see the title COURTS, vol. 4, pp. 1030, 1031. As to jurisdiction of courts of District of Columbia, see the title COURTS, vol. 4, p. 1164. As to venue, see the title VENUE.

9. **Expiration of patent pending suit.**—*Beedle v. Bennett*, 122 U. S. 71, 30 L. Ed. 1074; *Clark v. Wooster*, 119 U. S. 322, 325, 30 L. Ed. 392; *Busch v. Jones*, 184 U. S. 598, 46 L. Ed. 707. See *Keyes v. Eureka Consol. Min. Co.*, 158 U. S. 150, 39 L. Ed. 929.

The contention that a court of equity has no jurisdiction, of a suit for an injunction and accounting, for infringement, in that at the time of the hearing it appeared from the record that the only

patent before the court had expired, no motion for preliminary injunction having been made prior to the expiration of the patent and defendant being a mere user of one machine destroyed before the hearing, seeks to determine the jurisdiction by conditions not in existence at the time and cannot be sustained. Furthermore, whether the contract conveyed the patent-rights to the press only and not the process was an issue to be made in the case and pending its decision preliminary relief by injunction could have been granted. *Busch v. Jones*, 184 U. S. 598, 46 L. Ed. 707.

Where letters-patent expired before the final determination of the suit brought by the patentee complaining of the infringement of them, and praying for an injunction and an account, and the court below, by its decree, sustained their validity and awarded him costs, but neither damages nor profits, and the defendant appealed, the supreme court, where the only question now involved is that of costs, will affirm the decree without examining the merits. *Elastic Fabrics Co. v. Smith*, 100 U. S. 110, 25 L. Ed. 547.

10. **Necessity for grounds for equity jurisdiction.**—*Hayward v. Andrews*, 106 U. S. 672, 27 L. Ed. 271. See, also, *Root v. Railway Co.*, 105 U. S. 189, 26 L. Ed. 975.

11. **Equity jurisdiction.**—*Parks v. Booth*, 102 U. S. 96, 99, 26 L. Ed. 54; *McCoy v. Nelson*, 121 U. S. 484, 30 L. Ed. 1017; *Littlefield v. Perry*, 21 Wall. 205, 206, 22 L. Ed. 577; *Root v. Railway Co.*, 105 U. S. 189, 205, 26 L. Ed. 975.

12. **Necessity for recovery of judgment at law.**—The patent having been issued fifteen months before the bill was filed, and having nearly sixteen years then to run, and the bill alleging that the public have generally acknowledged and acquiesced in the validity of the patent, and that the invention has been put in practice by the plaintiff, and has been of great utility, it was not necessary to show a recovery at law, to warrant jurisdiction in equity, for an injunction and an account. *McCoy v. Nelson*, 121 U. S. 484, 487, 30 L. Ed. 1017; *Root v. Railway Co.*, 105 U. S. 189, 205, 26 L. Ed. 975.



remedy in equity.<sup>13</sup> An accounting for profits earned after suit can be demanded only where the infringement complained of took place previously and continued afterwards.<sup>14</sup> Equity has no jurisdiction of a suit for damages,<sup>15</sup> or where there is an adequate remedy at law.<sup>16</sup>

d. *Action against Government*.—The mode of obtaining compensation for use of a patented invention by the government is by suit in the court of claims where the patentee consents to the use of the invention with expectation of payment.<sup>17</sup> And even if the use was not with the consent of the patentee, the government may still be sued in that court, if the circumstances are such as to raise an implied promise to pay therefor,<sup>18</sup> and in such case a suit against the officer who made use of the invention, on behalf of the government, is improper.<sup>19</sup>

2. PARTIES.—a. *Parties Plaintiff*.—(1) *General Rules*.—(a) *Persons "Interested."*—Under the statute providing that damages may be recovered by action on the case, to be brought in the name of the person "interested," the word "interested" means interested in the patent at the time when the infringement was committed.<sup>20</sup>

(b) *Patentee*.—Patentees have secured to them, by virtue of the letters-patent granted to them, the full and exclusive right and liberty, for a prescribed term, "of making and using, and vending to others to be used," their respective inventions or discoveries; and, whenever their rights, as thus defined, are invaded by others, they are entitled to an action on the case to recover actual damages as compensation for the injury.<sup>21</sup>

(c) *Personal Representatives of Patentee*.—Under the laws of the United States, where a patent is granted by the government to a person, as executor, he can maintain a suit on the patent in all respects as if he had been designated

13. Where the patentee himself is infringing the rights of his own licensee, and the licensee (not being able to sue the patentee in the usual way in which a licensee sues an infringer, i. e., in the patentee's name) is remediless so far as the federal courts are concerned, unless he can sue in his own name—he may so sue in equity, which regards substance and not form. *Littlefield v. Perry*, 21 Wall. 205, 206, 22 L. Ed. 577.

14. Accounting for profits earned after suit.—*Marsh v. Nichols, etc., Co.*, 128 U. S. 605, 32 L. Ed. 538.

15. Where the object of the suit is to recover damages for an unlawful and fraudulent conspiracy to cheat one out of his interest in the original invention which is the subject-matter of the controversy, the remedy is clearly at law, and not in equity. *Ambler v. Choteau*, 107 U. S. 586, 790, 27 L. Ed. 322.

16. Necessity for want of adequate legal remedy.—Where the remedy at law by action for damages is adequate, equity has no jurisdiction of a suit for injunction and accounting. *Keyes v. Eureka Consol. Min. Co.*, 158 U. S. 150, 39 L. Ed. 929.

The assignee of patents and all prior claimants for damages for infringement cannot sue in equity merely because he cannot sue at law in his own name but in such case suit must be brought at law in the assignor's name. *Hayward v. Andrews*, 106 U. S. 672, 27 L. Ed. 271.

17. Remedy where patentee consents to use with expectation of payment.—*James v. Campbell*, 104 U. S. 356, 26 L. Ed. 786.

Jurisdiction of court of claims over suits by patentee against United States.—See the title COURTS, vol. 4, pp. 1030, 1031.

18. Implied promise to pay for use.—*Hollister v. Benedict, etc., Mfg. Co.*, 113 U. S. 59, 28 L. Ed. 901.

"If the right of the patentee was acknowledged, and, without his consent, an officer of the government, acting under legislative authority, made use of the invention in the discharge of his official duties, it would seem to be a clear case of the exercise of the right of eminent domain, upon which the law would imply a promise of compensation, an action on which would lie, within the jurisdiction of the court of claims, such as was entertained and sanctioned in the case of *United States v. Great Falls Mfg. Co.*, 112 U. S. 645, 28 L. Ed. 846." *Hollister v. Benedict, etc., Mfg. Co.*, 113 U. S. 59, 67, 28 L. Ed. 901.

19. Action against public officer.—*James v. Campbell*, 104 U. S. 356, 26 L. Ed. 786.

20. Meaning of "persons interested."—*Moore v. Marsh*, 7 Wall. 515, 19 L. Ed. 37.

21. Patentee.—*Moore v. Marsh*, 7 Wall. 515, 520, 19 L. Ed. 37; *Blanchard v. Putnam*, 8 Wall. 420, 423, 19 L. Ed. 433; *Birdsell v. Shaliol*, 112 U. S. 485, 28 L. Ed. 768.



in the patent as trustee instead of executor.<sup>22</sup> Where several executors are appointed by the will of a patentee decedent—provision being made, however, for one alone acting—and but one proves the will and receives the letters of administration, he alone can maintain an action for infringement of the letters-patent at common law.<sup>23</sup>

(2) *As Affected by Assignment of Patent*—(a) *Infringement before Assignment*.—The original owner of a patent, who has afterwards sold his right, may recover for an infringement committed during the time that he was owner,<sup>24</sup> and the assignees cannot sue,<sup>25</sup> and need not be joined as parties plaintiff.<sup>26</sup>

(b) *Infringement after Assignment*—aa. *Assignment of Whole Interest*.—Where the patentee has assigned his whole interest, either before or after the patent is issued, the action must be brought in the name of the assignee, because he alone was interested in the patent at the time the infringement took place.<sup>27</sup>

bb. *Assignment of Part Interest*—(aa) *Undivided Part*.—Where the assignment is of an undivided part of the patent, the action should be brought for every infringement committed subsequent to the assignment, in the joint names of the patentee and assignee, as representing the entire interest.<sup>28</sup>

(bb) *Assignment for Particular Territory*.—Formerly the grantee of a territorial right, for a particular district, could not bring an action on the patent in his own name,<sup>29</sup> but the act of congress having made him a party interested in the patent, it is now well settled that he may sue in his own name for invasion of the patent in that territorial district, as no one else is injured by any such infringement.<sup>30</sup>

**22. Patent granted to person "as executor."**—*Rubber Co. v. Goodyear*, 9 Wall. 788, 19 L. Ed. 566.

**23. Several executors appointed, but only one acting.**—*Rubber Co. v. Goodyear*, 9 Wall. 788, 19 L. Ed. 566.

**24. Suit by original owner for infringement before sale.**—*Moore v. Marsh*, 7 Wall. 515, 19 L. Ed. 37; *Dean v. Mason*, 20 How. 198, 204, 15 L. Ed. 878.

**25. Action by assignees for prior infringements.**—See ante, "Right to Sue for Prior Infringements," XII, A, 5, b, (2), (f).

**26. Necessity of joining assignees.**—*Dean v. Mason*, 20 How. 198, 204, 15 L. Ed. 878.

**27. Assignment of whole interest.**—*Moore v. Marsh*, 7 Wall. 515, 520, 19 L. Ed. 37; *Blanchard v. Putnam*, 8 Wall. 420, 423, 19 L. Ed. 433; *Waterman v. Mackenzie*, 138 U. S. 252, 257, 34 L. Ed. 923; *Pope Mfg. Co. v. Gormully, etc.*, Mfg. Co., No. 3, 144 U. S. 248, 251, 36 L. Ed. 423.

The monopoly granted by law to the patentee is for one entire thing, and in order to enable the assignee to sue, the assignment must convey to him the entire and unqualified monopoly which the patentee held, in the territory specified, and any assignment short of that is a mere license. *Pope Mfg. Co. v. Gormully, etc.*, Mfg. Co., No. 3, 144 U. S. 248, 251, 36 L. Ed. 423.

**What constitutes assignment.**—See ante, "What Constitutes," XII, A, 4, a.

**28. Assignment of part interest.**—*Moore v. Marsh*, 7 Wall. 515, 19 L. Ed. 37.

**29. Assignee for particular territory.**—

*Moore v. Marsh*, 7 Wall. 515, 521, 19 L. Ed. 37; *Tyler v. Tuel*, 6 Cranch 324, 3 L. Ed. 237.

An assignee of part of a patent right, that is, the right to sell it in certain territory cannot maintain an action on the case, for a violation of the patent. *Tyler v. Tuel*, 6 Cranch 324, 3 L. Ed. 237.

**30. Rule under statute.**—*Gayler v. Wilder*, 10 How. 477, 13 L. Ed. 504; *Moore v. Marsh*, 7 Wall. 515, 19 L. Ed. 37; *Blanchard v. Putnam*, 8 Wall. 420, 423, 19 L. Ed. 433; *Wilson v. Rousseau*, 4 How. 646, 11 L. Ed. 1141; *Littlefield v. Perry*, 21 Wall. 205, 22 L. Ed. 577; *Pope Mfg. Co. v. Gormully, etc.*, Mfg. Co., No. 3, 144 U. S. 248, 36 L. Ed. 423.

An assignee of an exclusive right to use two machines within a particular district, can maintain an action for an infringement of the patent within that district, even against the patentee. *Wilson v. Rousseau*, 4 How. 646, 11 L. Ed. 1141.

Where one instrument, duly recorded in the patent office, contains in unmistakable language, an absolute conveyance by a patentee of his patent and inventions described (in this case applications of a principle of heating furnaces for houses, heating stoves, steam boilers, etc.) and all improvements thereon, within and throughout certain states, and an agreement by the assignee to pay a royalty on all patented articles sold, with a clause of forfeiture in case of nonpayment, or neglect, after due notice, to make and sell the patented articles to the extent of a reasonable demand therefor, the grantee will not, by an agreement supplementary to

(cc) *Assignment of Interest in Proceeds*.—Persons having an interest in the proceeds of a patent, but no title thereto by sale or assignment, need not be joined as plaintiffs.<sup>31</sup>

cc. *Where Contract to Assign Is Not Perfected*.—Where a contract for sale of a patent has not been perfected, it will not prevent the grantor from suing for infringement thereof, after the grantee's death.<sup>32</sup>

(3) *As Affected by Mortgage of Patent*.—The mortgagee of a patent being the present owner of the whole title in the patent under a mortgage duly executed and recorded, was the person, and the only person, entitled to maintain a suit for infringement.<sup>33</sup>

(4) *As Affected by License*—(a) *Right of Licensee to Sue*—aa. *General Rule*.—A licensee of a patent cannot bring a suit in his own name, at law or in equity, for its infringement by a stranger.<sup>34</sup> An action at law for the benefit

such assignment and of even date but not recorded, be reduced into a mere licensee as respects a right to sue in the federal courts, for infringement within the assigned territory, by the fact that in the supplementary agreement the parties declare that nothing in the grant shall give the assignee the right to apply the principle of the invention to one special purpose (in this case to the heating of several rooms in a house by furnaces erected in the cellar), "the same being intended to be reserved" by the patentee. And this is so, although the supplementary and unrecorded agreement be referred as the grant back of a mere license from the assignee to the patentee. *Littlefield v. Perry*, 21 Wall. 205, 22 L. Ed. 577.

Even though this were not so, and he not technically an assignee, such a grantee may, under the patent act, which provides "that all actions, suits, controversies, and cases arising under any law of the United States granting or confirming to inventors the exclusive right to their inventions or discoveries shall be originally cognizable, as well in equity as at law, in the circuit court, etc.," maintain a suit in his own name in the federal court against the patentee, alleged to infringe. He has the exclusive right to the use of the patent for certain purposes within a defined territory, and so holds a right under the patent. Alleging infringement, a construction of the patent is involved; this raises a question "under" the "law." That such a suit may involve the construction of a contract as well as of the patent, will not oust the court of its jurisdiction. If the patent is involved it carries with it the whole case. *Littlefield v. Perry*, 21 Wall. 205, 206, 22 L. Ed. 577.

An assignee of an exclusive right to use ten machines within the city of Louisville, or ten miles round, may join his assignor with him in a suit for a violation of the patent right, under the circumstances of this case. *Woodworth v. Wilson*, 4 How. 712, 11 L. Ed. 1171.

**31. Persons without title to patent but interested in proceeds**.—At the hearing before the master, a brother of the plaintiff, called as a witness in his behalf, testified on cross-examination that before the

suit was brought the witness had acquired an interest in all license fees and recoveries under the patent. No further question was asked, or evidence offered, by either party, as to the nature or amount of that interest. The defendants contended before the master, and at the argument on appeal, that the plaintiff could recover in this suit no more than his own share, and, having failed to prove the extent of his interest, was entitled to nominal damages only. Held, it is a sufficient answer to this objection, that it is not shown that any one but the plaintiff has any interest, legal or equitable, by assignment or otherwise, in the patent sued on; and that "an interest in the net proceeds of collections under a patent does not necessarily amount to legal ownership of the patent itself." *Tilghman v. Proctor*, 125 U. S. 136, 143, 31 L. Ed. 664.

**32. Contract of sale not perfected**.—Where the owner of a patent granted the portion of his interest in it to another person in consideration of certain payments to be made by such person to third parties, and certain promises and agreements then made by him; and such person never made any of the payments which he was thus required to make, and by common consent of the grantor and grantee, the contract never went into operation in any way, because the grantee was unable to comply with any of his engagements, so that the grantor was compelled to pay, and did pay, the money which the grantee had agreed to pay; and the grantee during his lifetime never claimed any interest in the contract, but, on the contrary, always recognized the grantor's exclusive right, and acted as his agent in the patent, under a power of attorney, paying him a part of the profits for the privilege; held, after the grantee's death, that the agreement did not prevent the grantor's bringing suit for the infringement of the patent without naming the grantee. *Railroad Co. v. Trimble*, 10 Wall. 367, 19 L. Ed. 948.

**33. Mortgagee**.—*Waterman v. Mackenzie*, 138 U. S. 252, 261, 34 L. Ed. 923; *Root v. Railway Co.*, 105 U. S. 189, 212, 26 L. Ed. 975.

**34. Suits by licensee**.—*Birdsell v. Shaliol*.

of the licensee must be brought in the name of the patentee alone.<sup>35</sup> Where a suit in equity is brought by the patentee and the licensee together, the judgment is conclusive on the questions involved.<sup>36</sup>

bb. *Where Patentee Is Infringer*.—Where the patentee is the infringer, the licensee is powerless, so far as the courts of the United States are concerned, unless he can sue in his own name, and in such case a court of equity looks to the substance rather than form and will permit the licensee to sue in his own name.<sup>37</sup>

(b) *Action after Death of Licensee*.—And after the death of a licensee for particular territory, a suit for infringement should be brought by the patentee for his own use, and a suit by him for the use of the licensee's administrator is improper.<sup>38</sup>

112 U. S. 485, 486, 28 L. Ed. 768; Littlefield v. Perry, 21 Wall. 205, 223, 22 L. Ed. 577; Gayler v. Wilder, 10 How. 477, 495, 13 L. Ed. 504; Paper-Bag Cases, 105 U. S. 766, 771, 26 L. Ed. 959; Excelsior Wooden Pipe Co. v. Pacific Bridge Co., 185 U. S. 282, 293, 46 L. Ed. 910; Pope Mfg. Co. v. Gormully, etc., Mfg. Co., No. 3, 144 U. S. 248, 250, 36 L. Ed. 423; Waterman v. Mackenzie, 138 U. S. 252, 34 L. Ed. 923.

An agreement that the assignee might make and vend the article within certain specified limits, upon paying to the assignor a cent per pound, reserving, however, to the assignor the right to establish a manufactory of the article upon paying to the assignee a cent per pound, is only a license, and a suit for an infringement of the patent right must be conducted in the name of the assignor. Gayler v. Wilder, 10 How. 477, 13 L. Ed. 504.

Unquestionably, a contract for the purchase of any portion of the patent right may be good as between the parties as a license, and enforced as such in the courts of justice. But the legal right in the monopoly remains in the patentee, and he alone can maintain an action against a third party who commits an infringement upon it. Gayler v. Wilder, 10 How. 477, 495, 13 L. Ed. 504.

A license agreement by which is granted the sole and exclusive right and license to manufacture and sell fountain penholders containing the said patented improvement throughout the United States, did not include the right to use such penholders, at least if manufactured by third persons, and was therefore a mere license and not an assignment of any title, and did not give the licensee the right to sue alone, at law or in equity, for an infringement of the patent. Waterman v. Mackenzie, 138 U. S. 252, 34 L. Ed. 923.

In equity, as at law, when the transfer amounts to a license only, the title remains in the owner of the patent; and suit must be brought in his name, and never in the name of the licensee alone, unless that is necessary to prevent an absolute failure of justice, as where the patentee is the infringer, and cannot sue himself. Any rights of the licensee must be enforced through or in the name of the owner of

the patent, and perhaps, if necessary to protect the rights of all parties, joining the licensee with him as a plaintiff. Rev. Stat., § 4921; Littlefield v. Perry, 21 Wall. 205, 22 L. Ed. 577; Paper-Bag Cases, 105 U. S. 766, 26 L. Ed. 959; Birdsall v. Shaliol, 112 U. S. 485, 487, 28 L. Ed. 768; Waterman v. Mackenzie, 138 U. S. 252, 255, 34 L. Ed. 923.

**What constitutes licensee.**—See ante. "What Constitutes," XII, C, 1.

**35. Action at law for benefit of licensee.**—Birdsell v. Shaliol, 112 U. S. 485, 486, 28 L. Ed. 768; Excelsior Wooden Pipe Co. v. Pacific Bridge Co., 185 U. S. 282, 293, 46 L. Ed. 910; Littlefield v. Perry, 21 Wall. 205, 22 L. Ed. 577.

**36. Suit in equity by patentee and licensee, jointly.**—Birdsell v. Shaliol, 112 U. S. 485, 28 L. Ed. 768.

"When a suit in equity has been brought and prosecuted, in the name of the patentee alone, with the licensee's consent and concurrence, to final judgment from which, if for too small a sum, an appeal might have been taken in the name of the patentee, we should hesitate to say, merely because the licensee was not a formal plaintiff in that suit, that a new suit could be brought to recover damages against the same defendant for the same infringement." Birdsall v. Shaliol, 112 U. S. 485, 487, 28 L. Ed. 768.

**37. Where patentee is infringer.**—Excelsior Wooden Pipe Co. v. Pacific Bridge Co., 185 U. S. 282, 293, 46 L. Ed. 910; Littlefield v. Perry, 21 Wall. 205, 22 L. Ed. 577.

**38. After death of licensee for specific territory.**—Oliver v. Rumford Chemical Works, 109 U. S. 75, 27 L. Ed. 862.

The patentee of an "improvement in a pulverulent acid for use in the preparation of soda powders, farinaceous food and for other purposes" entered into a contract granting the exclusive right to use the patent acid in a specified territory for the purpose of making self raising flour, and giving the right to use and sell the flour in the territory, the acid used to be bought from the patentee. No right was given to make the acid, or to use or sell it otherwise than as an ingredient in the self raising flour. It was held that the contract only created a license which was



(5) *Objections for Misjoinder.*—An objection for misjoinder of parties plaintiff cannot be raised for the first time on appeal.<sup>39</sup>

b. *Parties Defendant.*—The owner of a patent may sue the user<sup>40</sup> as well as the manufacturer<sup>41</sup> of an infringing device, and a patentee who is himself infringing rights under a patent which he has assigned, may be sued for the infringement by the assignee or licensee.<sup>42</sup> A corporation whose stock is held by another may be sued for infringement.<sup>43</sup> But a suit for infringement will not lie against a corporation, after its dissolution,<sup>44</sup> nor against the trustees thereof who are not using the invention.<sup>45</sup> The United States cannot be sued for infringement of a patent unless it has given its consent thereto.<sup>46</sup> Since the United States cannot be sued in the court of claims except upon contracts, it cannot be sued there for infringement of a patent.<sup>47</sup> But officers of the United States, although acting under orders from the government, are personally liable to be sued for their own infringement of a patent, and may be sued in the courts having jurisdiction of such action.<sup>48</sup>

3. *LIMITATIONS AND LACHES*—a. *Limitations.*—As to whether federal courts will follow state statutes, see the title *COURTS*, vol. 4, p. 1093. As to limitations

terminated upon the death of the licensee, and that a suit for infringement brought by the patentee for the use of the administrator could not be sustained. *Oliver v. Rumford Chemical Works*, 109 U. S. 75, 27 L. Ed. 862.

39. *Objection for misjoinder.*—Where the assignors of a patent right were joined with the assignee for a particular locality, in a bill for an injunction to restrain a defendant from the use of the machine patented, and the defendant raised, in the federal supreme court, and after a final decree, an objection arising from a misjoinder of parties, the objection comes too late. *Livingston v. Woodworth*, 15 How. 546, 14 L. Ed. 809.

40. *User of infringing device.*—*Birdsell v. Shaliol*, 112 U. S. 485, 488, 28 L. Ed. 768 (damages may be recovered against the user).

41. *Manufacturer of infringing device.*—*Birdsell v. Shaliol*, 112 U. S. 485, 488, 28 L. Ed. 768 (the manufacturer may be required to account).

42. *Patentee.*—*Littlefield v. Perry*, 21 Wall. 205, 207, 22 L. Ed. 577; *Excelsior Wooden Pipe Co. v. Pacific Bridge Co.*, 185 U. S. 282, 293, 46 L. Ed. 910.

Where a patentee is himself the infringer of rights under the patent which he has assigned, equity looks upon him as a trustee faithless to his trust; the violator of rights which he was bound to protect. It will accordingly charge him for all profits improperly made, as well for profits on original patents, the subject of original patents, the subject of original bill, as for profits made on reissues obtained pendente lite, and the subject of a supplemental bill. *Littlefield v. Perry*, 21 Wall. 205, 207, 22 L. Ed. 577.

43. *Corporation whose stock held by another.*—A railroad company, organized under a charter from Pennsylvania is responsible for the infraction of a patent right respecting cars, although the entire capital stock of the company was held by a connecting railroad company in Mary-

land, which latter company also worked the road by the instrumentality of its agents, and motive power, and cars. *York, etc., R. Co. v. Winans*, 17 How. 30, 15 L. Ed. 27.

The obligations to the community which the Pennsylvania company is placed under by its charter, cannot be evaded by any transfer of its rights and powers to another company; and in this case, the Pennsylvania company contributes to the expense of working the road, and of paying the officers and agents who are employed. *York, etc., R. Co. v. Winans*, 17 How. 30, 15 L. Ed. 27.

44. *Dissolved corporation.*—*Hapgood v. Hewitt*, 119 U. S. 226, 30 L. Ed. 369.

45. *Trustees of dissolved corporation who are not using invention.*—*Hapgood v. Hewitt*, 119 U. S. 226, 30 L. Ed. 369.

46. *Suit against United States.*—*Schilling v. United States*, 155 U. S. 163, 39 L. Ed. 108.

As to necessity of consent in general, see the title *UNITED STATES*.

The complainant as the owner of letters-patent of the United States for new and useful improvements in stamp canceling and postmarking machines, sought to enjoin the further use in the service of the United States of two machines which infringed the complainant's letters-patent. The suit was really against the United States as lessee of the machines, though the postmaster of the office in which the machines were used was named as defendant, and as the United States could not be made a party, the United States circuit court did not have power to grant an injunction restraining the use of the machines. *International Postal Supply Co. v. Bruce*, 194 U. S. 601, 48 L. Ed. 1134.

47. *Suits against United States.*—See the title *COURTS*, vol. 4, p. 1030.

48. *United States officers.*—*Belknap v. Schild*, 161 U. S. 10, 18, 40 L. Ed. 599; *Cammeyer v. Newton*, 94 U. S. 225, 24 L.

in proceeding in the court of claims against United States, see the titles *LIMITATION OF ACTIONS AND ADVERSE POSSESSION*, vol. 7, p. 900; *UNITED STATES*.

b. *Laches*.—Equity will not take jurisdiction of a suit for injunction and accounting for the infringement of a patent right, where the complainant has been guilty of unreasonable delay in applying for relief.<sup>49</sup>

4. *PLEADINGS*.—a. *Declaration or Bill*.—(1) *Suit to Be Based on Patent Infringed*.—In a suit for infringement the plaintiff's pleading must make the patent, for the infringement of which relief is sought, the basis of the suit. Thus where the plaintiff is the owner of two patents covering the same invention the latter for an improvement, and sues to recover for the infringement of the second only, he cannot recover for an infringement of the first patent as well as the second.<sup>50</sup>

(2) *Averment That Plaintiff Is First Inventor*.—In a suit for infringement the plaintiff must aver that he was the first inventor of the device for which the patent sued on was issued.<sup>51</sup>

(3) *Averment of Notice of Patent*.—In a suit for infringement, the plaintiff must either aver that the article made by him under his patent was properly marked "patented" as required by the statute, or that he has given notice of the patent to the defendants.<sup>52</sup>

(4) *Suit on Renewal or Reissue*.—In a suit on a renewal granted pending suit on the original patent, a supplemental bill is the proper pleading.<sup>53</sup> In case of a reissue, a new original bill is the proper way of proceeding, but a failure to object to a proceeding by supplemental bill will waive the objection.<sup>54</sup>

Ed. 72. See the title *PUBLIC OFFICERS*.

49. *Laches*.—*Keyes v. Eureka Consol. Min. Co.*, 158 U. S. 150, 39 L. Ed. 929 (where an injunction and accounting was refused, where suit was brought just prior to the expiration of the patent, and it had been used by the defendant, with the knowledge of the complainant, for seventeen years).

When the complainant in a bill for an accounting and an injunction against the further use of his patent taken out while in defendant's employ, after asking a settlement, as he claimed, and being refused, dropped the matter, and continued to acquiesce in defendants' use of his patent, and to receive a salary from them for a period of several years, and when asked to account for his conduct in this respect, his explanation was that he felt convinced that any demand he might make would have been rejected, and thus his friendly relations with the defendant be disturbed, was guilty of laches which disentitled him to the relief asked. A license was to be presumed. *Lane, etc., Co. v. Locke*, 150 U. S. 193, 200, 37 L. Ed. 1049.

"The plaintiff's excuse, in this instance, that he preferred for prudential reasons, to receive a salary from the defendant rather than to demand a royalty, is entitled to a less favorable consideration by a court of equity than if his conduct had been that of mere inaction." *Lane, etc., Co. v. Locke*, 150 U. S. 193, 201, 37 L. Ed. 1049.

50. *Declaration or bill*.—*McCreary v. Pennsylvania Canal Co.*, 141 U. S. 459, 467, 35 L. Ed. 817.

**Sufficiency of bill for infringement.**—

*McCoy v. Nelson*, 121 U. S. 484, 30 L. Ed. 1017.

51. **Averment of novelty of invention.**—*Seymour v. Osborne*, 11 Wall. 516, 538, 20 L. Ed. 33; *Marsh v. Seymour*, 97 U. S. 348, 349, 24 L. Ed. 963; *Bates v. Coe*, 98 U. S. 31, 49, 25 L. Ed. 68; *Parks v. Booth*, 102 U. S. 96, 99, 26 L. Ed. 54; *Imhaeuser v. Buerk*, 101 U. S. 647, 662, 25 L. Ed. 945; *Mitchell v. Tilghman*, 19 Wall. 287, 390, 22 L. Ed. 125; *Dunbar v. Myers*, 94 U. S. 187, 196, 24 L. Ed. 34.

52. **Averment of notice of patent.**—*Dunlap v. Schofield*, 152 U. S. 244, 248, 38 L. Ed. 426; *Coupe v. Royer*, 155 U. S. 565, 583, 39 L. Ed. 263.

53. **Supplemental bill to continue suit after renewal of patent.**—Where the patent expires and is extended pending the litigation, and the infringement by the respondent is continued in respect to the extended patent, a supplemental bill is a proper pleading to prolong the suit, as in that state of the case the complainant may well claim, if he is the original and first inventor of the improvement, to recover of the respondent the gains and profits made by the infringement, both before and subsequent to the extension. *Reedy v. Scott*, 23 Wall. 352, 364, 23 L. Ed. 109.

54. **Suit on reissue.**—Though as a general rule suits for infringement of a patent are defeated by the surrender of the patent, and a new original bill—not a supplemental bill—is the proper sort of bill by which to proceed for an infringement under the reissue, yet where there has been a surrender and reissue, and the patentee has proceeded by a supplemental bill—the defendant making no objection to this sort of proceeding, but allowing

b. *Plea or Answer*—(1) *Necessity for and Sufficiency of Averments*—(a) *Want of Novelty or Invention*.—A patent may be declared void for want of novelty,<sup>55</sup> or invention,<sup>56</sup> although the defense is not set up in the answer.

(b) *Prior Invention*.—While the defense that the plaintiff is not the first inventor should be made by plea or answer,<sup>57</sup> it has been held that under a general denial of the patentee's priority of invention, evidence of prior knowledge and use taken without objection is competent at the final hearing on the question of the validity of the patent.<sup>58</sup>

In a suit for the infringement of a combination, the parts of which are not susceptible of division or separate use, if the answer sets up that the complainant is not the first and original inventor of it, the defense to be available must apply to the combination as an entirety, and not to a part of it, or to one or more of the claims of the letters, if they do not cover the entire invention.<sup>59</sup>

(c) *Prior Sale or Use*.—On a bill in chancery, for an infringement of a patent, the allegation, in an answer, of sale and public use "prior to the filing of an application for a patent," with the consent and allowance of the inventor, is insufficient, unless it also alleged in the answer that such sale or use was more than two years before he applied for a patent.<sup>60</sup>

(d) *Fraudulent Perfection of Another's Patent*.—The defense, "that the patentee fraudulently and surreptitiously obtained the patent for that which he knew was invented by another," is not a sufficient defense to a charge of infringement, unless accompanied by the further allegation, that the alleged first inventor was at the time using reasonable diligence in adapting and perfecting the invention.<sup>61</sup>

(e) *License*.—Where a contract concerning the use of a patented invention bound the "parties and their legal representatives" to the covenants and agreements of the contract, a plea in a suit for infringement which alleges that the defendants "are the legal representatives and successors and assignees in business and interest" of one of the parties, is sufficient.<sup>62</sup> An allegation that the patentee refused to manufacture and furnish his invention to the licensees, as he had agreed to do, is equivalent to an allegation of a demand on him to do so, and a refusal.<sup>63</sup>

(f) *Want of Notice of Patent*.—A defendant, who relies upon a want of knowledge upon his part of the actual existence of the patent, should aver the same in his answer, that the plaintiff may be duly advised of the defense.<sup>64</sup>

proofs to be taken and the suit to proceed otherwise to a conclusion, as if the irregularity were wholly unimportant; the two parties proceeding respectively throughout the trial upon the assumption and concession that the reissued patent was substantially for the same invention as that embodied in the original patent—all objection to the irregularity in proceeding by a supplemental bill instead of by a new original one must be considered as waived. *Reedy v. Scott*, 23 Wall. 352, 23 L. Ed. 109.

55. *Want of novelty*.—*Richards v. Chase Elevator Co.*, 158 U. S. 299, 301, 39 L. Ed. 991; *Dunbar v. Myers*, 94 U. S. 187, 24 L. Ed. 34; *Slawson v. Grand St. R. Co.*, 107 U. S. 649, 27 L. Ed. 576; *Brown v. Piper*, 91 U. S. 37, 23 L. Ed. 200.

56. *Want of invention*.—*Dunbar v. Myers*, 94 U. S. 187, 24 L. Ed. 34; *Slawson v. Grand St. R. Co.*, 107 U. S. 649, 27 L. Ed. 576; *Brown v. Piper*, 91 U. S. 37, 44, 23 L. Ed. 200.

57. *Defense of prior invention to be pleaded*.—*Loom Co. v. Higgins*, 105 U.

S. 580, 26 L. Ed. 1177; *Zane v. Soffe*, 110 U. S. 200, 28 L. Ed. 119.

58. *Loom Co. v. Higgins*, 105 U. S. 580, 26 L. Ed. 1177; *Zane v. Soffe*, 110 U. S. 200, 203, 28 L. Ed. 119. See, also, *Roemer v. Simon*, 95 U. S. 214, 24 L. Ed. 384.

59. *Defense of prior invention to suit on combination patent*.—*Parks v. Booth*, 102 U. S. 96, 26 L. Ed. 54.

60. *Prior sale or use*.—*Agawam Co. v. Jordan*, 7 Wall. 583, 19 L. Ed. 177.

61. *Fraudulent perfection of another's patent*.—*Agawam Co. v. Jordan*, 7 Wall. 583, 19 L. Ed. 177.

62. *License*.—*Hammond v. Mason, etc.*, *Organ Co.*, 92 U. S. 724, 23 L. Ed. 767.

63. *Hammond v. Mason, etc.*, *Organ Co.*, 92 U. S. 724, 23 L. Ed. 767.

64. *Denial of notice of patent*.—*Rubber Co. v. Goodyear*, 9 Wall. 788, 801, 19 L. Ed. 566; *Sessions v. Romadka*, 145 U. S. 29, 50, 36 L. Ed. 609. See ante, "Averment of Notice of Patent," XIII, B, 4, a, (3).

In view of the fact that all letters-patent are recorded, with their specifications, in



(2) *Admissions in Answer*.—Where the parties in their answer, as originally filed, to a bill for infringing a patent, admit that they did manufacture and sell the articles alleged to have been patented, the fact thus admitted in the answer must be accepted as established. As, however, the admission need go no further than its terms necessarily imply, the court will, under special circumstances, and where this is promotive of justice, assume that the smallest number of articles were made consistent with the use of the word involved, in the plural, and with the use by the defendants of any part of the patent which is valid.<sup>65</sup>

(3) *Amendment*.—Where, after setting up the defense of prior knowledge and use of the thing patented, and giving the names and residences of witnesses intended to be called to prove the defense, the answer to a bill for the infringement of letters-patent alleges that the names and residences of certain other witnesses are unknown to the defendant, and prays leave to insert and set forth in the answer such names and residences when they shall be discovered, it is competent for the court to allow, upon such discovery, the amendment to be made *nunc pro tunc*.<sup>66</sup>

(4) *Notice of Defenses*—(a) *Necessity of Notice*.—In order for the defendant to avail himself of the defenses of previous invention, knowledge or use of the thing patented, or of the other defenses provided for by § 4920 of the Revised Statutes, under the general issue, whether the suit be in law or equity, he must give notice thereof to the plaintiff or his attorney thirty days before trial.<sup>67</sup> No notice is necessary where the special matter is set up by special plea.<sup>68</sup> And, in the absence of objection, evidence of prior knowledge or use, given under the

the patent office, a record which is notice to all the world, the above rule is not an unreasonable. *Sessions v. Romadka*, 145 U. S. 29, 50, 36 L. Ed. 609.

An objection that the word "patented" was not affixed by the complainant, under § 13 of the act of March 2d, 1861, must be taken in the answer, if it is intended to be raised at the hearing or before the master. *Rubber Co. v. Goodyear*, 9 Wall. 788, 19 L. Ed. 566.

**65. Admissions in answer.**—*Jones v. Morehead*, 1 Wall. 155, 17 L. Ed. 662.

**66. Amendment.**—*Roemer v. Simon*, 95 U. S. 214, 24 L. Ed. 384.

**67. Necessity of previous notice.**—Rev. Stat., § 4920; *Blanchard v. Putnam*, 8 Wall. 420, 19 L. Ed. 433; *Agawam Co. v. Jordan*, 7 Wall. 583, 19 L. Ed. 177; *Roemer v. Simon*, 95 U. S. 214, 219, 24 L. Ed. 384; *Philadelphia, etc., R. Co. v. Stimpson*, 14 Pet. 448, 10 L. Ed. 535; *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33; *Teese v. Huntingdon*, 23 How. 2, 10, 16 L. Ed. 479; *Parks v. Booth*, 102 U. S. 96, 104, 26 L. Ed. 54.

Where, in a suit at law for infringement of a patent, witnesses testify to previous invention, knowledge, or use of the thing patented, the judgment will be reversed unless an antecedent compliance with the requirements of the 15th section of the Patent Act, requiring in the notice of special matter the names and places of residence of those whom the defendant intends to prove possessed prior knowledge, and where the same had been used, appear in the record. And this, although no reversal for this cause has been asked by counsel, but the case has been argued

wholly on other grounds. *Blanchard v. Putnam*, 8 Wall. 420, 19 L. Ed. 433.

To entitle a party to examine a witness in a patent cause, the purpose of whose testimony is to disprove the right of the patentee to the invention, by showing its use prior to the patent by others, the provisions of the patent act of 1836, relative to notice, must be strictly complied with. *Philadelphia, etc., R. Co. v. Stimpson*, 14 Pet. 448, 10 L. Ed. 535.

The 6th section of the Patent Act of 1793, c. 156, which requires a notice of the special matter to be given in evidence by the defendant, under the general issue, does not include all the matters of defense, which the defendant may be legally entitled to make. And where the witness was asked, whether the machine used by the defendant was like the model exhibited in court of the plaintiff's patented machine, held, that no notice was necessary to authorize the inquiry. *Evans v. Hettich*, 7 Wheat. 453, 5 L. Ed. 496.

In a suit for the infringement of a patent right, no notice is necessary to justify the admission of evidence on behalf of the defendant to show the improvements existing at the date of the plaintiff's invention in the class of articles to which it belongs. *Vance v. Campbell*, 1 Black 427, 17 L. Ed. 168.

**Defense of want of notice of patent** or failure to mark patented articles cannot be set up under the general issue, in the absence of notice. *Rubber Co. v. Goodyear*, 9 Wall. 788, 19 L. Ed. 566.

**68. Special plea dispenses with notice.**—*Evans v. Eaton*, 3 Wheat. 454, 4 L. Ed. 433.

general issue, is competent at final hearing.<sup>69</sup>

(b) *Object of Notice*.—The object of the rule is to prevent surprise of the plaintiff at the trial.<sup>70</sup>

(c) *Form and Requisites*.—The notice must be in writing,<sup>71</sup> and notices as to proof of previous invention, knowledge, or use of the thing patented, must state the names of the patentees and the dates of their patents, and when granted, and the names and residences of the persons alleged to have invented or to have had the prior knowledge of the thing patented, and where and by whom it had been used.<sup>72</sup> Under a notice given by the defendant, that the invention claimed by the plaintiff was described in a book, it is not competent to give in

**69. Evidence of prior knowledge or use.**—*Zane v. Soffe*, 110 U. S. 200, 28 L. Ed. 119.

**70. Object of rule.**—*Blanchard v. Putnam*, 8 Wall. 420, 19 L. Ed. 433; *Teese v. Huntingdon*, 23 How. 2, 16 L. Ed. 479; *Roemer v. Simon*, 95 U. S. 214, 219, 24 L. Ed. 384.

Unless the rule of law was so the plaintiff might often be surprised at the trial, as he would rely upon the presumption which the patent affords, that he or his assignor or grantor was the original and first inventor of the improvement in question, and would not think it necessary to summon witnesses to rebut the evidence introduced by the defendant attacking the novelty of his patent. *Blanchard v. Putnam*, 8 Wall. 420, 428, 19 L. Ed. 433.

**71. Necessity of writing.**—Rev. Stat., § 4920.

**72. What notice must state.**—Rev. Stat., § 4920; *Agawam Co. v. Jordan*, 7 Wall. 583, 19 L. Ed. 177; *Wise v. Allis*, 9 Wall. 737, 19 L. Ed. 784; *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33; *Evans v. Eaton*, 3 Wheat. 454, 4 L. Ed. 433; *Teese v. Huntingdon*, 23 How. 2, 10, 16 L. Ed. 479; *Roemer v. Simon*, 95 U. S. 214, 219, 24 L. Ed. 384; *Blanchard v. Putnam*, 8 Wall. 420, 427, 19 L. Ed. 433; *Silsby v. Foote*, 14 How. 218, 219, 14 L. Ed. 394; *Phillips v. Page*, 24 How. 164, 16 L. Ed. 639; *Anderson v. Miller*, 129 U. S. 70, 32 L. Ed. 635.

In giving notice, under the 15th section of the Patent Act of July 4th, 1836, of the names and places of residence of those by whom he intends to prove a previous use or knowledge of the thing, and where the same had been used, the party giving notice is not bound to be so specific as to relieve the other from all inquiry or effort to investigate the facts. If he fairly puts his adversary in the way that he may ascertain all that is necessary to his defense or answer, it is all that can be required, and he is not bound by his notice to impose an unnecessary and embarrassing restriction on his own right of producing proof of what he asserts. *Wise v. Allis*, 9 Wall. 737, 19 L. Ed. 784.

It was held, therefore, in a suit for infringing a patent for balancing millstones, that when, in addition to the particular town or city in which such large objects as millstones are used, the name and residence of the witness by whom

that use was to be proved was also given, there was sufficient precision and certainty in the notice. *Wise v. Allis*, 9 Wall. 737, 19 L. Ed. 784.

The patent law does not require the defendant to give notice of the time when any person may have possessed the knowledge or use of the invention in question, but only of the name of the person and of his place of residence, and the place where it has been used. *Phillips v. Page*, 24 How. 164, 16 L. Ed. 639.

Section 4920, Rev. Stat., declares that the proofs of previous invention, knowledge, or use of the thing patented, may be given upon notice in the answer of the defendant, stating the names of patentees, the dates of their letters-patent and when granted, and the names and residences of the persons alleged to have invented or to have had the prior knowledge of the thing patented, and where or by whom it had been used. Held, that only the names of those who had invented or used the anticipating machine or improvement, and not of those who are to testify touching its invention or use, are required to be set forth. *Planing-Machine Co. v. Keith*, 101 U. S. 479, 480, 25 L. Ed. 939.

Under the 6th section of the patent law of 1793, ch. 156, the defendant pleaded the general issue, and gave notice that he would prove at the trial that the machine, for the use of which without license the suit was brought, had been used previous to the alleged invention of the plaintiff in several places which were specified in the notice, or in some of them, "and also at sundry other places in Pennsylvania, Maryland and elsewhere in the United States;" the defendant having giving evidence as to some of the places specified, offered evidence as to others not specified. Held, that this evidence was admissible; but the powers of the court, in such a case, are sufficient to prevent, and will be exercised to prevent, the patentee from being injured by surprise. *Evans v. Eaton*, 3 Wheat. 454, 4 L. Ed. 433.

Where, after setting up the defense of prior knowledge and use of the thing patented, and giving the names and residences of witnesses intended to be called to prove the defense, the answer to a bill for the infringement of letters-patent alleges that the names and residences of certain other witnesses are unknown to

evidence a very large book. The place in the book should have been specified.<sup>73</sup>

(d) *Leave or Order of Court as Prerequisite to Notice*.—The defendant may give the requisite notice without any leave or order from the court.<sup>74</sup>

(e) *Amendment or Substitution of Notice*.—If the defendant discovers that the first notice served is defective, or not sufficiently comprehensive to admit his defense, he may give another, to remedy the defect or supply the deficiency, subject to the condition that it must be in writing, and be served more than thirty days before the trial.<sup>75</sup>

c. *Demurrer*.—While patent cases are usually disposed of upon bill, answer, and proof, there is no objection, if the patent be manifestly invalid upon its face, to the point being raised on demurrer, and the case being determined upon the issue so formed.<sup>76</sup>

5. EVIDENCE—*a. Manner of Giving Evidence*.—Ordinarily in patent cases, if the case involve a question of fact, as of anticipation or infringement, the parties are entitled to put in their evidence in the manner prescribed by the rules for taking testimony in equity causes,<sup>77</sup> unless the case be clearly against the plaintiff.<sup>78</sup>

b. *Necessity of Producing Original in Suit on Reissue*.—Persons seeking redress for the infringement of a reissued patent are not obliged to introduce the surrendered patent.<sup>79</sup>

c. *Presumptions and Burden of Proof*—(1) *Novelty or Priority of Invention*—(a) *In General*.—Persons seeking redress for the unlawful use of letters-patent, in which they have an interest, are obliged to allege and prove that they, or those under whom they claim, are the original and first inventors of the improvement embodied in the letters-patent on which the suit is founded.<sup>80</sup>

(b) *Where Patent Is Produced*.—The law is well settled that the letters-patent in question, where they are introduced in evidence in support of the claim, if they are in due form, afford a prima facie presumption that the patentee is the original and first inventor and the rule is equally well settled that that presumption, in the absence of satisfactory proof to the contrary, is sufficient to entitle the part instituting the suit to recover for the alleged violation of the exclusive rights secured to him in the letters-patent.<sup>81</sup> In such case not only is the

the defendant, and prays leave to insert and set forth in the answer such names and residences when they shall be discovered, it is competent for the court to allow, upon such discovery, the amendment to be made nunc pro tunc. *Roemer v. Simon*, 95 U. S. 214, 24 L. Ed. 384.

73. *Specification of place in book where invention described*.—*Silby v. Foote*, 14 How. 218, 219, 14 L. Ed. 394.

74. *Leave or order of court*.—*Teese v. Huntingdon*, 23 How. 2, 10, 16 L. Ed. 479.

75. *Amendment or substitution of notice*.—*Teese v. Huntingdon*, 23 How. 2, 10, 16 L. Ed. 479.

76. *Demurrer*.—*Richards v. Chase Elevator Co.*, 158 U. S. 299, 301, 39 L. Ed. 991.

77. *Taking evidence as in equity cases generally*.—*Mast, etc., Co. v. Stover Mfg. Co.*, 177 U. S. 485, 495, 44 L. Ed. 856.

78. *Case clearly against plaintiff*.—If there be nothing in the affidavits tending to throw a doubt upon the existence or date of the anticipating devices, and giving them their proper effect, they establish the invalidity of the patent; or if no question be made regarding the identity of the alleged infringing device, and it appear clear that such device is not an in-

fringement, and no suggestion be made of further proofs upon the subject, the court should not only overrule the order for the injunction but dismiss the bill. *Mast, etc., Co. v. Stover Mfg. Co.*, 177 U. S. 485, 495, 44 L. Ed. 856.

79. *Necessity of producing original in suit on reissue*.—*Seymour v. Osborne*, 11 Wall. 516, 546, 20 L. Ed. 33; *Bates v. Coe*, 98 U. S. 31, 40, 25 L. Ed. 68.

80. *Burden of proof as to novelty*.—*Cammeyer v. Newton*, 94 U. S. 225, 230, 24 L. Ed. 72; *Seymour v. Osborne*, 11 Wall. 516, 538, 20 L. Ed. 33; *Mitchell v. Tilghman*, 19 Wall. 287, 390, 22 L. Ed. 125; *Ashcroft v. Railroad Co.*, 97 U. S. 189, 24 L. Ed. 982.

81. *Presumption of novelty where patent in evidence*.—*Seymour v. Osborne*, 11 Wall. 516, 538, 20 L. Ed. 33; *Coffin v. Ogden*, 18 Wall. 120, 21 L. Ed. 821; *Cantrell v. Wallick*, 117 U. S. 689, 29 L. Ed. 1017; *Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 486, 23 L. Ed. 952; *Lehnbeuter v. Holthaus*, 105 U. S. 94, 26 L. Ed. 939; *Morgan v. Daniels*, 153 U. S. 120, 122, 38 L. Ed. 657; *Parks v. Booth*, 102 U. S. 96, 99, 26 L. Ed. 54; *Imhaeuser v. Buerk*, 101 U. S. 647, 662, 25 L. Ed. 945; *Mitchell v. Tilghman*, 19 Wall. 287, 390, 22 L. Ed.



burden of proving anticipation on the defendant,<sup>82</sup> but it has been held that every reasonable doubt should be resolved against him.<sup>83</sup> And the first of several patentees is presumed to be the first inventor.<sup>84</sup> Presumption of priority of invention from the introduction of letters-patent may be rebutted by evidence, provided notice of such defense is given in the answer, as required by the rules of equity practice.<sup>85</sup>

125; *Bates v. Coe*, 98 U. S. 31, 40, 25 L. Ed. 68; *Blanchard v. Putnam*, 8 Wall. 420, 19 L. Ed. 433; *The Barbed Wire Patent*, 143 U. S. 275, 36 L. Ed. 154; *Marsh v. Seymour*, 97 U. S. 348, 349, 24 L. Ed. 963; *Cammeyer v. Newton*, 94 U. S. 225, 230, 24 L. Ed. 72; *Roemer v. Simon*, 95 U. S. 214, 24 L. Ed. 384; *Palmer v. Corning*, 156 U. S. 342, 39 L. Ed. 445; *Dunbar v. Myers*, 94 U. S. 187, 196, 24 L. Ed. 34; *Kennedy v. Hazelton*, 128 U. S. 667, 32 L. Ed. 576; *Stimpson v. Woodman*, 10 Wall. 117, 19 L. Ed. 866; *Gandy v. Main Belting Co.*, 143 U. S. 587, 36 L. Ed. 272; *Agawam Co. v. Jordan*, 7 Wall. 583, 19 L. Ed. 177; *Busch v. Jones*, 184 U. S. 598, 604, 46 L. Ed. 707; *Brainard v. Buck*, 184 U. S. 99, 46 L. Ed. 442; *Elizabeth v. Pavement Co.*, 97 U. S. 126, 24 L. Ed. 1000; *St. Paul Plow Works v. Starling*, 140 U. S. 184, 35 L. Ed. 404; *Clark Thread Co. v. Willimantic Linen Co.*, 140 U. S. 481, 35 L. Ed. 521; *Corning v. Burden*, 15 How. 252, 270, 14 L. Ed. 683; *Cohn v. United States Corset Co.*, 93 U. S. 366, 378, 23 L. Ed. 907; *Philadelphia, etc., R. Co. v. Stimpson*, 14 Pet. 448, 10 L. Ed. 535; *Duff v. Sterling Pump Co.*, 107 U. S. 636, 27 L. Ed. 517; *Miller v. Eagle Mfg. Co.*, 151 U. S. 186, 208, 38 L. Ed. 121.

Where separate patents are considered as alike having improved on the prior art, the presumption from the grant of the letters-patent is that there was a substantial difference between the inventions. *Kokomo Fence Machine Co. v. Kitselman*, 189 U. S. 8, 23, 47 L. Ed. 689; *Miller v. Eagle Mfg. Co.*, 151 U. S. 186, 38 L. Ed. 121; *Boyd v. Janesville Hay Tool Co.*, 153 U. S. 260, 39 L. Ed. 973.

The presumption arising from the oath of the application that he believes himself to be the first inventor or discoverer of the thing for which he seeks letters-patent remains until the contrary is proved. *Elizabeth v. Pavement Co.*, 97 U. S. 126, 24 L. Ed. 1000.

Neither damages nor profits can be recovered unless the complaining party alleges and proves that he or the person under whom he claims was the original and first inventor of the patented improvement, and that the same has been infringed by the party against whom the suit is brought. *Parks v. Booth*, 102 U. S. 96, 99, 26 L. Ed. 54.

The representations of the specification may be such as to afford satisfactory proof that the alleged invention is neither new nor useful. *Collar Co. v. Van Dusen*, 23 Wall. 530, 560, 23 L. Ed. 128.

**82. Burden of proving anticipation.—**

*Coffin v. Ogden*, 18 Wall. 120, 21 L. Ed. 821; *Clark Thread Co. v. Willimantic Linen Co.*, 140 U. S. 481, 35 L. Ed. 521; *St. Paul Plow Work v. Starling*, 140 U. S. 184, 35 L. Ed. 404; *The Barbed Wire Patent*, 143 U. S. 275, 36 L. Ed. 154.

The burden of proof of the completeness of the device relied on as an anticipation is on the defendant, and every reasonable doubt should be resolved against him. *Coffin v. Ogden*, 18 Wall. 120, 124, 21 L. Ed. 821.

**83. Proof must show want of priority beyond reasonable doubt.—***Morgan v. Daniels*, 153 U. S. 120, 122, 38 L. Ed. 657; *The Barbed Wire Patent*, 143 U. S. 275, 36 L. Ed. 154; *Coffin v. Ogden*, 18 Wall. 120, 21 L. Ed. 821.

In view of the unsatisfactory character of such testimony, arising from the forgetfulness of witnesses, their liability to mistakes, their proneness to recollect things as the party calling them would have them recollect them, aside from the temptation to actual perjury, courts have not only imposed upon defendants the burden of proving such devices, but have required that the proof shall be clear, satisfactory and beyond a reasonable doubt. *The Barbed Wire Patent*, 143 U. S. 275, 284, 36 L. Ed. 154.

If the thing were embryonic or inchoate; if it rested in speculation or experiment; if the process pursued for its development had failed to reach the point of consummation, it cannot avail to defeat a patent founded upon a discovery or invention which was completed, while in the other case there was only progress, however near that progress may have approximate to the end in view. *Coffin v. Ogden*, 18 Wall. 120, 21 L. Ed. 821; *Cantrell v. Wallick*, 117 U. S. 689, 696, 29 L. Ed. 1017; *The Barbed Wire Patent*, 143 U. S. 275, 285, 36 L. Ed. 154.

**84. Presumption that prior patentee is first inventor.—***Garratt v. Seibert*, 98 U. S. 75, 25 L. Ed. 84; *Atlantic Works v. Brady*, 107 U. S. 192, 27 L. Ed. 438; *Bates v. Coe*, 98 U. S. 31, 33, 25 L. Ed. 68.

A patent offered in evidence or the printed publication will be held to be prior, if it is of prior date to the patent in suit, unless the patent in suit is accompanied by the application for the same, or unless the complainant introduces parol proof to show that his invention was actually made prior to the date of the patent, or prior to the time the application was filed. *Bates v. Coe*, 98 U. S. 31, 33, 25 L. Ed. 68.

**85. Rebutting presumption of priority of invention.—***Cammeyer v. Newton*, 94

(2) *Notice of Patent*.—The burden of proof is on the plaintiff to prove that the defendant had notice of the existence of the patent either from the fact that the articles manufactured in pursuance thereof were properly marked "patented" as required by the statute or from the fact of notice actually given him by the plaintiff of its existence.<sup>86</sup>

(3) *License to Defendant*.—Where, in a suit for infringement, the defendants set up a license as a defense, the burden of proving it is on them.<sup>87</sup> But where this is shown, the burden of proving that the license was delivered as an escrow is on the plaintiff.<sup>88</sup>

(4) *Infringement*.—Infringement is alleged by the complainants, and the burden is upon them to prove the allegation, as it imputes a wrongful act to the respondents.<sup>89</sup> As between two patents, the presumption is that there is no infringement of the first by the second.<sup>90</sup>

(5) *Damages*.—See post, "Recovery of Damages, Profits or Penalties," XIII, B, 11.

(6) *Notice of Special Matter*.—In an action for infringement, the burden of showing that notice of special matter was given as required by the statute, is on

U. S. 225, 230, 24 L. Ed. 72; Seymour v. Osborne, 11 Wall. 516, 20 L. Ed. 33; Bates v. Coe, 98 U. S. 31, 40, 25 L. Ed. 68; Parks v. Booth, 102 U. S. 96, 99, 26 L. Ed. 54; Dunbar v. Myers, 94 U. S. 187, 196, 24 L. Ed. 34; Kennedy v. Hazelton, 128 U. S. 667, 32 L. Ed. 576.

The burden of proof is on the plaintiff, where the defendant has made out a prima facie case of anticipation. Clark Thread Co. v. Willimantic Linen Co., 140 U. S. 481, 35 L. Ed. 521.

**86. Burden of proof as notice of patent.**—Dunlap v. Schofield, 152 U. S. 244, 248, 38 L. Ed. 426; Coupe v. Royer, 155 U. S. 565, 583, 39 L. Ed. 263.

The plaintiffs had manufactured and sold goods with the patented design upon them, but they made no allegation or proof that the goods were marked as the statute required. They did allege in their bill that they notified the defendants of the patent and of their infringement; but this allegation was distinctly denied in the defendants' answer, and the plaintiffs offered no proof in support of it. It was held that they could not, therefore, recover. Dunlap v. Schofield, 152 U. S. 244, 248, 38 L. Ed. 426.

**87. Burden of proof as to license as defense.**—Chaffee v. Boston Belting Co., 22 How. 217, 16 L. Ed. 240.

Where a patentee, whose patent had been extended according to law, conveyed all his interest to another person, and the assignee brought suit against certain parties for an infringement of the patent, and these parties claimed, under a license granted by the original patentee before the assignment, it was necessary to show a connected chain of title to themselves, in order to justify their use of the improvements secured by the patent. Having omitted to do this, the judgment of the court below, which was in favor of the defendants, must be reversed, and the case remanded for another trial. Chaffee

v. Boston Belting Co., 22 How. 217, 16 L. Ed. 240.

**88. Burden of proof that license was an escrow.**—Where in a suit for infringement, the defendant pleads a license which license was in his possession and was produced by him on the trial, and which on its face was absolute and without any limitation or condition, the burden of proof was upon the plaintiffs to show that it was delivered as an escrow. Mellon v. Delaware, etc., R. Co., 154 U. S. 673, 674, 26 L. Ed. 929.

**89. Burden of proof as to infringement.**—Seymour v. Osborne, 11 Wall. 516, 538, 20 L. Ed. 33; Cammeyer v. Newton, 94 U. S. 225, 231, 24 L. Ed. 72; Bene v. Jeantet, 129 U. S. 683, 32 L. Ed. 803; Bates v. Coe, 98 U. S. 31, 32, 25 L. Ed. 68; Parks v. Booth, 102 U. S. 96, 99, 26 L. Ed. 54; Price v. Kelly, 154 U. S. 669, 670, 26 L. Ed. 634; Imhaeuser v. Buerk, 101 U. S. 647, 662, 25 L. Ed. 945; Mitchell v. Tilghman, 19 Wall. 287, 390, 22 L. Ed. 125; Marsh v. Seymour, 97 U. S. 348, 349, 24 L. Ed. 963; Railroad Co. v. Mellon, 104 U. S. 112, 119, 26 L. Ed. 639; Ashcroft v. Railroad Co., 97 U. S. 189, 24 L. Ed. 982.

Infringement being denied in the answer, the burden of proof is upon the complainant; and the court decided that the charge in this case was fully proved. Bates v. Coe, 98 U. S. 31, 32, 25 L. Ed. 68.

**90. Presumption that one patent does not infringe another.**—Boyd v. Janesville Hay Tool Co., 158 U. S. 260, 261, 39 L. Ed. 973; Elizabeth v. Pavement Co., 97 U. S. 126, 24 L. Ed. 1000.

"The grant of the letters-patent was virtually a decision of the patent office that there is a substantial difference between the inventions. It raises the presumption that, according to the claims of the latter patentees, this invention is not an infringement of the earlier patent." Elizabeth v. Pavement Co., 97 U. S. 126, 24 L. Ed. 1000; Boyd v. Janesville Hay Tool Co., 158 U. S. 260, 261, 39 L. Ed. 973.

the defendant.<sup>91</sup>

d. *Competency of Witnesses*.—It is no objection to the competency of a witness, in a patent cause, that he is sued in another action for an infringement of the same patent.<sup>92</sup>

e. *Admissibility*—(1) *Declarations of Patentee*.—The declarations of the plaintiff are admissible to show the date of the invention.<sup>93</sup> And the declarations of the patentee, made after assignment, as to fraud in obtaining the patent, are admissible.<sup>94</sup>

(2) *Expert Evidence*.—In controversies between a patentee and an infringer, experts may explain to the court and jury the machines, models, or drawings exhibited in the case. They may point out the difference or identity of the mechanical devices involved in their construction, and the maxim "*cuipue in sua arte credendum*" permits them to be examined in questions of art or science peculiar to their trade or profession.<sup>95</sup> But their opinion as to the construction of the patent is inadmissible.<sup>96</sup>

(3) *Prior Patents*.—Prior patents are receivable in evidence to show the state of the art, and to aid in the construction of the plaintiff's claim, though not to invalidate that claim on the ground of want of novelty, when properly construed.<sup>97</sup> After the defendant has introduced in evidence the earlier patents, it was proper for the plaintiff to show that, prior to the date of any of them, he had reduced the invention covered by his first claim to practice, in a working form.<sup>98</sup>

**91. Notice of special matter.**—*Blanchard v. Putnam*, 8 Wall. 420, 19 L. Ed. 433; *Philadelphia, etc., R. Co. v. Stimpson*, 14 Pet. 448, 10 L. Ed. 535; *Phillips v. Page*, 24 How. 164, 16 L. Ed. 639.

**92. Competency of witnesses.**—*Evans v. Hettich*, 7 Wheat. 453, 5 L. Ed. 496.

**93. Declarations of plaintiffs.**—*Philadelphia, etc., R. Co. v. Stimpson*, 14 Pet. 448, 10 L. Ed. 535.

In many cases of inventions, it is hardly possible, in any other manner, to ascertain the precise time and exact origin of the invention. *Philadelphia, etc., R. Co. v. Stimpson*, 14 Pet. 448, 10 L. Ed. 535.

The conversations and declarations of a patentee, merely affirming that, at some former period, he had invented a particular machine, may well be objected to; but his conversations and declarations, stating that he had made an invention, and describing its details, and explaining its operations, are properly deemed an assertion of his right, at that time, as an inventor, to the extent of the facts and details which he then makes known, although not of their existence at an anterior time. Such declarations, coupled with a description of the nature and objects of the invention, are to be deemed a part of the *res gestæ*, and legitimate evidence that the invention was then known and claimed by him; and thus its origin may be fixed, at least, as early as that period. *Philadelphia, etc., R. Co. v. Stimpson*, 14 Pet. 448, 449, 10 L. Ed. 535.

**94. Declarations by patentee after assignment.**—*Wilson v. Simpson*, 9 How. 109, 13 L. Ed. 66.

**95. Experts.**—*Spring Co. v. Edgar*, 99 U. S. 645, 658, 25 L. Ed. 487; *Klein v. Russell*, 19 Wall. 433, 22 L. Ed. 116; *Winans*

*v. New York, etc., R. Co.*, 21 How. 88, 100, 16 L. Ed. 68; *Seymour v. Osborne*, 11 Wall. 516, 546, 20 L. Ed. 33.

When a patent is on trial and the question in issue involves the matter of novelty, utility, and *modus operandi*, it is proper enough to ask an expert what the effect of the patented invention has been. *Klein v. Russell*, 19 Wall. 433, 22 L. Ed. 116.

**96. Opinion of experts as to construction of patent.**—*Winans v. New York, etc., R. Co.*, 21 How. 88, 16 L. Ed. 68; *Corning v. Burden*, 15 How. 232, 14 L. Ed. 683.

In the trial of a suit for the violation of a patent right, the court cannot be compelled to receive the evidence of experts as to how a patent ought to be construed. The judge may obtain information from them, if he desire it. *Winans v. New York, etc., R. Co.*, 21 How. 88, 16 L. Ed. 68.

**97. Prior patents.**—*Grier v. Wilt*, 120 U. S. 412, 429, 30 L. Ed. 712; *Vance v. Campbell*, 1 Black 427, 430, 17 L. Ed. 168; *Railroad Co. v. Dubois*, 12 Wall. 47, 65, 20 L. Ed. 265; *Brown v. Piper*, 91 U. S. 37, 41, 23 L. Ed. 200; *Eachus v. Broomall*, 115 U. S. 429, 434, 29 L. Ed. 419.

**98. St. Paul Plow Works v. Starling**, 140 U. S. 184, 198, 35 L. Ed. 404; *Elizabeth v. Pavement Co.*, 97 U. S. 126, 130, 24 L. Ed. 1000; *Loom Co. v. Higgins*, 105 U. S. 580, 599, 26 L. Ed. 1177.

Proof of the date of the plaintiff's invention was strictly a matter of rebuttal, after the defendant had put in the patents which were prior in date to the plaintiff's patent. *St. Paul Plow Works v. Starling*, 140 U. S. 184, 198, 35 L. Ed. 404.



(4) *Patent under Which Defendant Claims.*—In a suit brought for an infringement of a patent right, the defendant ought to be allowed to give in evidence the patent under which he claims, although junior to the plaintiff's patent.<sup>99</sup>

(5) *Prior State of Art.*—Evidence to show the state of the art at the date of the plaintiff's patent may be admitted, for the purpose of defeating the invention.<sup>1</sup>

f. *Weight and Sufficiency.*—Testimony on the part of the plaintiff, that the persons of whose prior use of the machine the defendant had given evidence, had paid the plaintiff for licenses to use the machine, since his patent, ought not to be absolutely rejected, though entitled to very little weight.<sup>2</sup> Where there is not a preponderance of evidence in favor of the complainants, a case of infringement is not made out.<sup>3</sup> But infringement is established where the evidence shows substantial identity.<sup>4</sup>

6. *VARIANCE.*—Where a patentee, suing for an infringement of his patent, declares upon a combination of elements which he asserts constitute the novelty of his invention, he cannot, in his proofs, abandon a part of such combination and maintain his claim to the rest, nor prove any part of the combination immaterial or useless.<sup>5</sup>

7. *DISMISSAL.*—Want of patentability is a ground for dismissal, though not set up in an answer or plea.<sup>6</sup> And where is the plaintiff's claim is construed to include the defendant's device, it is void because too broad, the bill will be dismissed.<sup>7</sup> But the fact that the plaintiff has assigned his interest pending suit is no ground for dismissal, where the profits for which recovery is sought were made prior to the assignment.<sup>8</sup>

8. *INSTRUCTIONS.*—The court in explaining the nature of the plaintiff's patent must not limit it to a device narrower than that which it really covers.<sup>9</sup> Where an instruction for the defendant is asked on the ground of want of nov-

**99. Patent under which defendant claims.**—*Corning v. Burden*, 15 How. 252, 14 L. Ed. 683.

Hence, it was erroneous for the circuit court to exclude evidence offered to show that the practical manner of giving effect to the principle embodied in the machine of the defendants was different from that of the plaintiff; that the machine of the defendants produced a different mechanical result from the other; and that the mechanical structure and mechanical action of the two machines were different. *Corning v. Burden*, 15 How. 252, 14 L. Ed. 683.

**1. Prior state of art.**—*Grier v. Wilt*, 120 U. S. 412, 30 L. Ed. 712; *Vance v. Campbell*, 1 Black 427, 17 L. Ed. 168; *Klein v. Russell*, 19 Wall. 433, 22 L. Ed. 116; *Brown v. Piper*, 91 U. S. 37, 23 L. Ed. 200; *Zane v. Soffe*, 110 U. S. 200, 28 L. Ed. 119. See ante, "Construed with Reference to Prior State of Art," VII, B, 7.

**2. Evidence of plaintiff to disprove priority of another device.**—*Evans v. Eaton*, 3 Wheat. 454, 4 L. Ed. 433.

**3. Bene v. Jeantet**, 129 U. S. 683, 32 L. Ed. 803.

**4. Substantial identity.**—*Bennet v. Fowler*, 8 Wall. 445, 19 L. Ed. 431.

**5. Variance.**—*McClain v. Ortmyer*, 141 U. S. 419, 425, 35 L. Ed. 800; *Vance v. Campbell*, 1 Black 427, 17 L. Ed. 168; *Gill v. Wells*, 22 Wall. 1, 26, 22 L. Ed. 699;

*Case v. Brown*, 2 Wall. 320, 17 L. Ed. 817; *Burr v. Duryee*, 1 Wall. 531, 566, 17 L. Ed. 650.

**6. Dismissal for want of patentability.**—*May v. Juneau County*, 137 U. S. 408, 411, 34 L. Ed. 729; *Brown v. Piper*, 91 U. S. 37, 44, 23 L. Ed. 200; *Dunbar v. Myers*, 94 U. S. 187, 24 L. Ed. 34; *Slawson v. Grand St. R. Co.*, 107 U. S. 649, 652, 27 L. Ed. 576; *Hendy v. Golden State, etc., Iron Works*, 127 U. S. 370, 375, 32 L. Ed. 207.

**7. Where claim too narrow to include alleged infringing device.**—*Burr v. Duryee*, 1 Wall. 531, 581, 17 L. Ed. 650.

**8. Assignment of interest by plaintiff pending suit.**—*Dean v. Mason*, 20 How. 198, 15 L. Ed. 876. See, also, *Moore v. Marsh*, 7 Wall. 515, 522, 19 L. Ed. 37.

**9. Patent not to be narrowed by instruction.**—*Phillips v. Page*, 24 How. 164, 16 L. Ed. 639.

In a patent taken out by Page for certain improvements in the construction of the portable circular sawmill, he claimed the manner of affixing and guiding the circular saw, by allowing end play to its shaft, in combination with the means of guiding it (the saw), by friction rollers, embracing it near its periphery, so as to leave its centre entirely unchecked laterally. An instruction by the court below, that the claim was as stated above, but adding "in a sawmill capable of being applied to the sawing of ordinary logs," was

elty of the plaintiff's patent, error cannot be assigned on its refusal, because the patent sued on is a reissue for a different invention from the original.<sup>10</sup>

9. **ISSUES OUT OF CHANCERY.**—In patent cases, a court of chancery may order an issue to the jury to determine the title to the patent in question, before awarding an injunction.<sup>11</sup> An issue out of chancery in patent cases is to be tried in the same way as in ordinary cases, and the verdict, when returned, is entitled to the same weight and subject to the same rules.<sup>12</sup>

10. **PROVINCE OF COURT AND JURY.**—In an action for infringement, the question of infringement is for the jury to determine under proper instructions from the court.<sup>13</sup>

11. **RECOVERY OF DAMAGES, PROFITS OR PENALTIES**—a. *Damages in Actions at Law*—(1) *Time for Which Damages Are to Be Estimated.*—The jury, in ascertaining the damages, upon evidence of the liability and advantages of the patented device over other means of performing the same work is not to estimate

erroneous. *Phillips v. Page*, 24 How. 164, 16 L. Ed. 639.

Although the improvements of the patentee may have enabled the machine to be applied to the purpose of sawing logs, when before it was applied only to the purpose of sawing light materials, such as shingles, and blinds for windows, yet there is nothing in the patent to distinguish the new parts of the machine from the old, or to state those parts which he had invented, so as to enable the machine to saw logs. *Phillips v. Page*, 24 How. 164, 16 L. Ed. 639.

10. **Instruction asked on one ground and error assigned for its refusal on another.**—Where on a trial for infringement of a reissue of letters-patent—the defense being a want of novelty—a defendant requests the court below to direct the jury to bring in a verdict for the defendant (no objection being then or having during the trial been taken by such defendant, that the reissue was for a different invention from that secured by the original patent), and the request for the direction just stated not having been on that ground, but on the ground of the evidence “relative to the alleged prior use of the process, and the novelty, and usefulness, character, and effect of the alleged invention being so decisive as to entitle the defendant to a verdict”—and the request has been refused—the defendant cannot assign as error the refusal to give the direction, because the reissue was not for the same invention as was the original patent. *Klein v. Russell*, 19 Wall. 433, 22 L. Ed. 116.

11. **Issues out of chancery.**—*Watt v. Starke*, 101 U. S. 247, 25 L. Ed. 826; *Cochrane v. Deener*, 94 U. S. 780, 24 L. Ed. 139. See the title **ISSUES TO JURY**, vol. 7, p. 526.

12. **Mode of trying issue and effect of verdict.**—*Watt v. Starke*, 101 U. S. 247, 25 L. Ed. 826.

The verdict upon an issue which a court of chancery directs to be tried at law is merely advisory. A motion for a new trial can be made only to that court, and the party submitting it must procure, for the use of the chancellor, notes of the pro-

ceedings at the trial, and of the evidence there given. The evidence and proceedings became then a part of the record, and are subject to review by the appellate court should an appeal from the decree be taken. These rules are not affected by the second section of the act of Feb. 16, 1875 (18 Stat., part 3, p. 315), which provides that in a patent case the circuit court, when sitting in equity, may impanel a jury and submit to them such questions of fact as it may deem expedient. *Watt v. Starke*, 101 U. S. 247, 25 L. Ed. 826.

13. **Infringement a jury question.**—*Carver v. Hyde*, 16 Pet. 513, 519, 10 L. Ed. 1051; *Coupe v. Royer*, 155 U. S. 565, 577, 39 L. Ed. 263; *Tucker v. Spalding*, 13 Wall. 453, 20 L. Ed. 515; *Tyler v. Boston*, 7 Wall. 327, 19 L. Ed. 93; *California, etc., Paving Co. v. Molitor*, 113 U. S. 609, 28 L. Ed. 1106; *Keyes v. Grant*, 118 U. S. 25, 30 L. Ed. 54; *Royer v. Schultz Belting Co.*, 135 U. S. 319, 34 L. Ed. 214; *Mitchell v. Tilghman*, 19 Wall. 287, 418, 22 L. Ed. 125; *Battin v. Taggart*, 17 How. 74, 15 L. Ed. 37.

The doctrine of the cases is aptly expressed by Robinson in his work on Patents, vol. 3, page 378, as follows: “Where the defense denies that the invention used by the defendant is identical with that included in the plaintiff's patent, the court defines the patented invention as indicated by the language of the claims; the jury judge whether the invention so defined covers the art or article employed by the defendant.” *Coupe v. Royer*, 155 U. S. 565, 579, 39 L. Ed. 263.

Whether one compound of given proportions is substantially the same as another compound varying the proportions, is a question for the jury. *Tyler v. Boston*, 7 Wall. 327, 19 L. Ed. 93.

**Infringement, no matter how plain**, is a jury question. *Coupe v. Royer*, 155 U. S. 565, 577, 39 L. Ed. 263; *Bischoff v. Wethered*, 9 Wall. 812, 19 L. Ed. 829.

**Determination of infringement by appellate court.**—Where in each of the patents it is apparent from the face of the instrument that extrinsic evidence is not needed to explain terms of art therein, or



them for the whole term of the patent, but only for the period of the infringement.<sup>14</sup>

(2) *Measure and Elements*—(a) *Measure of Damages*—aa. *General Rule*—At law the plaintiff is entitled to recover, as damages, compensation for the pecuniary loss he has suffered from the infringement, without regard to the question whether the defendant has gained or lost by his unlawful acts—the measure of recovery in such cases being not what the defendant has gained, but what plaintiff has lost.<sup>15</sup> Where the infringement is only as to part of a machine, it is erroneous to charge that the defendant was responsible in damages to the same extent as if he had pirated the whole machine.<sup>16</sup>

bb. *Actual Not Speculative*.—The question is not what speculatively the plaintiff may have lost by the infringement, but what actually he did lose.<sup>17</sup>

cc. *Royalties or License Fees*.—Where the unlawful acts consist in making and selling a patented improvement, or in its extensive and protracted use, without palliation or excuse, evidence of an established royalty or license will, in an action at law, undoubtedly furnish the true measure of damages;<sup>18</sup> but where the use is a limited one, and for a brief period, the arbitrary and unqualified application of that rule is erroneous.<sup>19</sup> In order that a royalty may be accepted as a measure of damages against an infringer, who is a stranger to the license establishing it, it must be paid or secured before the infringement complained of; it must be paid by such a number of persons as to indicate a general acquies-

to apply the descriptions to the subject matter, and the court is able from mere comparison to comprehend what are the inventions described in each patent and from such comparison to determine the question of infringement or no infringement, that question becomes one of law which may be determined on writ of error. *Singer Mfg. Co. v. Cramer*, 192 U. S. 265, 275, 48 L. Ed. 437, citing *Heald v. Rice*, 104 U. S. 737, 26 L. Ed. 910; *Market St. Cable R. Co. v. Rowley*, 155 U. S. 621, 625, 39 L. Ed. 284.

14. *Term for which damages are to be estimated*.—The *Suffolk Co. v. Hayden*, 3 Wall. 315, 18 L. Ed. 76; *Livingston v. Woodworth*, 15 How. 546, 14 L. Ed. 809.

15. *Measure of damages*.—*Coupe v. Royer*, 155 U. S. 565, 582, 39 L. Ed. 263; *Birdsall v. Coolidge*, 93 U. S. 64, 68, 23 L. Ed. 802; *Cincinnati, etc., Gas Illuminating Co. v. Western, etc., Co.*, 152 U. S. 200, 205, 38 L. Ed. 411.

16. *Infringement as to part of device*.—*Seymour v. McCormick*, 16 How. 480, 14 L. Ed. 1024.

17. *Actual not speculative damages*.—*Seymour v. McCormick*, 16 How. 480, 14 L. Ed. 1024; *Cincinnati, etc., Gas Illuminating Co. v. Western, etc., Co.*, 152 U. S. 200, 205, 38 L. Ed. 411.

18. *Royalties received by infringer as measure of damages*.—*Philp v. Nock*, 17 Wall. 460, 21 L. Ed. 679; *Seymour v. McCormick*, 16 How. 480, 490, 14 L. Ed. 1024; *Livingston v. Woodworth*, 15 How. 546, 560, 14 L. Ed. 809; *Dean v. Mason*, 20 How. 198, 213, 15 L. Ed. 878; *Black v. Thorne*, 111 U. S. 122, 28 L. Ed. 372; *Birdsall v. Coolidge*, 93 U. S. 64, 23 L. Ed. 802; *Tilghman v. Proctor*, 125 U. S. 136, 31 L. Ed. 664; *Packet Co. v. Sickles*, 19 Wall. 611, 619, 22 L. Ed. 203; *Burdell*

*v. Denig*, 92 U. S. 716, 23 L. Ed. 764; *New York City v. Ransom*, 23 How. 487, 16 L. Ed. 515; *Clark v. Wooster*, 119 U. S. 322, 30 L. Ed. 392; *Root v. Railway Co.*, 105 U. S. 189, 26 L. Ed. 975; *Rude v. Westcott*, 130 U. S. 152, 32 L. Ed. 888.

It is a general rule in patent causes, that established license fees are the best measure of damages that can be used. There may be damages beyond this, such as the expense and trouble the plaintiff has been put to by the defendant; and any special inconvenience he has suffered from the wrongful acts of the defendant; but these are more properly the subjects of allowance by the court, under the authority given to it to increase the damages. *Clark v. Wooster*, 119 U. S. 322, 326, 30 L. Ed. 392.

The reason for this rule is still stronger when the use of the patented invention has been with the consent of the patentee, express or implied, without any rate of compensation fixed by the parties. *Packet Co. v. Sickles*, 19 Wall. 611, 612, 22 L. Ed. 203.

19. *Limited use of patent or short period of infringement*.—*Birdsall v. Coolidge*, 93 U. S. 64, 70, 23 L. Ed. 802; *Packet Co. v. Sickles*, 19 Wall. 611, 617, 22 L. Ed. 203; *Burdell v. Denig*, 92 U. S. 716, 23 L. Ed. 764; *The Suffolk Co. v. Hayden*, 3 Wall. 315, 320, 18 L. Ed. 76.

Where an inventor finds it profitable to exercise his monopoly by selling licenses to make or use his improvement, he has himself fixed the average of his actual damage, when his invention has been used without his license. If he claims anything above that amount, he is bound to substantiate his claim by clear and distinct evidence. *Seymour v. McCormick*, 16 How. 480, 489, 14 L. Ed. 1024.



cence in its reasonableness by those who have occasion to use the invention; and it must be uniform at the places where the licenses are issued.<sup>20</sup>

dd. *Profits of Defendant*.—In an action at law the profits which the other party might have made is not the primary or controlling measure of damages.<sup>21</sup> It is only where, from the peculiar circumstances of the case, no other rule can be found, that the defendant's profits become the criterion of the plaintiff's loss.<sup>22</sup>

ee. *Damages Paid by Other Infringers*.—A payment of any sum in settlement of a claim for an alleged infringement cannot be taken as a standard to measure the value of the improvements patented, in determining the damages sustained by the owners of the patent in other cases of infringement.<sup>23</sup>

ff. *Province of Court and Jury*.—What a patentee would have made, if the infringer had not interfered with his rights, is a question of fact and not "a judgment of law."<sup>24</sup>

(b) *Elements*—aa. *Damages Accruing before Date of Reissue*.—A patentee claiming under a reissued patent cannot recover damages for infringements committed antecedently to the date of his reissue.<sup>25</sup>

bb. *Deductions Made in Selling Price to Meet That of Infringers*.—The plaintiff may recover loss sustained by him by being compelled to lower his prices to compete with the defendant.<sup>26</sup> But he must show that the reduction was due to the acts of the defendant, or to what extent it was due to such acts.<sup>27</sup>

cc. *Counsel Fees*.—Counsel fees of the plaintiff are not recoverable.<sup>28</sup>

20. *Rude v. Westcott*, 130 U. S. 152, 165, 32 L. Ed. 888.

**Sales of licenses, made at periods years apart**, will not establish any rule on the subject and determine the value of the patent. Like sales of ordinary goods, they must be common, that is, of frequent occurrence, to establish such a market price for the article that it may be assumed to express with reference to all similar articles, their salable value at the place designated. *Rude v. Westcott*, 130 U. S. 152, 165, 32 L. Ed. 888.

21. **Profits as measure of damages in action at law**.—*Packet Co. v. Sickles*, 19 Wall. 611, 617, 22 L. Ed. 203; *Burdell v. Denig*, 92 U. S. 716, 720, 23 L. Ed. 764; *Seymour v. McCormick*, 16 How. 480, 490, 14 L. Ed. 1024.

When he has himself established the market value of his improvement, as separate and distinct from the other machinery with which it is connected, he can have no claim in justice or equity to make the profits of the whole machine the measure of his demand. *Seymour v. McCormick*, 16 How. 480, 490, 14 L. Ed. 1024.

22. *Seymour v. McCormick*, 16 How. 480, 490, 14 L. Ed. 1024; *Burdell v. Denig*, 92 U. S. 716, 720, 23 L. Ed. 764; *Packet Co. v. Sickles*, 19 Wall. 611, 617, 22 L. Ed. 203.

23. **Damages paid by other infringers to settle claim**.—*Rude v. Westcott*, 130 U. S. 152, 164, 32 L. Ed. 888; *Cornely v. Marckwald*, 131 U. S. 159, 161, 33 L. Ed. 117.

Many considerations other than the value of the improvements patented may induce the payment in such cases. The avoidance of the risk and expense of litigation will always be a potential motive

for a settlement. *Rude v. Westcott*, 130 U. S. 152, 32 L. Ed. 888.

24. **Amount of damage a question of fact**.—*Seymour v. McCormick*, 16 How. 480, 14 L. Ed. 1024; *Cincinnati, etc., Gas Illuminating Co. v. Western, etc., Co.*, 152 U. S. 200, 205, 33 L. Ed. 411.

25. **Damages accruing before reissue**.—*Agawam Co. v. Jordan*, 7 Wall. 583, 19 L. Ed. 177.

26. **Loss due to reductions made to meet defendant's price**.—*Boesch v. Graff*, 133 U. S. 697, 706, 33 L. Ed. 787; *Cornely v. Marckwald*, 131 U. S. 159, 33 L. Ed. 117; *Yale Lock Mfg. Co. v. Sargent*, 117 U. S. 373, 29 L. Ed. 950.

This is the subject of an award of damages, although the defendant may have made no profits and the plaintiff may have had no established license fee. *Yale Lock Mfg. Co. v. Sargent*, 117 U. S. 536, 29 L. Ed. 954.

Where the patentee granted no licenses, and had no established license fee, but supplied the demand himself, and was able to do so, an enforced reduction of price is a proper item of damages, if proven by satisfactory evidence. *Boesch v. Graff*, 133 U. S. 697, 705, 33 L. Ed. 787; *Yale Lock Mfg. Co. v. Sargent*, 117 U. S. 536, 29 L. Ed. 954.

27. *Boesch v. Graff*, 133 U. S. 697, 706, 33 L. Ed. 787, citing *Cornely v. Marckwald*, 131 U. S. 159, 33 L. Ed. 117.

28. **Counsel fees**.—*Philp v. Nock*, 17 Wall. 460, 21 L. Ed. 679; *Day v. Woodworth*, 13 How. 363, 372, 14 L. Ed. 182; *Teese v. Huntingdon*, 23 How. 2, 9, 16 L. Ed. 479; *Parks v. Booth*, 102 U. S. 96, 26 L. Ed. 54.

Counsel fees cannot be included in the verdict, and an instruction which directed

(c) *Evidence*—aa. *Necessity of Proving Damages*.—Actual damages must be actually proved, and cannot be assumed as a legal inference, from any facts which amount not to actual proof of the fact.<sup>29</sup>

bb. *Burden of Proof*.—In an action for the infringement of letters-patent, damages must be proved, and the burden of proof is upon the complainant.<sup>30</sup>

cc. *Admissibility*.—In cases where there is no established patent or license fee, general evidence may be resorted to in order to get at the measure of damages.<sup>31</sup> Evidence of the utility and advantage of the invention over the old modes or devices that had been used for working out similar results is competent and appropriate.<sup>32</sup>

(d) *Jury Must Find Actual Damages*.—Juries, in an action at law for the infringement of a patent, are required to find the actual damages sustained by the plaintiff in consequence of the unlawful acts of the defendant.<sup>33</sup>

(e) *Power of Court to Increase Damages*.—Power is given to the court in a suit for infringement to enter judgment for any sum above the amount of the verdict, not exceeding three times the amount of the same, together with costs.<sup>34</sup> The allowance of an increase of damages in suit for infringement under the statute is a matter which rests somewhat in the discretion of the court, and the supreme court will not be inclined to disturb its finding upon this point, unless the evidence clearly demands it.<sup>35</sup>

(f) *Excessive Damages*.—The case must be a very extreme one to authorize a reversal on account of excessive damages for infringement, where the true rule was given by the court in its charge.<sup>36</sup>

(g) *Mitigation of Damages*.—Absence of knowledge of existence of patent by infringer may be shown in mitigation though not in exoneration.<sup>37</sup>

b. *Recovery of Profits in Suits in Equity*—(1) *Right to Recover*—(a) *General Rule*.—In a suit in equity for infringement, the patentee is entitled to re-

the jury to award to the plaintiff "such sum as they should find to be required to remunerate him for the loss sustained by the wrongful act of the defendants, and to reimburse him for all such expenditures as have been necessarily incurred by him in order to establish his right," was held to be erroneous as too broad and vague, and as tending to lead the jury to suppose that it was their duty to allow counsel fees and perhaps other charges and expenditures equally inadmissible. *Philp v. Nock*, 17 Wall. 460, 21 L. Ed. 679.

29. *Necessity of proving damages*.—*Seymour v. McCormick*, 16 How. 480, 490, 14 L. Ed. 1024; *Cincinnati, etc., Gas Illuminating Co. v. Western, etc., Co.*, 152 U. S. 200, 205, 38 L. Ed. 411; *New York City v. Ransom*, 23 How. 487, 16 L. Ed. 515; *Philp v. Nock*, 17 Wall. 460, 21 L. Ed. 679.

In an action for damages for the infringement of a patent right, the plaintiff must furnish some data by which the jury may estimate the actual damages. If he rests his case after merely proving an infringement of his patent, he may be entitled to nominal damages but no more. *New York City v. Ransom*, 23 How. 487, 16 L. Ed. 515.

30. *Burden of proving damages*.—*Blake v. Robertson*, 94 U. S. 728, 24 L. Ed. 245; *New York City v. Ransom*, 23 How. 487, 16 L. Ed. 515; *Jones v. Morehead*, 1 Wall. 155, 17 L. Ed. 662; *Seymour*

*v. McCormick*, 16 How. 480, 14 L. Ed. 1024.

31. *Evidence in absence of established license fee*.—*The Suffolk Co. v. Hayden*, 3 Wall. 315, 18 L. Ed. 76; *Packet Co. v. Sickles*, 19 Wall. 611, 617, 22 L. Ed. 203.

32. *Utility and advantages of machine*.—*The Suffolk Co. v. Hayden*, 3 Wall. 315, 18 L. Ed. 76.

33. *Jury to find actual damages*.—*Birdsall v. Coolidge*, 93 U. S. 64, 23 L. Ed. 802; *Tilghman v. Proctor*, 125 U. S. 136, 31 L. Ed. 664; *Teese v. Huntingdon*, 23 How. 2, 9, 16 L. Ed. 479; *Day v. Woodworth*, 13 How. 363, 372, 14 L. Ed. 182.

34. *Judgment for triple damages*.—*Birdsall v. Coolidge*, 93 U. S. 64, 23 L. Ed. 802; *Teese v. Huntingdon*, 23 How. 2, 9, 16 L. Ed. 479; *Tilghman v. Proctor*, 125 U. S. 136, 31 L. Ed. 664; *Day v. Woodworth*, 13 How. 363, 372, 14 L. Ed. 182.

35. *Reversal of allowance of increase*.—*Sessions v. Romadka*, 145 U. S. 29, 36 L. Ed. 609.

36. *Excessive damages*.—*Hogg v. Emerson*, 11 How. 587, 607, 13 L. Ed. 824.

37. *Ignorance of patented device as mitigating damages*.—*Hogg v. Emerson*, 11 How. 587, 607, 13 L. Ed. 824.

A patentee, whose patent right has been violated, may recover damages for such infringement for the time which intervened between the destruction of the patent office by fire, in 1836, and the restoration of the records under the act of March

cover the profits that have been actually realized by the defendant from the use of his invention.<sup>38</sup>

(b) *Profits Due to Unpatented Features of Device*.—Profits due to elements not patented, which entered into the composition of the patented article, may sometimes be allowed.<sup>39</sup>

(c) *Where Patent Does Not Contribute to Profits*.—Though the defendant's general business be ever so profitable, if the use of the invention has not contributed to the profits, none can be recovered.<sup>40</sup>

(d) *Where Defendant's Business Unprofitable*.—If the defendant gained an advantage by using the plaintiff's invention, that advantage is the measure of the profits to be accounted for, even if from other causes the business in which that invention was employed by the defendant did not result in profits. If, for example, the unauthorized use by the defendant of a patented process produced a definite saving in the cost of manufacture, he must account to the

3, 1837. *Hogg v. Emerson*, 6 How. 437, 12 L. Ed. 503.

**38. Profits recoverable.**—*Keystone Mfg. Co. v. Adams*, 151 U. S. 139, 146, 38 L. Ed. 103; *Stevens v. Gladding*, 17 How. 447, 455, 15 L. Ed. 155; *Belknap v. Schild*, 161 U. S. 10, 25, 40 L. Ed. 599; *Elizabeth v. Pavement Co.*, 97 U. S. 126, 24 L. Ed. 1000; *Mowry v. Whitney*, 14 Wall. 620, 20 L. Ed. 860; *Sessions v. Romadka*, 145 U. S. 29, 45, 36 L. Ed. 609; *Birdsall v. Coolidge*, 93 U. S. 64, 69, 23 L. Ed. 802; *Marsh v. Seymour*, 97 U. S. 348, 24 L. Ed. 963; *Root v. Railway Co.*, 105 U. S. 189, 214, 215, 26 L. Ed. 975, above cited; *Manufacturing Co. v. Cowing*, 105 U. S. 253, 26 L. Ed. 987; *Garretson v. Clark*, 111 U. S. 120, 28 L. Ed. 371; *Black v. Thorne*, 111 U. S. 122, 28 L. Ed. 372; *Birdsell v. Shaliol*, 112 U. S. 485, 488, 28 L. Ed. 768; *Thomson v. Wooster*, 114 U. S. 104, 29 L. Ed. 105; *Tilghman v. Proctor*, 125 U. S. 136, 148, 31 L. Ed. 664; *Livingston v. Woodworth*, 15 How. 546, 14 L. Ed. 809; *Dean v. Mason*, 20 How. 198, 15 L. Ed. 878; *Rubber Co. v. Goodyear*, 9 Wall. 788, 19 L. Ed. 566; *Littlefield v. Perry*, 21 Wall. 205, 229, 22 L. Ed. 577; *Mason v. Graham*, 23 Wall. 261, 23 L. Ed. 86; *The Tremolo Patent*, 23 Wall. 518, 23 L. Ed. 97; *Cawood Patent*, 94 U. S. 695, 24 L. Ed. 238; *Mevs v. Conover*, *October Term*, 1876, 11 Pat. Off. Gaz. 1111; *Root v. Railway Co.*, 105 U. S. 189, 26 L. Ed. 975.

The right to an account of profits is incident to the right to an injunction in copy and patent right cases. *Stevens v. Gladding*, 17 How. 447, 455, 15 L. Ed. 155.

**Reason for rule.**—The reasons that have led to the adoption of this rule are, that it comes nearer than any other to doing complete justice between the parties; that in equity the profits made by the infringer of a patent belong to the patentee and not to the infringer; and that it is inconsistent with the ordinary principles and practice of courts of chancery, either, on the one hand, to permit the wrongdoer

to profit by his own wrong, or, on the other hand, to make no allowance for the cost and expense of conducting his business, or to undertake to punish him by obliging him to pay more than a fair compensation to the person wronged. *Tilghman v. Proctor*, 125 U. S. 136, 145, 31 L. Ed. 664.

**39. Profits due to unpatented element of device.**—*Rubber Co. v. Goodyear*, 9 Wall. 788, 19 L. Ed. 566, where it was held that such profits were improperly allowed.

**40. Where patent did not contribute to profits.**—*Livingston v. Woodworth*, 15 How. 546, 559, 14 L. Ed. 809; *Elizabeth v. Pavement Co.*, 97 U. S. 126, 139, 24 L. Ed. 1000; *Root v. Railway Co.*, 105 U. S. 189, 202, 26 L. Ed. 975; *Cawood Patent*, 94 U. S. 695, 24 L. Ed. 238; *Mowry v. Whitney*, 14 Wall. 434, 20 L. Ed. 858; *Belknap v. Schild*, 161 U. S. 10, 25, 40 L. Ed. 599; *Keystone Mfg. Co. v. Adams*, 151 U. S. 139, 147, 38 L. Ed. 103.

"In a suit in equity for the infringement of a patent, the ground upon which profits are recovered is that they are the benefits which have accrued to the defendants from their wrongful use of the plaintiff's invention, and for which they are liable, *ex aequo et bono*, to the like extent as a trustee would be who had used the trust property for his own advantage. The defendants, in any such suit, are therefore liable to account for such profits only as have accrued to themselves from the use of the invention, and not for those which have accrued to another, and in which they have no participation. *Elizabeth v. Pavement Co.*, 97 U. S. 126, 138, 140, 24 L. Ed. 1000; *Root v. Railway Co.*, 105 U. S. 189, 26 L. Ed. 975; *Tilghman v. Proctor*, 125 U. S. 136, 144, 148, 31 L. Ed. 664; *Keystone Mfg. Co. v. Adams*, 151 U. S. 139, 147, 38 L. Ed. 103; *Coupe v. Royer*, 155 U. S. 565, 583, 39 L. Ed. 263." *Belknap v. Schild*, 161 U. S. 10, 25, 40 L. Ed. 599.

In *Elizabeth v. Pavement Co.*, 97 U. S. 126, 138, 24 L. Ed. 1000, a suit in equity for the infringement of a patent for an



patentee for the amount so saved. This application or corollary of the general rule is as well established as the rule itself.<sup>41</sup> And compensatory damages for the infringement of letters-patent may be allowed in equity, although the business of the infringer was so improvidently conducted as to yield no substantial profits.<sup>42</sup>

(c) *Recovery by Assignee*.—No stipulations between a patentee and his assignee, as to royalty to be charged, can prevent the latter from recovering from an infringer the whole profits realized by reason of the infringement.<sup>43</sup>

(2) *Amount Recoverable*—a. *Actual, Not Possible, Profits*.—The infringer is liable for actual, not for possible, gains. The profits, therefore, which he must account for are not those which he might reasonably have made, but those which he did make, by the use of the plaintiff's invention.<sup>44</sup>

(b) *Profits Must Be Fruits of Invention*.—In the ascertainment of profits made by infringer, the profits are not all he made in the business in which he used the invention, but they are the worth of the advantage he obtained by such use; or, in other words, they are the fruits of that advantage.<sup>45</sup>

improvement in wooden pavements was brought against a city, as well as against the contractor who had laid down the pavements. It being shown that the city had made no profits from the use of the invention, but that the contractor had, the court held that profits could be recovered against the contractor only, and not against the city.

**41. Where defendant's business as a whole unprofitable.**—*Tilghman v. Proctor*, 125 U. S. 136, 146, 31 L. Ed. 664; *Mowry v. Whitney*, 14 Wall. 434, 20 L. Ed. 858; *Cawood Patent*, 94 U. S. 695, 24 L. Ed. 238; *Elizabeth v. Pavement Co.*, 97 U. S. 126, 138, 24 L. Ed. 1000; *Marsh v. Seymour*, 97 U. S. 348, 24 L. Ed. 963; *Sessions v. Romadka*, 145 U. S. 29, 48, 36 L. Ed. 609; *Birdsall v. Coolidge*, 93 U. S. 64, 23 L. Ed. 802; *Root v. Railway Co.*, 105 U. S. 189, 202, 26 L. Ed. 975.

**42. Damages of a compensatory character.**—16 Stat. 206; Rev. Stat., § 4921; *Birdsall v. Coolidge*, 93 U. S. 64, 23 L. Ed. 802; *Marsh v. Seymour*, 97 U. S. 348, 360, 24 L. Ed. 963.

**43. Assignee may recover full profits, though royalties limited by contract.**—*Elizabeth v. Pavement Co.*, 97 U. S. 126, 127, 24 L. Ed. 1000.

**44. Actual not possible gains.**—*Tilghman v. Proctor*, 125 U. S. 136, 31 L. Ed. 664; *Keystone Mfg. Co. v. Adams*, 151 U. S. 139, 148, 38 L. Ed. 103; *Birdsall v. Coolidge*, 93 U. S. 64, 68, 23 L. Ed. 802; *Coupe v. Royer*, 155 U. S. 565, 583, 39 L. Ed. 263; *Livingston v. Woodworth*, 15 How. 546, 14 L. Ed. 809; *The Suffolk Co. v. Hayden*, 3 Wall. 315, 18 L. Ed. 76; *Root v. Railway Co.*, 105 U. S. 189, 26 L. Ed. 975; *Dean v. Mason*, 20 How. 198, 15 L. Ed. 878; *Rubber Co. v. Goodyear*, 9 Wall. 788, 19 L. Ed. 566; *Mowry v. Whitney*, 14 Wall. 620, 20 L. Ed. 860; *Packet Co. v. Sickles*, 19 Wall. 611, 22 L. Ed. 203; *Burdell v. Denig*, 92 U. S. 716, 23 L. Ed. 764; *Littlefield v. Perry*, 21 Wall. 205, 22 L. Ed. 577.

In suits for the infringement of a pat-

ent right, the rule of damages is the amount which the infringer actually realized in profits, not what he might have made by reasonable diligence. *Dean v. Mason*, 20 How. 198, 15 L. Ed. 878.

**45. Profits derived from use of invention only to be recovered.**—*Mowry v. Whitney*, 14 Wall. 620, 651, 20 L. Ed. 860; *Mevs v. Conover*, 131 U. S., appx. cxlii, 23 L. Ed. 1008; *Keystone Mfg. Co. v. Adams*, 151 U. S. 139, 148, 38 L. Ed. 103; *Tilghman v. Proctor*, 125 U. S. 136, 146, 31 L. Ed. 664; *Cawood Patent*, 94 U. S. 695, 24 L. Ed. 238; *Sessions v. Romadka*, 145 U. S. 29, 46, 36 L. Ed. 609; *Black v. Thorne*, 111 U. S. 122, 124, 28 L. Ed. 372; *Littlefield v. Perry*, 21 Wall. 205, 207, 22 L. Ed. 577.

In other words the fruits of the advantage which he derived from the use of that invention, over what he would have had in using other means then open to the public and adequate to enable him to obtain an equally beneficial result, constitute the measure of the defendant's liability for profits, and if there was no such advantage in his use of the plaintiff's invention, there can be no decree for profits, and the plaintiff's only remedy is by an action at law for damages. *Tilghman v. Proctor*, 125 U. S. 136, 146, 31 L. Ed. 664; *Keystone Mfg. Co. v. Adams*, 151 U. S. 139, 148, 38 L. Ed. 103.

In *Cawood Patent*, 94 U. S. 695, 710, 24 L. Ed. 238, the defendant made use of an infringing swage block for the purpose of reforming the ends of railroad rails which had become exfoliated by wear, and it was held that the gain in mending these rails by the use of the plaintiff's device, compared with the cost of mending on the common anvil, and the saving in fuel and labor, were the proper measure of damages. "They had the choice of repairing them on the common anvil or on the complainant's machine. By selecting the latter, they saved a large part of what they must have expended in the use of the former. To that extent they had a positive advantage,

(c) *Where Entire Profits Due to Invention.*—When the entire profit of a business or undertaking results from the use of the invention, the patentee will be entitled to recover the entire profits.<sup>46</sup>

(d) *Sale or Use of Patented Device Alone.*—Where the patented invention is for a new article of manufacture, which is sold separately, the patentee is entitled to damages arising from the manufacture and sale of the entire article.<sup>47</sup>

(e) *Sale or Use of Patented Device in Connection with Other Elements*—  
aa. *General Rule.*—Where a patent is for a particular part of an existing machine, it is not sufficient to ascertain the profits on the whole machine, but it must be shown what portion of the profits is due to the particular invention secured by the patent in suit.<sup>48</sup> Where the infringing device has been sold by

growing out of their invasion of complainant's patent." *Sessions v. Romadka*, 145 U. S. 29, 46, 36 L. Ed. 609.

**46. Entire profits of defendants derived from patent.**—*Elizabeth v. Pavement Co.*, 97 U. S. 126, 139, 24 L. Ed. 1000; *Rubber Co. v. Goodyear*, 9 Wall. 788, 19 L. Ed. 566; *Root v. Railway Co.*, 105 U. S. 189, 26 L. Ed. 975; *Garretson v. Clark*, 111 U. S. 120, 28 L. Ed. 371; *Hurlbut v. Schillinger*, 130 U. S. 456, 472, 32 L. Ed. 1011; *Crosby, etc., Valve Co. v. Consolidated, etc., Valve Co.*, 141 U. S. 441, 454, 35 L. Ed. 809.

The entire profits made by the defendant by the laying by him of concrete flagging according to plaintiff's patent is properly allowed to the plaintiff where it clearly appears that the defendant's flagging derived its entire value from the use of the plaintiff's invention, and that if it had not been laid in that way it would not have been laid at all. *Hurlbut v. Schillinger*, 130 U. S. 456, 471, 32 L. Ed. 1011.

In a suit for infringement, where the defendant used the plaintiff's invention in connection with his own, but the patented improvements of the defendant only embodied the form in which he clothed the plaintiff's invention, which was really the life of the defendant's device, and without which it was worthless, and there is no evidence that anything patented by the defendant gave any advantage in selling the device, the defendant is not entitled to be allowed for profits accruing from the improvement of his own invention in connection with those of the plaintiff. *Crosby, etc., Valve Co. v. Consolidated, etc., Valve Co.*, 141 U. S. 441, 35 L. Ed. 809.

**47. Sale of device by defendant as entirety.**—*Manufacturing Co. v. Cowing*, 105 U. S. 253, 26 L. Ed. 987; *Hurlbut v. Schillinger*, 130 U. S. 456, 32 L. Ed. 1011; *Crosby, etc., Valve Co. v. Consolidated, etc., Valve Co.*, 141 U. S. 441, 35 L. Ed. 809; *Warren v. Keep*, 155 U. S. 265, 268, 39 L. Ed. 144.

**48. Sale of patented device in connection with other devices or as part of machine.**—*Warren v. Keep*, 155 U. S. 265, 269, 39 L. Ed. 144; *Mowry v. Whitney*, 14 Wall. 620, 20 L. Ed. 860; *Littlefield v. Perry*, 21 Wall. 205, 22 L. Ed. 577; *Garretson v. Clark*, 111 U. S. 120, 28 L. Ed.

371; *Keystone Mfg. Co. v. Adams*, 151 U. S. 139, 148, 38 L. Ed. 103; *Blake v. Robertson*, 94 U. S. 728, 24 L. Ed. 245; *Dobson v. Hartford Carpet Co.*, 114 U. S. 439, 29 L. Ed. 177; *Sessions v. Romadka*, 145 U. S. 29, 45, 36 L. Ed. 609; *Dobson v. Dornan*, 118 U. S. 10, 17, 30 L. Ed. 63; *Tilghman v. Proctor*, 125 U. S. 136, 31 L. Ed. 664; *McCreary v. Pennsylvania Canal Co.*, 141 U. S. 459, 35 L. Ed. 817; *Seymour v. McCormick*, 16 How. 480, 14 L. Ed. 1024; *Elizabeth v. Pavement Co.*, 97 U. S. 126, 24 L. Ed. 1000; *Manufacturing Co. v. Cowing*, 105 U. S. 253, 255, 26 L. Ed. 987; *Rubber Co. v. Goodyear*, 9 Wall. 788, 19 L. Ed. 566.

"Where the infringed device was a portion only of defendant's machine, which embraced inventions covered by patents other than that for the infringement of which the suit was brought, in the absence of proof to show how much of that profit was due to such other patents, and how much was a manufacturer's profit, the complainant is entitled to nominal damages only. *Seymour v. McCormick*, 16 How. 480, 14 L. Ed. 1024; *Rubber Co. v. Goodyear*, 9 Wall. 788, 19 L. Ed. 566; *Mowry v. Whitney*, 14 Wall. 620, 20 L. Ed. 860; *Elizabeth v. Pavement Co.*, 97 U. S. 126, 24 L. Ed. 1000." *Keystone Mfg. Co. v. Adams*, 151 U. S. 139, 147, 38 L. Ed. 103.

Where no license fee charged by the complainant was shown, although it appeared that he made a profit of forty dollars per inch on the width of the jaws of the machines sold by him, but they embraced inventions covered by patents other than that for the infringement of which this suit was brought, it was held that, in the absence of proof to show how much of that profit was due to such other patents, and how much was a manufacturer's profits, he is entitled to nominal damages only against the respondent. *Blake v. Robertson*, 94 U. S. 728, 24 L. Ed. 245.

"The rule requiring that the profits arising from the patented features must be separated from those arising from the unpatented features has little application in a case where every feature is patented." *Warren v. Keep*, 155 U. S. 265, 269, 39 L. Ed. 144.

**Design patents.**—The rule in question is

the defendant both separately and with attachments, regard should be had, in ascertaining his profits upon those sold with attachments, to his profits upon those sold separately, rather than to the aggregate profits made by him upon the device and attachment combined.<sup>49</sup>

bb. *Patented Improvements*.—There is no doubt of the general principle that in estimating the profits the defendant has made by the use of the plaintiff's device, where such device is a mere improvement upon what was known before, and was open to the defendant to use, the plaintiff is limited to such

even more applicable to a patent for a design than to one for mechanism. A design or pattern in ornamentation or shape appeals only to the taste through the eye, and is often a matter of evanescent caprice. The article which embodies it is not necessarily or generally any more serviceable or durable than an article for the same use having a different design or pattern. Approval of the particular design or pattern may very well be one motive for purchasing the article containing it, but the article must have intrinsic merits of quality and structure, to obtain a purchaser, aside from the pattern or design; and to attribute, in law, the entire profit to the pattern, to the exclusion of the other merits, unless it is shown, by evidence, as a fact, that the profit ought to be so attributed, not only violates the statutory rules of "actual damages" and of "profits to be accounted for," but confounds all distinctions between cause and effect. *Dobson v. Hartford Carpet Co.*, 114 U. S. 439, 445, 29 L. Ed. 177.

No rule has been sanctioned which will allow, in the case of a patent for a design for ornamental figures created in the weaving of a carpet, or imprinted on it, the entire profit from the manufacture and sale of the carpet, as profits or damages, including all the profits from the carding, spinning, dyeing and weaving, thus regarding the entire profits as due to the figure or pattern, unless it is shown, by reliable evidence, that the entire profit is due to the figure or pattern. *Dobson v. Hartford Carpet Co.*, 114 U. S. 439, 29 L. Ed. 177.

In *Dobson v. Hartford Carpet Co.*, 114 U. S. 439, 29 L. Ed. 177, the patents being for designs for carpets, it was found that no profits had been made by the defendant, but the circuit court allowed to the plaintiff, as damages, in respect to the yards of infringing carpet made and sold by the defendant, the sum per yard which was the profit of the plaintiff in making and selling carpets with the patented design, there being no evidence as to the value imparted to the carpet by the design. It was held that such award of damages was improper, and that only nominal damages should have been allowed. *Dobson v. Dornan*, 118 U. S. 10, 16, 30 L. Ed. 63.

The master found that the plaintiffs' profit on their carpets was a certain per-

centage, and assumed or presumed that the defendants' carpets, which were far inferior in quality as well as in market value, displaced those of the plaintiffs to the extent of the sales by the defendants, and held that the entire profit which the plaintiffs would have received, at such percentage, from the sale of an equal quantity of their own carpets of the same pattern, was the proper measure of their damages. The defendants' carpets were so inferior in quality that they sold them at a much less price than the plaintiffs got for their carpets, and even at those prices the defendants made no profits. It was held that under these circumstances there could be no presumption that the plaintiffs would have sold their better quality of carpets in place of the defendants' poorer quality, if the latter had not existed, or that the pattern would have induced the purchasers from the defendants to give to the plaintiffs the higher price. On the contrary, the presumption was at least equal that the cheaper price, and not the pattern, sold the defendants' carpets. There being no satisfactory testimony that those who bought the cheap carpets from the defendants would have bought the higher priced ones from the plaintiffs, or that the design added anything to the defendants' price, or promoted their sale of the particular carpet; and none to show what part of the defendants' price was to be attributed to the design, the judgment was reversed. *Dobson v. Dornan*, 118 U. S. 10, 17, 30 L. Ed. 63.

**49. Infringing device sold both separately and with attachments.**—*Mason v. Graham*, 23 Wall. 261, 262, 23 L. Ed. 86. See, also, *The Tremolo Patent*, 23 Wall. 518, 23 L. Ed. 97.

The defendants, venders of organs generally, and selling sometimes organs having a patented invention consisting of a combination of what was called a "tremolo attachment," with the organ; and selling sometimes organs without the attachment, were decreed guilty, in their sales of organs with the attachment, of infringing the complainant's patent. Held, that in the ascertainment of profits made by them from sales of the organs with the tremolo attachment, it was proper to let them prove the general expenses of their business in effecting sales of organs generally, and deduct a ratable proportion from the profits made by the tremolo at-



profits as have arisen from the use of the improvement over what the defendant might have made by the use of that or other devices without such improvements.<sup>50</sup>

(f) *Deductions in Favor of Defendant*—aa. *In General*.—In estimating the cost, in finding difference between cost and sales, in order to ascertain profits the elements of cost of materials, interest, expense of manufacture and sale, and bad debts, considered by a manufacturer in finding his profits, are to be taken into account, and no others.<sup>51</sup> The defendant will not be allowed to diminish the show of profits by putting in unconscionable claims for personal services or other inequitable deductions.<sup>52</sup> And extraordinary salaries are properly disallowed by the master, on the ground that they were dividends of profits under another name.<sup>53</sup>

bb. *Interest on Investment, Plant, etc.*—The question whether the defendant is entitled to deduct from the profits made by him, interest on his investment or plant, is not well settled.<sup>54</sup> But even if there ought to be such an allowance, evidence must be such as to enable the master to satisfactorily apportion the interest between the several kinds of business.<sup>55</sup>

cc. *Cost of Imperfect or Worthless Devices*.—In a suit for infringement the defendant should not be allowed the cost of devices made by him and destroyed because of defects, where the full cost of the devices actually sold has already been charged to the plaintiff.<sup>56</sup>

tachment. The Tremolo Patent, 23 Wall. 518, 23 L. Ed. 97.

**50. Use of patented improvement.**—McCreary v. Pennsylvania Canal Co., 141 U. S. 459, 463, 35 L. Ed. 817; Seymour v. McCormick, 16 How. 480, 14 L. Ed. 1024; Mowry v. Whitney, 14 Wall. 620, 20 L. Ed. 860; Littlefield v. Perry, 21 Wall. 205, 22 L. Ed. 577; Elizabeth v. Pavement Co., 97 U. S. 126, 24 L. Ed. 1000; Garretson v. Clark, 111 U. S. 120, 28 L. Ed. 371; Manufacturing Co. v. Cowing, 105 U. S. 253, 26 L. Ed. 987; Sessions v. Romadka, 145 U. S. 29, 45, 36 L. Ed. 609.

If the improvement is required to adapt the machine to a particular use, and there is no other way open to the public of supplying the demand for that use, then it is clear the infringer has by his infringement secured the advantage of a market he would not otherwise have had, and that the fruits of this advantage are the entire profits he has made in that market. Manufacturing Co. v. Cowing, 105 U. S. 253, 255, 26 L. Ed. 987.

If, without the improvement, a machine adapted to the same uses can be made which will be valuable in the market, and salable, then, in that case, the inquiry is, "What was the advantage in cost, in skill required, in convenience of operation or marketability," gained by the use of the patented improvement? Manufacturing Co. v. Cowing, 105 U. S. 253, 255, 26 L. Ed. 987.

**Process patents.**—It is as true of a process, invented as an improvement in a manufacture, as it is of an improvement in a machine, that an infringer is not liable to the extent of his entire profits in the manufacture. Mowry v. Whitney, 14 Wall. 620, 20 L. Ed. 860.

**51. Rubber Co. v. Goodyear, 9 Wall. 788, 19 L. Ed. 566.**

**52. Deduction of claim for personal service, etc.**—Rubber Co. v. Goodyear, 9 Wall. 788, 19 L. Ed. 566; Elizabeth v. Pavement Co., 97 U. S. 126, 139, 24 L. Ed. 1000; Root v. Railway Co., 105 U. S. 189, 26 L. Ed. 975.

**53. Salaries paid.**—Rubber Co. v. Goodyear, 9 Wall. 788, 19 L. Ed. 566.

**54. Deductions of interest on defendant's investment, plant, etc.**—Such a deduction was denied in Rubber Co. v. Goodyear, 9 Wall. 788, 804, 19 L. Ed. 566, and Seabury v. Am Ende, 152 U. S. 561, 569, 38 L. Ed. 553, but allowed in Manufacturing Co. v. Cowing, 105 U. S. 253, 257, 26 L. Ed. 987, but the latter was said to be an "exceptional" case.

**55. Evidence of value of investment, plant, etc.**—Seabury v. Am Ende, 152 U. S. 561, 569, 38 L. Ed. 553.

Where the defendant's plant and real estate were used for several other and wholly different kinds of manufacture than the patented article, and the evidence offered to distinguish between the profits derived from the use of the plant and real estate for making the borated cotton and those attributable to the other sources of profit, was not sufficient to enable the master to make a satisfactory apportionment or allowance for interest on the investment, a deduction of interest on the defendant's investment plant, etc., was held improper. Seabury v. Am Ende, 152 U. S. 561, 569, 38 L. Ed. 553.

**56. Deduction of cost of imperfect or worthless devices.**—Crosby, etc., Valve Co. v. Consolidated, etc., Valve Co., 141 U. S. 441, 457, 35 L. Ed. 809; Cawood Patent, 94 U. S. 695, 24 L. Ed. 238; Elizabeth v. Pavement Co., 97 U. S. 126, 138, 24 L. Ed.

dd. *Improvements Made by Defendant*.—If a defendant has cheapened the cost of producing the infringing device by an improvement of his own, he is entitled to a corresponding credit in the ascertainment of the profits, which a complainant is entitled to recover.<sup>57</sup>

ee. *Payments Made to Patentee to Protect Purchasers from Defendant from Suit*.—In a suit for infringement, the defendant is not entitled to have deducted from the damages, sums paid by him in order to protect persons who bought the infringing device from him against suits by the patentee for past infringements.<sup>58</sup>

(3) *Evidence of Profits*—(a) *Burden of Proof*—aa. *General Rule*.—In order for the patentee to recover profits in a suit in equity against an infringer, it is necessary for him to prove that they were made, and the amount thereof.<sup>59</sup>

bb. *Where Only Part of Profits Due to Use of Invention*.—Not only must the profits be proved, but, in cases where all of the profits of the defendant's business were not derived from the use of the patented device, it is incumbent on the complainant to show what part of the profits were derived therefrom.<sup>60</sup> But where profits are made by an infringer by the use of an article patented as an entirety or product, he is responsible to the patentee for them, unless he can show—and the burden is on him to show it—that a portion of them is the result of some other thing used by him.<sup>61</sup>

(b) *Admissibility*.—Since there can be no recovery except for profits actually made, profits cannot be estimated on the basis of what others in a similar business made during the same time, and evidence on this point is, therefore, inadmissible,<sup>62</sup> even though the defendant fails or refuses to disclose the condition of his business.<sup>63</sup>

(4) *Interest on Profits*—(a) *Right to Interest*.—As a general rule a patentee is not entitled to interest on profits made by an infringer. The reason is that profits are regarded in the light of unliquidated damages.<sup>64</sup> But in many of the cases it is said that circumstances may arise in which it would be proper to add interest.<sup>65</sup>

(b) *Time from Which Interest Runs*.—Interest on the profits and damages

1000; *Tilghman v. Proctor*, 125 U. S. 136, 31 L. Ed. 664.

57. *Deduction for improvements*.—*Mason v. Graham*, 23 Wall. 261, 262, 23 L. Ed. 86.

58. *Deduction of payments to patentee for use by defendant's customers*.—After an interlocutory decree and reference to a master in a suit against M., a manufacturer and seller of infringing machines, the owners of the patent commenced proceedings against persons who used machines made and sold by M. M. thereupon, to protect his customers, paid the patentees a sum fixed upon, under a written agreement that the payment should be "in full satisfaction of our right to collect back damages for past infringement" by M.'s customers and a license fee for the future use of all the machines sold by M.; but the agreement contained a proviso that this settlement should "not affect in any manner our right to recover profits or damages" from M., and that the suit against M. "shall proceed precisely as if this settlement had never been made." Held, that the amount paid to the patentees by M. was properly excluded by the master as a credit in computing profits made by M. *Mason v. Graham*, 23 Wall. 261, 262, 23 L. Ed. 86.

59. *Profits must be proved*.—*Cornely v. Marckwald*, 131 U. S. 159, 161, 33 L. Ed. 117; *Blake v. Robertson*, 94 U. S. 728, 24 L. Ed. 245; *Keystone Mfg. Co. v. Adams*, 151 U. S. 139, 147, 38 L. Ed. 103.

60. *Necessity of proving what part of profits derived from infringement*.—See ante, "Sale or Use of Patented Device with Other Elements," XIII, B, 11, b, (2), (e).

61. *Elizabeth v. Pavement Co.*, 97 U. S. 126, 127, 24 L. Ed. 1000.

62. *Evidence of profits made by others*.—*Keystone Mfg. Co. v. Adams*, 151 U. S. 139, 148, 38 L. Ed. 103; *Coupe v. Royer*, 155 U. S. 565, 583, 39 L. Ed. 263.

63. *Failure of defendant to disclose condition of business*.—*Keystone Mfg. Co. v. Adams*, 151 U. S. 139, 148, 38 L. Ed. 103.

64. *Right to interest—General rule*.—*Mowry v. Whitney*, 14 Wall. 620, 20 L. Ed. 860; *Littlefield v. Perry*, 21 Wall. 205, 22 L. Ed. 577; *Illinois Cent. R. Co. v. Turrill*, 110 U. S. 301, 303, 28 L. Ed. 154; *Silsby v. Foote*, 20 How. 378, 386, 15 L. Ed. 953.

65. *Interest may be recoverable*.—*Parks v. Booth*, 102 U. S. 96, 26 L. Ed. 54; *Illinois Cent. R. Co. v. Turrill*, 110 U. S. 301, 303, 28 L. Ed. 154; *Littlefield v. Perry*, 21 Wall. 205, 207, 22 L. Ed. 577.

for infringement of a patent should only be allowed from the day the master's report is submitted to the court, and not from the date of the decree.<sup>66</sup>

(5) *Damages in Addition to Profits.*—Damages of a compensatory character may also be allowed to the complainant suing in equity, in certain cases, where the gains and profits made by the respondent are clearly not sufficient to compensate the complainant for the injury sustained by the unlawful violation of the exclusive right secured to him by the patent.<sup>67</sup> Where in a suit in equity for infringement the court renders a judgment for damages, in addition to profits, it has the same power to render a judgment for treble damages, or for a less sum, as it has in actions at law.<sup>68</sup>

c. *Penalty for Infringement of Design Patents.*—In order for a patentee of a design to recover the penalty provided for by the act of Feb. 4, 1887, against one who makes use of his design, it must be shown that the defendant did so with the knowledge of the existence of the patent, and knew that he was infringing it.<sup>69</sup>

12. JUDGMENT OR DECREE— a. *Form and Requisites.*—The decree for profits, or for damages and profits, should limit the recovery to the profits or damages arising from the infringement.<sup>70</sup>

b. *Conclusiveness.*—A judgment in an infringement suit affirming the valid-

**66. From what time interest begins to run.**—Crosby, etc., Valve Co. v. Consolidated, etc., Valve Co., 141 U. S. 441, 448, 35 L. Ed. 809; Illinois Cent. R. Co. v. Turrill, 110 U. S. 301, 28 L. Ed. 154; Tilghman v. Proctor, 125 U. S. 136, 31 L. Ed. 664; Littlefield v. Perry, 21 Wall. 205, 22 L. Ed. 577. But see Mowry v. Whitney, 14 How. 620, 20 L. Ed. 860.

"By a uniform current of decisions of this court, beginning thirty years ago, the profits allowed in equity, for the injury that a patentee has sustained by the infringement of his patent, have been considered as a measure of unliquidated damages, which, as a general rule, and in the absence of special circumstances, do not bear interest until after their amount has been judicially ascertained; and the provision introduced in the patent act of 1870, regulating the subject of profits and damages, made no mention of interest, and has not been understood to affect the rule as previously announced. Silsby v. Foote, 20 How. 378, 387, 15 L. Ed. 953; Mowry v. Whitney, 14 Wall. 620, 651, 20 L. Ed. 860; Littlefield v. Perry, 21 Wall. 205, 229, 22 L. Ed. 577; Act of July 8, 1870, c. 230, § 55, 16 Stat. 206; Rev. Stat., § 4921; Parks v. Booth, 102 U. S. 96, 106, 26 L. Ed. 54; Root v. Railway Co., 105 U. S. 189, 198, 200, 204, 26 L. Ed. 975; Illinois Cent. R. Co. v. Turrill, 110 U. S. 301, 303, 28 L. Ed. 154." Tilghman v. Proctor, 125 U. S. 136, 160, 31 L. Ed. 664.

**67. Damages in addition to profits.**—Birdsall v. Coolidge, 93 U. S. 64, 69, 23 L. Ed. 802; Tilghman v. Proctor, 125 U. S. 136, 31 L. Ed. 664; Root v. Railway Co., 105 U. S. 189, 26 L. Ed. 975.

Gains and profits are still the proper measure of damages in equity suits, except in cases where the injury sustained by the infringement is plainly greater than the aggregate of what was made by the respondent; in which event the provision

is, that the complainant "shall be entitled to recover, in addition to the profits to be accounted for by the respondent, the damages he has sustained thereby." Birdsall v. Coolidge, 93 U. S. 64, 69, 23 L. Ed. 802.

A court of equity, which has acquired, upon some equitable ground, jurisdiction of a suit for the infringement of a patent, will not send the plaintiff to a court of law to recover damages, but will itself administer full relief, by awarding, as an equivalent or a substitute for legal damages, a compensation computed and measured by the same rule that courts of equity apply to the case of a trustee who has wrongfully used the trust property for his own advantage. Tilghman v. Proctor, 125 U. S. 136, 31 L. Ed. 664; Root v. Railway Co., 105 U. S. 189, 214, 26 L. Ed. 975.

**68. Treble damages.**—16 Stat. 206; Tilghman v. Proctor, 125 U. S. 136, 31 L. Ed. 664.

**69. Penalty for infringement of design patents.**—Dunlap v. Schofield, 152 U. S. 244, 248, 38 L. Ed. 426.

**70. Decree.**—A decree "for all the profits made in violation of the rights of the complainants under the patents aforesaid, by respondents, by the manufacture, use, or sale of any of the articles named in the bill of complaint," is correct in form. Rubber Co. v. Goodyear, 9 Wall. 788, 19 L. Ed. 566.

A decree awarding a recovery for the profits and damages from the infringement of a design, ordering an account to be taken of the profits of the defendants from infringing upon the exclusive rights of the plaintiffs, "by the manufacture, use and sale of carpeting bearing said patented design," and of the additional damages suffered by the plaintiffs "by reason of said infringements," is correct in form. Dobson v. Dornan, 118 U. S. 10, 15, 30 L. Ed. 63.



ity of a single claim of a patent does not estop the defendant from contesting the validity of the patent, as a whole, in another suit.<sup>71</sup>

c. *Effect of Recovery and Satisfaction of Judgment.*—The recovery and satisfaction of a judgment for damages against an infringer does not ordinarily confer, upon him or upon others, the right to continue or repeat the wrong.<sup>72</sup>

13. *COSTS.*—In a suit on patent the claims of which are too broad, no costs can be recovered unless a disclaimer of the excess is filed in the patent office before suit.<sup>73</sup>

14. *INJUNCTION AGAINST SUIT FOR INFRINGEMENT*—a. *Right to Enjoin.*—Where the right to manufacture a device has been established by virtue of a

**71. Conclusiveness.**—*Russell v. Place*, 94 U. S. 606, 24 L. Ed. 214. See the title RES ADJUDICATA.

In an action at law for damages for the infringement of a patent for an alleged new and useful improvement in the preparation of leather, which patent contained two claims, one for the use of fat liquor generally in the treatment of leather, and the other for a process of treating bark tanned lamb or sheep skin, by means of a compound composed and applied in a particular manner, the declaration alleged, as the infringement complained of, that the defendants had made and used the invention, and caused others to make and use it, without averring whether such infringement consisted in the simple use of fat liquor in the treatment of leather, or in the use of the process specified. Held, that the judgment recovered in the action does not estop the defendant in a suit in equity by the same plaintiff, for an injunction and an accounting for gains and profits, from contesting the validity of the patent, it not appearing by the record, and not being shown by extrinsic evidence, upon which claim the recovery was had. The validity of the patent was not necessarily involved, except with respect to the claim which was the basis of the recovery; a patent may be valid as to a single claim, and invalid as to the others. *Russell v. Place*, 94 U. S. 606, 24 L. Ed. 214.

**72. Recovery does not vest infringer with right to use.**—*The Suffolk Co. v. Hayden*, 3 Wall. 315, 18 L. Ed. 76; *Birdsell v. Shaliol*, 112 U. S. 485, 487, 28 L. Ed. 768; *Root v. Railway Co.*, 105 U. S. 189, 198, 26 L. Ed. 975.

An infringer does not, by paying damages for making and using a machine in infringement of a patent, acquire any right himself to the future use of the machine. On the contrary, he may, in addition to the payment of damages for past infringement, be restrained by injunction from further use, and, when the whole machine is an infringement of the patent, be ordered to deliver it up to be destroyed. *Birdsell v. Shaliol*, 112 U. S. 485, 487, 28 L. Ed. 768.

If one person is in any case exempt from being sued for damages for using the same machine for the making and selling of which damages have been recovered against and paid by another person, it can

only be when actual damages have been paid, and upon the theory that the plaintiff has been deprived of the same property by the acts of two wrongdoers, and has received full compensation from one of them. *Birdsell v. Shaliol*, 112 U. S. 485, 488, 28 L. Ed. 768.

**73. In suits on patent with excessive claims.**—Rev. Stat., § 4922; *Elastic Fabric Co. v. Smith*, 100 U. S. 110, 25 L. Ed. 547; *Sessions v. Romadka*, 145 U. S. 29, 36 L. Ed. 609; *Smith v. Nichols*, 21 Wall. 112, 22 L. Ed. 566; *Dunbar v. Myers*, 94 U. S. 187, 24 L. Ed. 34; *Gage v. Herring*, 107 U. S. 640, 27 L. Ed. 601; *Yale Lock Mfg. Co. v. Sargent*, 117 U. S. 536, 29 L. Ed. 954; *Silsby v. Foote*, 20 How. 378, 386, 15 L. Ed. 953; *Seymour v. McCormick*, 19 How. 96, 15 L. Ed. 557.

In 1845, McCormick obtained a patent for improvements in a reaping machine, in which, after filing his specification, he claimed, amongst other things, as follows, viz: "2d. I claim the reversed angle of the teeth of the blade, in manner described. 3d. I claim the arrangement and construction of the fingers (or teeth for supporting the grain), so as to form the angular spaces in front of the blade, as and for the purpose described." These two clauses are not to be read in connection with each other, but separately. The first claim, viz: for "the reversed angle of the teeth of the blade," not being new, and not being disclaimed, he was not entitled to costs, although he recovered a judgment for a violation of other parts of his patent. *Seymour v. McCormick*, 19 How. 96, 15 L. Ed. 557.

Where such letters had been reissued in separate divisions, and the patentee filed in the patent office a disclaimer in regard to one of them, after bringing a suit for the infringement of the others, the validity of which was sustained, and the fact of infringement of the others, the validity of which was sustained, and the fact of infringement found by the court below, held, that § 4922, Rev. Stat., has no application to the case, and that he is entitled to costs. *Elastic Fabrics Co. v. Smith*, 100 U. S. 110, 25 L. Ed. 547.

Where a defendant has infringed a restated valid claim of a reissue, the plaintiff, on filing a disclaimer of the new and invalid claims of the reissue may have a decree, without costs, for the infringement of such a valid claim, where there

judgment in an infringement suit, a court of equity, where an action at law would be inadequate, will intervene to prevent the impairment of this right, by enjoining the prosecution of suits against the plaintiff's customers for alleged infringement of the same patent.<sup>74</sup> But an injunction against infringement suits will not be allowed where the theory of the bill is that complainants have a perfect right to use the patent, for in such case there would be a perfect defense to the suit and an ample remedy at law.<sup>75</sup>

b. *Contempt for Disobedience of Injunction.*—An act claimed to be a new infringement of a patent cannot be punished by contempt proceedings, where it is denied, and there is doubt, that it comes within the scope of the former suit.<sup>76</sup>

15. **ARBITRATION AND AWARD.**—Where the question of infringement is submitted to arbitration, the award is presumed to be correct, and is final and conclusive.<sup>77</sup>

#### XIV. Duty of Patent Office to Furnish Copies of Patent.

**A. Nature and Extent of Duty.**—Patents are public records, and it is the duty of the commissioner to give authenticated copies to any person, on payment of the legal fees.<sup>78</sup> But the party entitled to such services must request their performance in a proper manner, and not accompany his demand with insult or abuse.<sup>79</sup> Hence, a commissioner could not be held responsible for refusing to comply with a demand couched in such language.<sup>80</sup> If, after an improper request, a second application was made, in a proper manner, the commissioner should comply with it.<sup>81</sup>

has been no unreasonable delay in entering the disclaimer. *Gage v. Herring*, 107 U. S. 640, 648, 27 L. Ed. 601; *Yale Lock Mfg. Co. v. Sargent*, 117 U. S. 536, 553, 29 L. Ed. 954.

**74. Injunction against infringement suit.**—*Kessler v. Eldred*, 206 U. S. 285, 51 L. Ed. 1065.

**75. Where bill is framed on theory of right to use device.**—*Hapgood v. Hewitt*, 119 U. S. 226, 30 L. Ed. 369.

**76. Proceedings for contempt for disobeying injunction.**—*California, etc., Paving Co. v. Molitor*, 113 U. S. 609, 610, 28 L. Ed. 1106.

**77. Arbitration and award.**—Where in a pending suit a patentee and a party charged with infringing agree to refer the question of infringement to a third person as arbitrator, and to be bound by his award, the federal supreme court will presume, until the contrary is shown, that an award made is correctly made; and must so presume if, disregarding the award, the complainant goes on with his suit, and the case on coming here, comes with a record that exhibits neither the patent of the complainant nor any description of the machine which is alleged to infringe it. *Reedy v. Scott*, 23 Wall. 352, 353, 23 L. Ed. 109.

Where, pending a bill in a federal court for the infringement of a patent, the parties have agreed to submit the question whether a machine made by the defendant was an infringement, to a solicitor of patents, and to abide by his decision, and that if he decides that it is not, then that the bill in said suit shall stand dismissed; and the referee does decide that there is no infringement, but the complainant instead of having his original bill dismissed

and filing a new original bill, files a supplemental bill alleging a surrender and reissue, and that the reissue is "for the same invention" as was secured by the original patent; in such case if it appear that the parties throughout the trial have treated the invention secured by the reissue, as substantially the same invention as that secured by the original letter, and have raised no issue about exact specification or any of those differences which may properly exist between a claim in an original patent and a claim in a reissue, but on the contrary have impliedly admitted substantial identity, having taken the issue on other matters, the matters, to wit, whether the complainant was not deceived when agreeing to refer, and whether the right of the referee to make any award was not legally revoked before any award was made by him, and whether, therefore, the award was not void; in such case if the court be satisfied that there was no deception, and that the award was made, and validly, then the plea of the award and agreement to be bound by it, may be properly pleaded to the supplemental bill as it might have been to the original one. *Reedy v. Scott*, 23 Wall. 352, 23 L. Ed. 109.

**78. Duty of commissioner to furnish copies.**—*Boyden v. Burke*, 14 How. 575, 14 L. Ed. 548.

**79. Request to be in proper manner.**—*Boyden v. Burke*, 14 How. 575, 14 L. Ed. 548.

**80. Request to comply with improper request.**—*Boyden v. Burke*, 14 How. 575, 14 L. Ed. 548.

**81. Duty to comply with proper request after improper one.**—*Boyden v. Burke*, 14 How. 575, 14 L. Ed. 548.

**B. Action for Refusal to Furnish Copies.**—Where, in an action against the commissioner of patents for refusing to give copies of papers in his office, no special damage was set out in the declaration, evidence of the professional pursuits of the applicant is not admissible.<sup>82</sup> Where the application was made through a third person, letters of both parties to this third person are admissible in evidence, as part of the *res gestæ*.<sup>83</sup>

### XV. Taxation of Patented Articles.

Things manufactured under letters-patent of the United States are subject to be taxed by a state like other property.<sup>84</sup>

### XVI. Setting Aside Patent.

**A. Mode of Proceeding.**—The ancient mode of setting aside a patent was by *scire facias* brought in chancery where the patent was of record.<sup>85</sup> In the United States, the only authority competent to set aside or annul a patent is vested in the courts of the United States,<sup>86</sup> or the equity side thereof,<sup>87</sup> in a suit brought by the government, or on its behalf, for that purpose.<sup>88</sup> After a

**82. Evidence of special damage.**—*Boyden v. Burke*, 14 How. 575, 14 L. Ed. 548. See, generally, the title DAMAGES, vol. 5, p. 157.

**83. Letters written to person making application as evidence.**—*Boyden v. Burke*, 14 How. 575, 14 L. Ed. 548.

**84. Taxation of patented articles.**—*Belknap v. Schild*, 161 U. S. 10, 23, 40 L. Ed. 599; *Patterson v. Kentucky*, 97 U. S. 501, 506, 24 L. Ed. 1115; *Bloomer v. McQuewan*, 14 How. 539, 14 L. Ed. 532.

**85. Ancient mode of annulling patents.**—*Ex parte Wood*, 9 Wheat. 603, 6 L. Ed. 171; *United States v. American Bell Tel. Co.*, 128 U. S. 315, 32 L. Ed. 450; *Mowry v. Whitney*, 14 Wall. 434, 20 L. Ed. 858.

Under the 10th section of the patent act of the 21st of February, 1793, ch. 11, upon granting a rule, by the judge of the district court, upon the patentee, to show cause why process should not issue to repeal the patent, the patent is not repealed, *de facto*, by making the rule absolute; but the process to be awarded is in the nature of a *scire facias* at common law, to the patentee, to show why the patent should not be repealed, with costs of suit; and upon the return of such process, duly served, the judge is to proceed to try the cause upon the pleadings filed by the parties, and the issue joined thereon. If the issue be one of fact, the trial thereof is to be by a jury, if an issue of law, by the court, as in other cases. *Ex parte Wood*, 9 Wheat. 603, 6 L. Ed. 171.

In such a case, a record is to be made of the proceedings, antecedent to the rule to show cause why process should not issue to repeal the patent, and upon which the rule is founded. *Ex parte Wood*, 9 Wheat. 603, 6 L. Ed. 171.

**86. Power of court to set aside.**—*Moore v. Robbins*, 96 U. S. 530, 533, 24 L. Ed. 848; *United States v. American Bell Tel. Co.*, 128 U. S. 315, 364, 32 L. Ed. 450; *Michigan Land, etc., Co. v. Rust*, 168 U. S. 589, 593, 42 L. Ed. 591; *McCormick Harvesting Machine Co. v. Aultman*, 169 U. S. 606, 609, 42 L. Ed. 875; *United*

*States v. Schurz*, 102 U. S. 378, 26 L. Ed. 167.

**87. Exercised in court of equity.**—*United States v. American Bell Tel. Co.*, 128 U. S. 315, 364, 32 L. Ed. 450; *United States v. American Bell Tel. Co.*, 167 U. S. 224, 266, 42 L. Ed. 144; *Bourne v. Goodyear*, 9 Wall. 811, 19 L. Ed. 786.

In modern times the court of chancery, sitting in equity, entertains a similar jurisdiction by bill to that formerly exercised on *scire facias* and in this country it is the usual mode in all cases, because better adapted to the investigation and to the relief to be administered. *Mowry v. Whitney*, 14 How. 434, 20 L. Ed. 858.

"Though in this country the writ of *scire facias* is not in use as a chancery proceeding, the nature of the chancery jurisdiction and its mode of proceeding have established it as the appropriate tribunal for the annulling of a grant or patent from the government. This is settled so far as this court is concerned by the case of the *United States v. Stone*, 2 Wall. 525, 17 L. Ed. 765, in which it is said that the bill in chancery is found a more convenient remedy." *Mowry v. Whitney*, 14 Wall. 434, 20 L. Ed. 858.

"These provisions, while they do not in express terms confer upon the courts of equity of the United States the power to annul or vacate a patent, show very clearly the sense of congress that if such power is to be exercised anywhere it should be in the equity jurisdiction of those courts." *United States v. American Bell Tel. Co.*, 128 U. S. 315, 32 L. Ed. 450.

**A proceeding to vacate the extension of a patent**, of which the extension has expired before the proceeding was begun, has no equity to support it, and cannot be sustained on demurrer. *Bourne v. Goodyear*, 9 Wall. 811, 19 L. Ed. 786.

**88. Suit must be brought by or for government.**—No one but the government, either in its own name or the name of its appropriate officer, or by some form of proceeding which gives official assurance of the sanction of the proper authority,



patent has once issued, the patent office has no power to revoke, cancel or annul a patent, and it does not regain jurisdiction by an application for a reissue,<sup>89</sup> nor can it be revoked or canceled by the president, or any other officer of the government.<sup>90</sup>

**B. Grounds for Setting Aside.**—Where a patent has been obtained by fraud, accident or mistake, it may be set aside on suit by the government for that purpose.<sup>91</sup> But a patent cannot be set aside on the ground of error of judgment on the part of the patent officials,<sup>92</sup> or for delay of the patent office, unless corruption of the officials by the applicant is shown.<sup>93</sup>

can institute judicial proceedings for the purpose of vacating or rescinding the patent which the government has issued to an individual, except in the cases provided for in § 16 of the act of July 4, 1836. *United States v. American Bell Tel. Co.*, 128 U. S. 315, 368, 32 L. Ed. 450; *Mowry v. Whitney*, 14 Wall. 434, 439, 20 L. Ed. 858.

**89. Power of patent office to revoke patent.**—*McCormick Harvesting Machine Co. v. Aultman*, 169 U. S. 606, 612, 42 L. Ed. 875; *United States v. American Bell Tel. Co.*, 128 U. S. 315, 32 L. Ed. 450; *United States v. Schurz*, 102 U. S. 378, 26 L. Ed. 167.

**90.** Upon application being made for such reissue the patent office was authorized to deal with all its claims, the originals as well as those inserted first in the application, and might declare them to be invalid, but such action would not affect the claims of the original patent, which remained in full force, if the application for a reissue were rejected or abandoned. *McCormick Harvesting Machine Co. v. Aultman*, 169 U. S. 606, 612, 42 L. Ed. 875.

**Revocation by other officers of government.**—*McCormick Harvesting Machine Co. v. Aultman*, 169 U. S. 606, 608, 42 L. Ed. 875. See, also, *United States v. Schurz*, 102 U. S. 378, 26 L. Ed. 167; *United States v. American Bell Tel. Co.*, 128 U. S. 315, 32 L. Ed. 450; *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33; *Cammeyer v. Newton*, 94 U. S. 225, 24 L. Ed. 72; *United States v. Palmer*, 128 U. S. 262, 32 L. Ed. 442; *James v. Campbell*, 104 U. S. 356, 26 L. Ed. 786.

**91. Fraud, accident or mistake.**—*United States v. American Bell Tel. Co.*, 128 U. S. 315, 32 L. Ed. 450; *United States v. American Bell Tel. Co.*, 159 U. S. 548, 555, 40 L. Ed. 255; *Mowry v. Whitney*, 14 Wall. 434, 439, 20 L. Ed. 858; *Marsh v. Nichols, etc., Co.*, 128 U. S. 605, 32 L. Ed. 538; *Mahn v. Harwood*, 112 U. S. 354, 28 L. Ed. 665; *United States v. American Bell Tel. Co.*, 167 U. S. 224, 237, 42 L. Ed. 144.

**A patent procured by fraudulent representations** as to its novelty may be repealed or set aside in equity. *United States v. American Bell Tel. Co.*, 128 U. S. 315, 32 L. Ed. 450.

**Fraud must be clearly established.**—Before the government is entitled to a decree canceling a patent for an inven-

tion on the ground that it had been fraudulently and wrongfully obtained, it must, as in the case of a like suit to set aside a patent for land, establish the fraud and the wrong by testimony which is clear, convincing and satisfactory. *United States v. American Bell Tel. Co.*, 167 U. S. 224, 262, 42 L. Ed. 144.

**92. Error of judgment by patent office.**—*United States v. American Bell Tel. Co.*, 167 U. S. 224, 42 L. Ed. 144.

The courts of the United States, sitting as courts of equity, cannot entertain jurisdiction of a suit by the United States to set aside a patent for an invention on the mere ground of error of judgment on the part of the patent officials. That would be an attempt on the part of the courts in collateral attack to exercise an appellate jurisdiction over the decisions of the patent office, although no appellate jurisdiction has been by the statutes conferred. *United States v. American Bell Tel. Co.*, 167 U. S. 224, 269, 42 L. Ed. 144.

The objection to the validity of a patent on the ground that it is already covered by a prior patent is a defense which is open to every individual charged by the patentee with infringement and is an objection resting upon matters of record in the patent office. The government, therefore, if seeking simply to protect the right of an individual, cannot be permitted to maintain a suit in equity to cancel that against which the individual has a perfect legal defense available in any action brought by or against him. *United States v. American Bell Tel. Co.*, 167 U. S. 224, 266, 42 L. Ed. 144.

**93. Delay of patent office.**—*United States v. American Bell Tel. Co.*, 167 U. S. 224, 262, 42 L. Ed. 144.

Congress has established a department with officials selected by the government, to whom all applications for patents must be made; has prescribed the terms and conditions of such applications, and entrusted the entire management of affairs of the department to those officials; that when an applicant for a patent complies with the terms and conditions prescribed and files his application with the officers of the department, he must abide their action, and cannot be held to suffer or lose rights by reason of any delay on the part of those officials, whether reasonable or unreasonable, unless such delay has been brought about through his corruption of

**C. Collateral Attack.**—A patent of the United States can be attacked for defects, not apparent on its face, only by regular proceedings instituted for that purpose, and is not open to collateral attack.<sup>94</sup>

**PATENT TO LAND.**—The patent of the United States is the conveyance by which the nation passes its title to portions of the public domain.<sup>1</sup> And it is the instrument by which the fee simple title to the mining claim is granted.<sup>2</sup>

the officials, or through his inducement, or at his instance. Proof that they were in fault, that they acted unwisely, unreasonably and even that they were culpably dilatory, casts no blame on him and abridges none of his rights. *United States v. American Bell Tel. Co.*, 167 U. S. 224, 262, 42 L. Ed. 144.

**94. Patent not open to collateral attack.**—*Marsh v. Nichols, etc., Co.*, 128 U. S. 605, 32 L. Ed. 538; *Smelting Co. v. Kemp*, 104 U. S. 636, 26 L. Ed. 875; *Steel v. Smelting Co.*, 106 U. S. 447, 27 L. Ed. 226; *Mahn v. Harwood*, 112 U. S. 354, 28 L. Ed. 665; *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33; *Rubber Co. v. Goodyear*, 9 Wall. 788, 19 L. Ed. 566; *Eureka Co. v. Bailey Co.*, 11 Wall. 488, 20 L. Ed. 209.

A patent from the government cannot be impeached for fraud in procuring its issue in any other mode than by a direct

proceeding to set it aside. *Eureka Co. v. Bailey Co.*, 11 Wall. 488, 20 L. Ed. 209.

Neither reissued nor extended patents can be abrogated by an infringer in a suit against him for infringement, upon the ground that the letters-patent were procured by fraud in prosecuting the application for the same before the commissioner. *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33; *Rubber Co. v. Goodyear*, 9 Wall. 788, 19 L. Ed. 566.

**1. Public lands.**—*Smelting Co. v. Kemp*, 104 U. S. 636, 26 L. Ed. 875; *Barden v. Northern Pac. R. Co.*, 154 U. S. 288, 327, 38 L. Ed. 992. See the title PUBLIC LANDS, for full treatment of the subject.

**2. Patent to mineral land.**—*Mining Company v. Tunnel Company*, 196 U. S. 337, 347, 49 L. Ed. 501. See the title MINES AND MINERALS, vol. 8, p. 364.

## PAUPERS.

**As to exclusion of pauper immigrants,** see the title **ALIENS**, vol. 1, p. 248.

**As to discharge of poor debtors from imprisonment,** see the title **IMPRISONMENT FOR DEBT**, vol. 6, p. 892.

**As to charities for the relief of the poor, sick, aged and impotent,** see the title **CHARITIES**, vol. 3, p. 680.

**As to appeals in forma pauperis,** see the title **APPEAL AND ERROR**, vol. 2, p. 176.

**Disqualification of Justice to Order Removal from His Township.**—Justices of the peace, who are at the time inhabitants of, and ratable and contributory to the poor-tax of a township, cannot make an order of removal of a person as a pauper, from such township.<sup>1</sup>

**Examination of Pauper Need Not Appear on Face of Order.**—It would seem that it is not necessary that it should appear, on the face of an order of removal of a pauper, that the pauper had been examined.<sup>2</sup>

**PAVEMENTS.**—See the title **STREETS AND HIGHWAYS**.

**PAWN.**—See the title **PLEDGE AND COLLATERAL SECURITY**.

**PAY.**—See note 3.

**PAYMASTER.**—See the title **ARMY AND NAVY**, vol. 2, p. 531.

1. **Disqualification of justice to order removal from own township.**—*Upper Dublin v. Germantown*, 2 Dall. 213, 1 L. Ed. 353.

2. **Examination of pauper need not appear on face of order.**—*Fallowfield v. Marlborough*, 1 Dall. 28, 1 L. Ed. 23.

"No case can be shown, where an order was deemed bad, because the examination did not appear on the face of the order. Comb. 474, is a book of no great authority, and this case is contradicted by many others. We are of opinion, that it is not necessary that an examination, should ap-

pear on the face of the order; nor is it necessary that the examination of any person should be set forth. If any pauper was injured by a removal, the remedy might be had here, on information; and though it will not restore him, yet he might have complained to the sessions, where everything was open." *Fallowfield v. Marlborough*, 1 Dall. 28, 1 L. Ed. 23.

3. **Pay or allow.**—See **ALLOW**, vol. 1, p. 259.

**Pay proper.**—See the title **ARMY AND NAVY**, vol. 2, p. 502.



# PAYMENT.

BY WALTER CARRINGTON.

- I. Definition, 321.**
- II. To Whom Payment May Be Made, 321.**
  - A. In General, 321.
  - B. Agents and Attorneys, 322.
  - C. Executors and Administrators, 322.
  - D. Guardians, 322.
  - E. Sheriffs and Constables and United States Marshals, 322.
  - F. A Conquering State, 322.
  - G. Effect of Assignment by Creditor, 323.
- III. Who May Make Payment, 323.**
- IV. Place of Payment, 323.**
  - A. In Absence of Stipulation, 323.
  - B. Under Contract to Pay at a Particular Place, 323.
- V. Time of Payment, 324.**
  - A. In General, 324.
  - B. Where Time of Payment Is Made Conditional, 324.
  - C. Under Contract to Pay Distinct Sums at Different Periods, 324.
  - D. Waiver of Stipulated Damages for Failure to Pay at Time Agreed, 324.
- VI. Manner and Medium of Payment, 325.**
  - A. In General, 325.
  - B. Payment in Coin, 325.
  - C. Payment in United States Treasury Notes, 325.
  - D. Payment in Bank Notes, 326.
  - E. Payment in State Treasury Warrants, 327.
  - F. Payment in Continental Money, 327.
  - G. Payment in Confederate Money, 327.
  - H. Payment in Counterfeit Money or Canceled Treasury Notes, 327.
    - I. Payment in Bills, Notes or Checks, 327.
      - 1. Bills of Exchange and Promissory Notes, 327.
      - 2. Acceptances of Bills of Exchange, 329.
      - 3. Checks, 329.
    - J. Payment in Evidences of Debts Due the Debtor, 330.
  - K. Payment by Bond, 330.
  - L. Payment in Paper for Which the Creditor Is Responsible, 330.
  - M. Operation of the Principle of Set-Off, 330.
  - N. Medium in Which Agents, Attorneys, Executors and Trustees May Receive Payment, 330.
  - O. Contracts Relating to Manner and Medium of Payment, 331.
    - 1. In General, 331.
    - 2. Payment in "Current Money," 331.
    - 3. Payment in "Current Funds," 332.
    - 4. Payment in "Currency," 332.
    - 5. Payment in "Coin" or "Bullion," 332.
      - a. Express Contracts, 332.
      - b. When Undertaking to Pay in Gold Will Be Implied, 333.
    - 6. Payment in "Specie," 333.
    - 7. Payment in "Dollars," 334.

8. Payment in the Paper of a Bank, 334.
9. Payment in County Script or Warrants, 334.
10. Payment of Interest on Bonds in Money or Script, 334.
11. Payment in Promissory Notes, 334.
12. Payment by a Certificate of Deposit in a Bank, 335.
13. Payment in Confederate Currency, 335.
14. Payment in Goods or Chattels, 335.
15. Payment by Assessments upon Stock, 337.
16. Payment by a Conveyance of Land, 337.
17. Contractual Obligation of a State to Receive Designated Securities in Payment of Taxes and Other Obligations, 337.
18. Agreement That Payment in One Medium Shall Extinguish Larger Amount Estimated in Another Medium, 337.

**VII. What Constitutes a Demand for Payment, 338.**

**VIII. Acceptance of Payment, 338.**

- A. Authority to Accept, 338.
- B. Acceptance of Less than Is Due in Full Satisfaction of a Debt, 338.
  1. Where the Sum Due Is Liquidated, 338.
  2. Where the Debt Is Unliquidated, 338.
  3. Prepayment of Part of a Claim, 339.
- C. Acceptance of a Medium of Payment Different from That Promised, 339.

**IX. Receipt, 339.**

**X. Application of Payments, 339.**

- A. To What Debts Payments Are Applied, 339.
  1. Application by the Parties, 339.
    - a. In the Absence of Contract, 339.
    - b. Application by Contract, 341.
  2. In Absence of Application by the Parties, 341.
- B. Application to Discharge of Principal or Interest, 342.
  1. General Rule, 342.
  2. Application of Sum Paid into Court Where a Decree Is Rendered for a Greater Amount, 342.
  3. Interest Paid before It Is Due, 342.

**XI. Evidence of Payment, 342.**

- A. Presumptions and Burden of Proof, 342.
  1. Presumption That Everything Has Been Paid Which Ought Not to Be Paid, 342.
  2. Presumption Arising from a Receipt, 342.
  3. Presumption Arising from Acknowledgment of Payment, 342.
  4. Presumption Where a Promissory Note Is Given, 343.
  5. Presumption Arising from Lapse of Time, 343.
- B. Admissibility or Competency of Evidence, 343.

**XII. Effect of Part Payment of a Claim against the United States, 344.**

**XIII. Recovery of Payments, 344.**

- A. Doctrine as to Voluntary and Compulsory Payments, 344.
- B. Payments under Mistake of Law, 346.
- C. Payments under Mistake of Facts, 346.
  1. Rule Stated, 346.
  2. Mistake in Estimate of Value Where Contract Is Speculative, 347.
  3. Effect of Negligence or Breach of Duty, 347.
- D. Payments Procured through Imposition or Deceit, 347.
- E. Payments upon a Consideration Which Fails, 347.

1. In General, 347.
2. Payments under a Contract Which Is Subsequently Rescinded, 347.
- F. Payments under a Contract Procured Through Fraud, 347.
- G. Payments under an Illegal Contract, 348.
  1. In General, 348.
  2. Payments of Usurious Interest, 348.
- H. Payments of Void or Illegal Taxes or Assessments, 348.
  1. Money Paid by the United States under an Unauthorized Certificate, 349.
- J. Payments by or to Public Officers, 349.
- K. Payment in Currency That Has Been Embezzled, 349.

#### **XIV. Pleading, 349.**

- A. Plea of Payment, 349.
  1. When Proper, 349.
  2. What Must Be Averred, 349.
- B. Demurrer to Plea of Payment, 349.

#### **CROSS REFERENCES.**

See the titles ACCORD AND SATISFACTION, vol. 1, p. 69; AMBASSADORS AND CONSULS, vol. 1, p. 273; APPEAL AND ERROR, vol. 1, p. 333; ARMY AND NAVY, vol. 2, p. 494; ASSIGNMENTS, vol. 2, p. 549; ASSUMPSIT, vol. 2, p. 636; ATTACHMENT AND GARNISHMENT, vol. 2, p. 660; ATTORNEY AND CLIENT, vol. 2, p. 703; BANKS AND BANKING, vol. 3, p. 1; BILLS, NOTES AND CHECKS, vol. 3, p. 257; BONDS, vol. 3, p. 382; COMPROMISE AND SETTLEMENT, vol. 3, p. 980; CONTRACTS, vol. 4, p. 552; CONTRIBUTION AND EXONERATION, vol. 4, p. 595; COUPONS, vol. 4, p. 846; COURTS, vol. 4, p. 861; DURESS, vol. 5, p. 682; EVIDENCE, vol. 5, p. 1004; EXECUTIONS, vol. 6, p. 84; EXECUTORS AND ADMINISTRATORS, vol. 6, p. 119; FRAUD AND DECEIT, vol. 6, p. 394; GUARDIAN AND WARD, vol. 6, p. 599; ILLEGAL CONTRACTS, vol. 6, p. 737; IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 758; IMPLIED CONTRACTS, vol. 6, p. 888; INSURANCE, vol. 7, p. 66; INTEREST, vol. 7, p. 217; INTERNATIONAL LAW, vol. 7, p. 239; JUDGMENTS AND DECREES, vol. 7, p. 544; LACHES, vol. 7, p. 790; LIENS, vol. 1, p. 890; LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, p. 900; LOANS, vol. 7, p. 1056; MARITIME LIENS, vol. 8, p. 218; MECHANICS' LIENS, vol. 8, p. 328; MISTAKE AND ACCIDENT, vol. 8, p. 417; MORTGAGES AND DEEDS OF TRUST, vol. 8, p. 452; MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES, vol. 8, p. 650; PAROL EVIDENCE, ante, p. 12; PARTNERSHIP, ante, p. 73; PATENTS, ante, p. 136; POSTAL LAWS; PRESUMPTIONS AND BURDEN OF PROOF; PRINCIPAL AND AGENT; PRINCIPAL AND SURETY; PUBLIC LANDS; PUBLIC OFFICERS; RECEIPTS; REVENUE LAWS; SALES; SET-OFF, RECOURPMENT AND COUNTERCLAIM; SHERIFFS AND CONSTABLES; SPECIAL ASSESSMENTS; SPECIFIC PERFORMANCE; STOCK AND STOCKHOLDERS; TAXATION; TENDER; TRUSTS AND TRUSTEES; UNITED STATES; UNITED STATES MARSHALS; USURY; VENDOR AND PURCHASER; WAR.

#### **I. Definition.**

Payment implies a debt from him who pays to him who is to receive, and that when the payment is complete the debt will be discharged.<sup>1</sup> On principle, nothing can be payment in fact except what is in truth such, unless specially agreed to be taken as its equivalent.<sup>2</sup>

#### **II. To Whom Payment May Be Made.**

**A. In General.**—Debts can only be satisfied when paid to the creditors to whom they are due, or to persons legally authorized to receive payment.<sup>3</sup>

1. What payment implies.—Tennessee Bond Cases, 114 U. S. 663, 687, 29 L. Ed. 281.

2. There is no equivalent for payment, except by special agreement.—The Emily Souder, 17 Wall. 666, 670, 21 L. Ed. 683.

3. To whom payment may be made.—Williams & Bruffy, 96 U. S. 176, 187, 24 L. Ed. 716.

Coerced payment to an unlawful combination.—"Debtors cannot claim release



**B. Agents and Attorneys.**<sup>4</sup>—Payment may be made to an agent or attorney having authority to receive it.<sup>5</sup> But the death of the principal operates as a revocation of the agent's authority to receive payment for him.<sup>6</sup>

**C. Executors and Administrators.**—As to the authority of an executor or administrator to receive payment of a debt due his testator or intestate, see the title EXECUTORS AND ADMINISTRATORS, vol. 6, p. 119.

**D. Guardians.**—As to the authority of a guardian to receive payment of a debt due the ward, see the title GUARDIAN AND WARD, vol. 6, p. 599.<sup>7</sup>

**E. Sheriffs and Constables and United States Marshals.**—See the titles EXECUTIONS, vol. 6, p. 84; SHERIFFS AND CONSTABLES; UNITED STATES MARSHALS.

**F. A Conquering State.**—It would seem that a conquering state, after the conquest has subsided into government, may exact payment from the state

from liability to their creditors by reason of the coerced payment of equivalent sums to an unlawful combination." *Williams v. Bruffy*, 96 U. S. 176, 187, 24 L. Ed. 716.

4. Generally, as to the authority of agents, see the title PRINCIPAL AND AGENT. As to the authority of banks to receive payment of negotiable paper deposited for collection, see the title BANKS AND BANKING, vol. 3, p. 47. As to the medium in which an agent may receive payment, see post, "Medium in Which Agents, Attorneys, Executors and Trustees May Receive Payment," VI, N.

5. Payment may be made to an authorized agent or attorney.—*Case Mfg. Co. v. Soxman*, 138 U. S. 431, 439, 34 L. Ed. 1019; *Bailey v. United States*, 109 U. S. 432, 27 L. Ed. 988; *Potter v. United States*, 107 U. S. 126, 27 L. Ed. 330.

The acting financial manager of a corporation is authorized to receive payment for the corporation. *Case Mfg. Co. v. Soxman*, 138 U. S. 431, 439, 34 L. Ed. 1019.

If a public officer sees fit to allow the money of the government to be paid during his absence from his office into the hands of his agent or servant, it is a good payment to him, and the risk is with him and his sureties and not with the government. *Potter v. United States*, 107 U. S. 126, 27 L. Ed. 330.

Payment of a claim against the United States to an attorney in fact, constituted such by power of attorney executed by the claimants before the allowance of their claim by congress or by the proper department, is good as between the government and such claimants, where the power of attorney has not been revoked at the time payment is made; notwithstanding the provisions of the Act of July 29, 1846, entitled "An Act in Relation to the Payment of Claims," and the act of February 26, 1853, entitled "An Act to Prevent Frauds upon the Treasury of the United States." 9 Stat. at L., 41, and 10 *Ib.*, 170. *Bailey v. United States*, 109 U. S. 432, 27 L. Ed. 988.

Payment made upon terms not within agent's power.—Where a vendor gave a power of attorney to an agent to receive a payment from the purchasers on ac-

count, and the agent gave a receipt in full for certain balances by way of adjustment, and compromise, and the vendor disapproved of the acts of the agent, it was held that the payment was not good, even on account, against the vendor. The purchasers, by making a payment in this way, upon certain terms which were not within the power of attorney, constituted the agent their agent. For two years afterwards, they insisted upon the binding force of the acts of the agent to the extent to which he had given releases, and only claimed the payment to be on account when the agent became insolvent. It was held that it was then too late. *Curtis v. Innerarity*, 6 How. 146, 12 L. Ed. 380.

6. Death of principal revokes agent's authority.—*Long v. Thayer*, 150 U. S. 520, 37 L. Ed. 1167.

A payment to the agent after the death of the principal will not discharge the obligation to the principal's estate, even though it be made in ignorance of the death of the principal. *Long v. Thayer*, 150 U. S. 520, 522, 37 L. Ed. 1167.

Where a sale is made by one through an agent, payment to be made by installments, and the principal dies and the purchaser makes the payment at the stipulated times to the agent until the entire sum is paid and then learns of the principal's death, the payments made to the agent will not discharge the purchaser's obligation to the estate of the seller, even if such payments were made in ignorance of the seller's death. *Long v. Thayer*, 150 U. S. 520, 37 L. Ed. 1167.

Effect of death of a joint owner on authority of agent of joint owners.—The weight of authority supports the rule that the death of one joint owner operates to sever the joint interest, and that the authority of an agent appointed by the joint owners and authorized to receive payment for them thereupon ceases, where such authority is not coupled with an interest. But that this is the correct rule admits of some doubt. *Long v. Thayer*, 150 U. S. 520, 522, 37 L. Ed. 1167.

7. Payment by United States in District of Columbia to tutrix appointed in

debtors of the conquered power, and that payments to the conqueror discharge the debt, so that when the former government returns, the debtor is not compellable to pay again. But the principle has no applicability to debts not due to the conquered state. The conquering state does not succeed to the rights of a private creditor, and compulsory payments to it by a private debtor will not extinguish the claims of the original creditor.<sup>8</sup>

**G. Effect of Assignment by Creditor.**—See the title *ASSIGNMENTS*, vol. 2, pp. 582, 585.

### III. Who May Make Payment.

**A solvent man** may at any time pay his just debts not attached by lawful process.<sup>9</sup>

**Unauthorized Payments by Government Officers.**—As a general rule, the government cannot be bound by the action of its officers, where by misconstruction of the law under which they have assumed to act, unauthorized payments are made.<sup>10</sup>

### IV. Place of Payment.

**A. In Absence of Stipulation.**—A personal obligation where the place of payment is not stipulated is due at the domicile of the obligee. It is the duty of the debtor to seek the creditor, and pay him his debt at his place of residence.<sup>11</sup>

**B. Under Contract to Pay at a Particular Place.**—Place for the payment of money is a substantial part of any contract to pay it there. It can be insisted upon by him who is to receive it, and cannot be rightfully refused or

**Louisiana.**—A payment by the United States in the District of Columbia of a debt due by it to certain minor children, to their tutrix appointed under the laws of Louisiana, is a valid payment. *Taylor v. Bemiss*, 110 U. S. 42, 45, 28 L. Ed. 64.

**8. What debts may be paid to a conquering state.**—*Planters' Bank v. Union Bank*, 16 Wall. 483, 497, 21 L. Ed. 473.

On the 17th of August, 1863, when the city of New Orleans was in quiet possession of the United States forces, and after a proclamation had been issued by the general in command that all rights of property of whatever kind would be held inviolate, subject only to the laws of the United States, which was only a reiteration of the rules established by the legislative and executive action of the national government in respect to the portions of the states in insurrection occupied and controlled by the troops of the Union, General Banks, of the federal army, issued an order requiring the several banks of New Orleans to pay over to the chief quartermaster of the army, or to such officer of his department as he might designate, all money in their possession belonging to or standing upon their books to the credit of any corporation or association in hostility to the United States, and declaring that such funds would be held and accounted for by the quartermaster's department subject to the future adjudication of the government of the United States. Under this order the Union Bank paid to the acting quartermaster the balance standing to the credit of the Planter's Bank on their books, and the quartermaster accepted such payment in discharge of such balance. It was held that the order was without authority and

wholly invalid, and the payment to the quartermaster did not satisfy the debt due by the Union Bank to the Planter's Bank. *Planter's Bank v. Union Bank*, 16 Wall. 483, 21 L. Ed. 473.

**9. Right of solvent man to pay unattached debts.**—*Simpson & Co. v. Dall*, 3 Wall. 460, 18 L. Ed. 265.

Where a solvent firm owing bona fide a debt, learns—though by irregular and perhaps improper means on the part of one of their number—that the debt is about to be attached by a creditor of the person to whom they owe it, they may nevertheless pay the debt as soon as they please and in such securities, including their own negotiable note, as their creditor is willing to accept; and if the debt is actually paid, and so acknowledged by their creditor to be, the creditor of such creditor cannot make them pay it over again to him; though his attachment may thus have been provokingly defeated. Neither is there anything in the laws of Tennessee relating to the attachment of debts due by nonresidents that militates with this doctrine that a solvent man may at any time pay his just debt not attached by lawful process. *Simpson & Co. v. Dall*, 3 Wall. 460, 18 L. Ed. 265. See the titles *ATTACHMENT AND GARNISHMENT*, vol. 2, p. 660; *FRAUDULENT AND VOLUNTARY CONVEYANCES*, vol. 6, p. 475.

**10. Unauthorized payments by government officers.**—*Wisconsin Cent. R. Co. v. United States*, 164 U. S. 190, 210, 41 L. Ed. 399.

**11. Place of payment in absence of stipulation.**—*Chemung Canal Bank v. Lowery*, 93 U. S. 72, 77, 23 L. Ed. 806.

omitted by him who has it to pay. A breach of the promise gives to the creditor a right of action against the debtor.<sup>12</sup> The designation of a bank as the place of payment of a bond, imports a stipulation that its holder will have it at the bank when due to receive payment, and that the obligor will produce there the funds to pay it.<sup>13</sup>

### V. Time of Payment.

**A. In General.**—One who is solvent may at any time pay a just debt not attached by lawful process.<sup>14</sup> When no specific time for the payment of money is fixed, in judgment of law, it is payable on demand.<sup>15</sup> But when the time of payment is made a substantial and not a mere formal circumstance, it enters into the essence of the contract, and must be observed.<sup>16</sup> In such case a failure to pay at the date specified will not be relieved against in equity.<sup>17</sup>

**B. Where Time of Payment Is Made Conditional.**—A promise to pay as soon as a certain crop "can be sold or the money raised from any other source," is a promise to pay upon the occurrence of either of the events, or after the lapse of a reasonable amount of time within which to procure, in one mode or the other, the means necessary to meet the liability.<sup>18</sup> The question of what is a reasonable time, if there is no evidence in the case but the written promise itself, is a question for the court. Five years and more is much more than a reasonable time.<sup>19</sup>

**C. Under Contract to Pay Distinct Sums at Different Periods.**—Under a contract for the payment of distinct sums of money, at different periods, an action lies for each sum, as it becomes due, and when the sum is paid, the debtor or contractor is forever discharged from the contract to pay it.<sup>20</sup>

**D. Waiver of Stipulated Damages for Failure to Pay at Time Agreed.**—Where a debt is payable at a time specified, and the debtor promises that upon failure to pay at that time, he will pay in addition specified damages, the creditor may waive the right to demand such damages.<sup>21</sup>

**12. Place of payment a substantial part of contract.**—*Raymond v. Tyson*, 17 How. 53, 64, 15 L. Ed. 47.

**Contract construed.**—Contract for the payment of money held to require payment in Philadelphia in the event of non-payment in Amsterdam on a date specified. *United States v. Gurney*, 4 Cranch 333, 343, 2 L. Ed. 638.

**13. Designation of bank as place of payment of bond.**—*Ward v. Smith*, 7 Wall. 447, 19 L. Ed. 207. See the title BONDS, vol. 3, p. 421.

**14. Debt not attached by lawful process may be paid at any time.**—*Simpson & Co. v. Dall*, 3 Wall. 460, 476, 18 L. Ed. 265.

Where a solvent firm owing bona fide a debt, learns—though by irregular and perhaps improper means on the part of one of their number—that the debt is about to be attached by a creditor of the person to whom they owe it, they may nevertheless pay the debt as soon as they please and in such securities, including their own negotiable note, as their creditor is willing to accept; and if the debt is actually paid, and so acknowledged by their creditor to be, the creditor of such creditor cannot make them pay it over again to him; though his attachment may thus have been provokingly defeated. Neither is there anything in the laws of Tennessee relating to the attachment of debts due by nonresidents that militates with this doctrine that a solvent man may at

any time pay his just debts not attached by lawful process. *Simpson & Co. v. Dall*, 3 Wall. 460, 461, 18 L. Ed. 265.

**15. Debt payable on demand where time not stipulated.**—*Bank v. Hagner*, 1 Pet. 455, 7 L. Ed. 219.

**16. When time of payment is made a substantial circumstance it must be observed.**—*Hollingsworth v. Fry*, 4 Dall. 345, 1 L. Ed. 860.

**17. Hollingsworth v. Fry, 4 Dall. 345, 1 L. Ed. 860.**

**18. Time of payment conditional.**—*Nunez v. Dautel*, 19 Wall. 560, 22 L. Ed. 161.

Such a promise does not mean that if the crop should be destroyed or could never be sold, and the parties promising could not procure the money from any other source, the debt should never be paid. *Nunez v. Dautel*, 19 Wall. 560, 22 L. Ed. 161.

**19. Nunez v. Dautel, 19 Wall. 560, 22 L. Ed. 161.**

**20. Promise to pay distinct sums at different periods.**—*Faw v. Marsteller*, 2 Cranch 10, 24, 2 L. Ed. 191.

**21. Waiver of stipulated damages for failure to pay at time agreed.**—*United States v. Gurney*, 4 Cranch 333, 345, 2 L. Ed. 638.

B., in Philadelphia, agreed to pay A.'s agent 170,000 guilders in Amsterdam, on the 1st of March; and if he should fail so to do, then to pay to A. the value of said



## VI. Manner and Medium of Payment.

**A. In General.**—The general rule, under both the common and the civil law, is that in the absence of a stipulation to the contrary, the character of money which is current at the time fixed for performance of a contract is the medium in which payments may be made.<sup>22</sup> In this country all debts not solvable by their terms in something else are *prima facie* payable in legal tender money, as ascertained by the acts of congress. And this is true whether the contract be express or implied, and whether it existed in parol, or in a promissory note, or in a judgment.<sup>23</sup>

**B. Payment in Coin.**—One owing a debt may pay it in gold coin, unless there is something to the contrary in the obligation out of which the debt arises.<sup>24</sup> Coin is the only legal tender for debts less than one dollar.<sup>25</sup>

**Act of Congress Withdrawing from Circulation Porto Rican Coins.**—The eleventh section of the act of congress of April 12, 1900, provided for the withdrawal of all coins in circulation in Porto Rico, and for the payment of all existing debts at the rate of sixty cents in coins of the United States for one peso. This statute did not impair or change the obligation of any contract. The withdrawal did not take legal effect so far as concerned debts then existing, except upon the condition that such debts might be solved in the coins of the United States at the rate of exchange stated in the act.<sup>26</sup>

The question of the computation for customs purposes of the value of foreign coin, is treated under the title *REVENUE LAWS*.

As to contracts providing for payment in coin, see post, "Payment in 'Coin' or 'Bullion,'" VI, O, 5.

**C. Payment in United States Treasury Notes.**—The acts of congress known as the Legal Tender Acts, declaring treasury notes a legal tender, are constitutional as applied both to contracts made before their passage,<sup>27</sup> and to those

guilders, at the rate of exchange current in Philadelphia, at the time demand of payment was made, together with damages at twenty per cent, in the same manner as if bills of exchange had been drawn for the sum, and they had been returned protested for nonpayment. B. paid the 170,000 guilders, in Amsterdam, to the agent of A., on the 13th of May, instead of the 1st of March. It was held that the acceptance of the money in Amsterdam subsequent to the date specified for payment, and before a demand was made in Philadelphia, constituted a waiver of the right to demand the stipulated damages. *United States v. Gurney*, 4 Cranch 333, 345, 2 L. Ed. 638.

**22. Payment may be made in money current at time fixed for performance.**—*San Juan v. St. John's Gas Co.*, 195 U. S. 510, 520, 49 L. Ed. 299.

"A contract to pay a certain sum in money, without any stipulation as to the kind of money in which it shall be paid, may always be satisfied by payment of that sum in any currency which is lawful money at the place and time at which payment is to be made." *Legal Tender Cases*, 110 U. S. 421, 28 L. Ed. 204. See, also, *United States v. Robertson*, 5 Pet. 641, 659, 8 L. Ed. 257.

**23. Debts *prima facie* payable in legal tender money, as ascertained by act of congress.**—*Blount v. Windley*, 95 U. S. 173, 176, 24 L. Ed. 424; *Thompson v. Butler*, 95 U. S. 694, 696, 24 L. Ed. 540. But

see post, "Payment in Paper for Which the Creditor Is Responsible," VI, L.

**24. Payment in gold coin.**—*Thompson v. Butler*, 95 U. S. 694, 696, 24 L. Ed. 540.

**25. Coin only legal tender for debts less than one dollar.**—*Lane County v. Oregon*, 7 Wall. 71, 75, 19 L. Ed. 101.

**26. Act withdrawing coins in circulation in Porto Rico.**—*Serralles' Succession v. Esbri*, 200 U. S. 103, 117, 50 L. Ed. 391.

**27. Legal tender acts constitutional as applied to contracts made before their passage.**—*Legal Tender Cases*, 12 Wall. 457, 20 L. Ed. 287, overruling *Hepburn v. Griswold*, 8 Wall. 603, 19 L. Ed. 513; *Legal Tender Cases*, 110 U. S. 421, 28 L. Ed. 204; *Dooley v. Smith*, 13 Wall. 604, 606, 20 L. Ed. 547; *Railroad Co. v. Johnson*, 15 Wall. 195, 21 L. Ed. 178; *Bigler v. Waller*, 14 Wall. 297, 298, 20 L. Ed. 891.

"Every contract for the payment of money, simply, is necessarily subject to the constitutional power of the government over the currency, whatever that power may be, and the obligation of the parties is, therefore, assumed with reference to that power." *Legal Tender Cases*, 12 Wall. 457, 549, 20 L. Ed. 287; *Legal Tender Cases*, 110 U. S. 421, 449, 28 L. Ed. 204.

**Acts of 1862 and 1863 applicable to debts contracted before their enactment.**—Construed by the plain import of their terms and the manifest intent of the legislature, the statutes of 1862 and 1863, which make United States notes a legal

made since,<sup>28</sup> and under them contracts to pay money generally, as distinguished from contracts to pay some specially defined species of money, or obligations payable in commodities or things other than money,<sup>29</sup> may be fulfilled by the payment of treasury notes, without reference to the time when such contracts were made.<sup>30</sup> But the Legal Tender Acts do not apply to involuntary contributions exacted by a state, but only to debts, in the strict sense of that term, that is, to obligations for the payment of money founded on contracts, express or implied, including judgments and recognizances.<sup>31</sup>

**D. Payment in Bank Notes.**—A debtor cannot discharge his debt in bank notes if the creditor is under no contractual obligation to receive such notes in

tender in payment of debts, apply to debts contracted before as well as to debts contracted after their enactment. *Hepburn v. Griswold*, 8 Wall. 603, 19 L. Ed. 513.

**28. Legal tender acts constitutional as applied to contracts made since their passage.**—*Legal Tender Cases*, 12 Wall. 457, 20 L. Ed. 287; *Legal Tender Cases*, 110 U. S. 421, 28 L. Ed. 204; *Dooley v. Smith*, 13 Wall. 604, 606, 20 L. Ed. 547.

**Power of congress not confined to time of war.**—Congress has the constitutional power to make the treasury notes of the United States a legal tender in payment of private debts, in time of peace as well as in time of war. *Legal Tender Cases*, 110 U. S. 421, 28 L. Ed. 204.

**Reasons for holding acts constitutional —Question of exigency to be determined by congress.**—"Congress as the legislature of a sovereign nation, being expressly empowered by the constitution to lay and collect taxes, to pay the debts and provide for the common defense and general welfare of the United States, and to borrow money on the credit of the United States, and to coin money and regulate the value thereof and of foreign coin; and being clearly authorized, as incidental to the exercise of those great powers, to emit bills of credit, to charter national banks and to provide a national currency for the whole people, in the form of coin, treasury notes and national bank bills; and the power to make the notes of the government a legal tender in payment of private debts being one of the powers belonging to sovereignty in other civilized nations, and not expressly withheld from congress by the constitution; we are irresistibly impelled to the conclusion that the impressing upon the treasury notes of the United States the quality of being a legal tender in payment of private debts is an appropriate means, conducive and plainly adapted to the execution of the undoubted powers of congress, consistent with the letter and spirit of the constitution and, therefore, within the meaning of that instrument, 'necessary and proper for carrying into execution the powers vested by this constitution in the government of the United States.' Such being our conclusion in matter of law, the question whether at any particular time, in war or in peace, the exigency is such, by reason of unusual and pressing demands on the resources of the government, or of the

inadequacy of the supply of gold and silver coin to furnish the currency needed for the uses of the government and of the people, that it is, as matter of fact, wise and expedient to resort to this means, is a political question to be determined by congress when the question of exigency arises, and not a judicial question, to be afterwards passed upon by the courts." *Gray, J.*, in delivering the opinion of the court in *Legal Tender Cases*, 110 U. S. 421, 28 L. Ed. 204.

**29.** See post, "Contracts Relating to Manner and Medium of Payment," VI, O.

**30. Contracts to pay money generally may be fulfilled by payment of treasury notes.**—*Legal Tender Cases*, 12 Wall. 457, 20 L. Ed. 287; *Bissell v. Heyward*, 96 U. S. 580, 587, 24 L. Ed. 678; *Dooley v. Smith*, 13 Wall. 604, 606, 20 L. Ed. 547; *Thompson v. Butler*, 95 U. S. 694, 696, 24 L. Ed. 540; *Trebilcock v. Wilson*, 12 Wall. 687, 20 L. Ed. 460. See, also, *Cheang-Kee v. United States*, 3 Wall. 320, 18 L. Ed. 72.

**Reissued treasury notes a legal tender.**—Under the Act of May 31, 1878, ch. 146, which enacts that notes of the United States, issued during the war of the rebellion under acts of congress declaring them to be a legal tender in payment of private debts, and since the close of that war redeemed and paid in gold coin at the treasury, shall be re-issued and kept in circulation, notes so re-issued are a legal tender. *Legal Tender Cases*, 110 U. S. 421, 28 L. Ed. 204.

**31. Legal tender acts apply to obligations founded on contracts.**—*Hagar v. Reclamation District*, No. 108, 111 U. S. 701, 706, 28 L. Ed. 569; *Lane County v. Oregon*, 7 Wall. 71, 19 L. Ed. 101. See the title **TAXATION**.

**"Assessments upon property for local improvements are involuntary exactions, and in that respect stand on the same footing with ordinary taxes."** *Hagar v. Reclamation District*, No. 108, 111 U. S. 701, 707, 28 L. Ed. 569. See the title **SPECIAL ASSESSMENTS**.

**Treasury notes not a legal tender for customs duties.**—The legal tender acts do not make treasury notes a legal tender for customs duties. *Cheang-Kee v. United States*, 3 Wall. 320, 18 L. Ed. 72. See the title **REVENUE LAWS**.

**As to the jurisdiction of the supreme court of the United States to review the decisions of state courts upon questions**

payment.<sup>32</sup> But bank notes constitutes a part of the common currency of the country, and ordinarily pass as money;<sup>33</sup> and if the debtor pays such notes, and they are received by the creditor in discharge of the contract, the payment is valid.<sup>34</sup> They are a good tender as money, unless specially objected to.<sup>35</sup> But this doctrine only applies to current notes, which are redeemed at the counter of the bank on presentation, and pass at par value in business transactions at the place where offered.<sup>36</sup> Notes not thus current at their par value, nor redeemable on presentation, are not a good tender whether they are objected to at the time or not.<sup>37</sup>

**E. Payment in State Treasury Warrants.**—Where state treasury warrants are issued in violation of the constitution in payment of debts due from the state, the subsequent receipt of such warrants by state officers, pursuant to legislative authority, in payment of an indebtedness due the state from the individual paying them, constitutes a payment of the indebtedness; and this though such individual is not the original holder, but is a transferee of such warrants.<sup>38</sup>

**F. Payment in Continental Money.**—In Pennsylvania, a partial payment, made in 1778, in continental money, under a contract made on the 7th day of May, 1776, was discharged pro tanto, and could not be scaled under the depreciation act.<sup>39</sup>

**G. Payment in Confederate Money.**—The so-called Confederate government was in no sense a lawful government, but was a mere government of force, having its origin and foundation in rebellion against the United States, and notes issued in its name and for its support had no legal value as money except by agreement or acceptance of parties capable of contracting with each other.<sup>40</sup>

raised under the Legal Tender Acts, see the title APPEAL AND ERROR, vol. 1, p. 697.

**32. Bank notes.**—Gwin *v.* Breedlove, 2 How. 29, 38, 11 L. Ed. 167; Griffin *v.* Thompson, 2 How. 244, 256, 11 L. Ed. 253. See post, "Payment in Paper for Which the Creditor Is Responsible," VI, L; "Payment in the Paper of a Bank," VI, O, 8.

**33. United States Bank *v.* Bank,** 10 Wheat. 333, 347, 6 L. Ed. 334.

**34. Gwin *v.* Breedlove,** 2 How. 29, 38, 11 L. Ed. 167; Griffin *v.* Thompson, 2 How. 244, 256, 11 L. Ed. 253.

**35. United States Bank *v.* Bank,** 10 Wheat. 333, 347, 6 L. Ed. 334.

Bank notes are not, like bills of exchange, considered as mere securities or documents for debts. United States Bank *v.* Bank, 10 Wheat. 333, 347, 6 L. Ed. 334.

**36. Ward *v.* Smith,** 7 Wall. 447, 451, 19 L. Ed. 207.

**37. Ward *v.* Smith,** 7 Wall. 447, 451, 19 L. Ed. 207.

**38. State treasury warrants.**—Houston, etc., *R. Co. v. Texas*, 177 U. S. 66, 90, 44 L. Ed. 673.

**39. Payment in continental money in Pennsylvania.**—Miller *v.* Leonard, 2 Dall. 237, 1 L. Ed. 363.

**40. Confederate notes had no legal value as money.**—Lamar *v.* Micou, 112 U. S. 452, 476, 28 L. Ed. 751. See post, "Medium in Which Agents, Attorneys, Executors and Trustees May Receive Payment," VI, N; "Payment in Confederate Currency," VI, O, 13.

**Mississippi cotton notes not receivable**

**after the war in payment of taxes.**—After the late rebellion in the Southern States had broken out into war, and the government had blockaded all the southern ports so as to prevent the shipment of the staples of the south, including especially cotton, from them, the legislature of Mississippi passed (December 19th, 1861), an act authorizing the issue of \$5,000,000 in what were called cotton notes; negotiable notes in a form suitable for currency, to be issued by the state in sums of \$1, \$2, \$3, \$5, \$10, \$20, and \$1,000. Owners of cotton were to hold it pledged to the government, which thereupon gave them an advance on it in these notes; it being agreed on both sides that after the removal of the blockade, and on a proclamation made to that effect, the cotton should be delivered by the owners, at some seaport or city to be named, and sold; the proceeds of sale to be paid into the treasury of the state, and if sufficient, to be applied to redeeming the notes; and if insufficient the owner of the cotton was to make the deficit good to the state. The notes were made, by the act, receivable in payment of all taxes due or to become due to the state, or to any county, or school fund, or municipal corporation, except a military tax then laid and confessedly in aid of the rebellion; and when received for taxes might be again paid out by the state treasurer upon any warrant of the auditor drawn upon the general treasury. It was held that notwithstanding the exception as to the "military tax," the notes were to be regarded as issued in aid of the rebellion and were



But one might by the operation of the doctrine of estoppel be precluded from questioning the validity of a payment in Confederate money made during the war, or by his laches forfeit the right to invoke the aid of a court of equity in his behalf.<sup>41</sup>

**H. Payment in Counterfeit Money or Canceled Treasury Notes.**—An attempted payment in counterfeit money or canceled treasury notes, as cash, is in law no payment.<sup>42</sup>

**I. Payment in Bills, Notes or Checks**—1. **BILLS OF EXCHANGE AND PROMISSORY NOTES.**—A bill of exchange or promissory note given for a precedent debt does not extinguish the debt or operate as payment of the same<sup>43</sup> in the absence of a local usage giving it that effect,<sup>44</sup> unless it is expressly agreed that it is received as payment,<sup>45</sup> or there is clear and satisfactory evidence which leaves no reasonable doubt that such was the intention of the parties.<sup>46</sup> A prom-

therefore void. And that on the rebellion being suppressed the notes—withstanding the provision in the original act about their receivability for taxes—were not receivable in payment of taxes which the reorganized state government directed to be paid in currency of the United States. *Taylor v. Thomas*, 22 Wall. 479, 22 L. Ed. 789.

**41. Estoppel to question validity of payment—Laches.**—*Glasgow v. Lipse*, 117 U. S. 327, 29 L. Ed. 901; *Washington v. Opie*, 145 U. S. 214, 36 L. Ed. 580. See the titles **ESTOPPEL**, vol. 5, p. 913; **LACHES**, vol. 7, p. 790.

Bonds secured by a mortgage, were given for the purchase price of land in Virginia, and payments of such bonds were made to the personal representative of the mortgagee who had died, in Confederate notes and Virginia bank notes during the Civil War. The transactions were in good faith, and were known by the deceased's children for such a length of time, as to establish acquiescence upon their part, in what was done by the personal representative. It was held that these facts precluded any interference in the children's behalf by a court of equity. *Washington v. Opie*, 145 U. S. 214, 36 L. Ed. 580.

Where a bond made in 1860 and payable in lawful money was paid in Confederate notes to an executor resident in Virginia during the Civil War, and such notes were received by the executor at the request of the legatees who willingly received the same upon distribution, it was held that such legatees were estopped to question the validity of the payment. *Glasgow v. Lipse*, 117 U. S. 327, 29 L. Ed. 901.

**42. Attempted payment in counterfeit money or converted treasury notes.**—*United States v. Morgan*, 11 How. 154, 159, 13 L. Ed. 613.

**43. Bills or notes not payment of debts for which they are given.**—*The Bird of Paradise*, 5 Wall. 545, 561, 18 L. Ed. 662; *Peter v. Beverly*, 10 Pet. 532, 568, 9 L. Ed. 522; *The Emily Souder*, 17 Wall. 666, 670, 21 L. Ed. 683; *Segrist v. Crabtree*, 131 U. S. 287, 289, 33 L. Ed. 125; *Embrey v. Jemison*, 131 U. S. 336, 347, 33 L. Ed. 172; *Sheehy v. Mandeville*, 6 Cranch 253, 264,

3 L. Ed. 215; *The Kimball*, 3 Wall. 37, 18 L. Ed. 50; *Downey v. Hicks*, 14 How. 240, 249, 14 L. Ed. 404; *United States Bank v. Daniel*, 12 Pet. 32, 33, 9 L. Ed. 989.

**Creditor stands on footing of an agent until bill is paid.**—"Where a bill of exchange is not paid and received in satisfaction of a debt, due from a merchant to his correspondent, it goes at the risk of the debtor; and the creditor who remits it for acceptance and payment, stands on the footing of an agent only, until the bill is actually paid." *Keppele v. Carr*, 4 Dall. 155, 157, 1 L. Ed. 780.

**Renewal notes given by executors to banks holding testator's note.**—Where a testator was indebted to certain banks and had given notes for the amount of the indebtedness, the substitution of the notes of his executors by way of renewal, and to comply with the rules of the banks, and thus continue the debts, by the indulgence of the banks, until the executors should be able to make sales for the payment of them, without any intention or understanding of any of the parties that the substituted notes were offered as payment of the debts, does not constitute a payment which will extinguish the original indebtedness. *Peter v. Beverly*, 10 Pet. 532, 567, 9 L. Ed. 522.

**44. Local usage making bills and notes payment.**—*The Emily Souder*, 17 Wall. 666, 670, 21 L. Ed. 683.

**45. Bill or note received as payment by express agreement.**—*The Bird of Paradise*, 5 Wall. 545, 561, 18 L. Ed. 662; *Peter v. Beverly*, 10 Pet. 532, 568, 9 L. Ed. 522; *The Emily Souder*, 17 Wall. 666, 670, 21 L. Ed. 683; *Embrey v. Jemison*, 131 U. S. 336, 347, 33 L. Ed. 172; *Sheehy v. Mandeville*, 6 Cranch 253, 264, 3 L. Ed. 215; *Segrist v. Crabtree*, 131 U. S. 287, 289, 33 L. Ed. 125; *The Kimball*, 3 Wall. 37, 18 L. Ed. 50; *Downey v. Hicks*, 14 How. 240, 249, 14 L. Ed. 404; *United States Bank v. Daniel*, 12 Pet. 32, 33, 9 L. Ed. 989.

**46. Evidence of intention of parties to receive bill or note as payment.**—*Peter v. Beverly*, 10 Pet. 532, 568, 9 L. Ed. 522; *Segrist v. Crabtree*, 131 U. S. 287, 289, 33 L. Ed. 125.

issory note only operates to extend until its maturity the period for the payment of the debt.<sup>47</sup> The creditor may return the note when dishonored, and proceed upon the original debt. The acceptance of the note is considered as accompanied with the condition of its payment.<sup>48</sup> But an action cannot be maintained on an original contract by a person who has received a note as conditional payment, if, instead of returning the note, he has endorsed it to a third person.<sup>49</sup>

**Presumption of Payment from Acceptance of Note.**—See post, "Presumption Where a Promissory Note Is Given," XI, A, 4.

2. **ACCEPTANCES OF BILLS OF EXCHANGE.**—Receiving an acceptance of a bill of exchange does not constitute payment of the debt for which such acceptance was given, in the absence of evidence, showing that it was received as payment.<sup>50</sup>

3. **CHECKS.**—In ordinary transactions, a check on a specie paying bank, payable on demand, is payment.<sup>51</sup>

**Election to receive bills in payment.**—Bills of exchange may be received in payment of a debt, if the creditor elects to so receive them. *Watts v. Willing*, 2 Dall. 100, 101, 1 L. Ed. 306.

Certain bills of exchange were delivered to a creditor, to be credited as part payment of a bond when paid. They were protested for nonpayment, and the holder who had never returned them or offered to do so, rendered an account, charging twenty per cent damages thereon. It was held that he had elected to receive them in payment and that a surety was discharged pro tanto. *Watts v. Willing*, 2 Dall. 100, 1 L. Ed. 306.

A. & B., being indebted to C. & Sons, foreign merchants, delivered a bill of exchange, drawn by one S., and indorsed by A. & B., to C., one of the firm of C. & Sons, but he refused to remit it on their account and risk. The bill was returned unpaid and protested, and then A. & B. tendered to C. the principal and interest of it, and demanded its restitution, with the protest, but he rejected this offer, saying that he would settle it with S. B. then told C. that they, A. & B., should consider the bill at the risk of C. & Sons, from that day. C. afterwards entered into an arrangement with S., and took his note for principal, damages and charges, but before the note became due, S. failed. C. & Sons sued A. & B., for the original consideration of the indorsement of the bill. It was held that the debt of A. & B., to C. & Sons was paid in law, by the conduct of the latter. *Keppele v. Carr*, 4 Dall. 155, 1 L. Ed. 780.

**Notes received in satisfaction of a judgment.**—Negotiable promissory notes paid on a judgment are equivalent to the payment of money, if received by the creditor in satisfaction of the judgment. *Hendrick v. Lindsay*, 93 U. S. 143, 149, 23 L. Ed. 855.

**As to contracts to receive promissory notes in payment of debts,** see post, "Payment in Promissory Notes," VI, O, 11.

47. **Note extends until its maturity period for payment of debt.**—The *Kimball*, 3 Wall. 37, 18 L. Ed. 50; *Segrist v. Crabtree*, 131 U. S. 287, 290, 33 L. Ed. 125.

48. **Acceptance of note accompanied with the condition of its payment.**—The *Kimball*, 3 Wall. 37, 18 L. Ed. 50; *Segrist v. Crabtree*, 131 U. S. 287, 290, 33 L. Ed. 125.

"The doctrine proceeds upon the obvious ground, that nothing can be justly considered as payment in fact, but that which is in truth such, unless something else is expressly agreed to be received in its place." The *Kimball*, 3 Wall. 37, 45, 18 L. Ed. 50.

49. **Effect of indorsing note to third person.**—*Harris v. Johnston*, 3 Cranch 311, 2 L. Ed. 450.

So held in relation to an action on a contract for goods sold and delivered. *Harris v. Johnston*, 3 Cranch 311, 2 L. Ed. 450. Chief Justice Marshall, in delivering the opinion of the court in this case, said: "Upon principle, it would appear that such an action could not be maintained. The endorsement of the note passes the property in it to another, and is evidence that it was sold for a valuable consideration. If, after such endorsement, the seller of the goods could maintain an action on the original contract, he would receive double satisfaction." *Harris v. Johnston*, 3 Cranch 311, 318, 2 L. Ed. 450.

50. **Receiving acceptance of bill of exchange, not payment.**—The *Guy*, 9 Wall. 758, 759, 19 L. Ed. 710.

In the case of a vessel chartered from Liverpool to San Francisco, freight was to "be paid in Liverpool on unloading and right delivery of the cargo," at a rate fixed by the parties, one-fourth thereof to be paid "by charterer's acceptance, at six months from the final sailing of the vessel." It was held that the "charterer's acceptance at six months from the final sailing of the vessel" having been dishonored and he become bankrupt, it was no payment of the one-fourth agreed to be so paid for, and that the lien for that fourth was not displaced. The *Bird of Paradise*, 5 Wall. 545, 18 L. Ed. 662. See the title *MARITIME LIENS*, vol. 8, p. 218.

51. **Check on specie paying bank, payable on demand, payment.**—*Downey v. Hlicks*, 14 How. 240, 249, 14 L. Ed. 404.

**As to deposit in bank of a forged check,** see the title **BANKS AND BANKING**, vol. 3, p. 25.

**J. Payment in Evidences of Debts Due the Debtor.**—Where a certificate of deposit in a bank, payable at a future day, is handed over by a debtor to his creditor, it does not constitute payment unless there is an express agreement on the part of the creditor, to receive it as such.<sup>52</sup>

**A debtor of the United States, who puts evidence of debts due to himself,** into the hands of a public officer of the United States, to collect and apply the money, when received, to the credit of such debtor, in account with the United States, is not entitled to such credit, until the money gets into the hands of a public officer of the United States, entitled to receive it.<sup>53</sup>

**K. Payment by Bond.**—In the absence of evidence that a bond given for a sum due was intended by the parties to be received in payment, the presumption arises that the bond was merely taken as collateral or supplementary security.<sup>54</sup>

**L. Payment in Paper for Which the Creditor Is Responsible.**—As has previously been stated, an obligation to pay money generally, is an obligation to pay in legal currency.<sup>55</sup> But where a person or body corporate is responsible for a paper, a debtor of such person or corporation may discharge his debt with that paper. But the right to so discharge it is an extraneous circumstance, and is terminated by a transfer of the debt.<sup>56</sup>

**M. Operation of the Principle of Set-Off.**—It is a principle of long standing in all systems of jurisprudence that one debt or obligation may be set off or counterbalanced against another, so that while the obligation of both is recognized both are satisfied in law and discharged without the payment of any money on either; and this is done by the courts without the consent of the party and against his will.<sup>57</sup>

**N. Medium in Which Agents, Attorneys, Executors and Trustees May Receive Payment.**—The power of a collecting agent by the general law is limited to receiving for the debt of his principal that which the law declares to be a legal tender, or which is by common consent considered and treated as money, and passes as such at par.<sup>58</sup> This rule also applies to attorneys, executors and trustees.<sup>59</sup> The only condition imposed upon the principal, if anything else is received by his agent, is, that he shall inform the debtor that he refuses to

**52. Certificate of deposit in a bank.**—Downey v. Hicks, 14 How. 240, 14 L. Ed. 404.

**53. Evidence of debts due debtor of United States.**—United States v. Patterson, 7 Cranch 575, 3 L. Ed. 444.

The money being in the hands of an agent of a person who, at the time when the claims were put into his hands for collection, was a public officer of the United States, entitled to receive debts due to the United States, but whose office became extinct, before the money was received by his agent, is not sufficient to entitle the debtor to a credit in account with the United States therefor. United States v. Patterson, 7 Cranch 575, 3 L. Ed. 444.

**54. Presumption is that a bond is taken merely as security.**—Hamilton v. Callender, 1 Dall. 420, 424, 1 L. Ed. 204.

**Bond not payment of interest due on mortgage.**—A. mortgaged lands to B., and after his death, his executors sold part of the mortgaged premises to C., who assumed payment of the principal and interest, and gave his bond to B., for the interest due. No receipt was given on the mortgage, for the amount of this bond,

and it did not appear that it was accepted by B. as satisfaction. It was held that the bond was not payment pro tanto, so as to discharge the executors of A. Hamilton v. Callender, 1 Dall. 420, 1 L. Ed. 204. See the title **MORTGAGES AND DEEDS OF TRUST**, vol. 8, p. 452.

**55. See ante, "In General," VI, A.**

**56. Payment in paper for which creditor is responsible.**—United States v. Robertson, 5 Pet. 641, 659, 8 L. Ed. 257.

**Notes of bank.**—Under a Maryland statute, act of Feb. 9th, 1819, a debt due to or judgment obtained by any bank in that state, could be paid in the notes of the bank. United States v. Robertson, 5 Pet. 641, 659, 8 L. Ed. 257. See ante, "Payment in Bank Notes," VI, D.

**57. Set-off.**—Blount v. Windley, 95 U. S. 173, 176, 24 L. Ed. 424. See the title **SET OFF, RECOURTMENT AND COUNTERCLAIM**.

**58. Medium in which collecting agent may receive payment.**—Ward v. Smith, 7 Wall. 447, 452, 19 L. Ed. 207.

**59. Medium in which attorneys, executors or trustees may receive payment.**—Fretz v. Stover, 22 Wall. 198, 22 L. Ed.



sanction the unauthorized transaction, within a reasonable period after it is brought to his knowledge.<sup>60</sup>

**O. Contracts Relating to Manner and Medium of Payment.**—1. IN GENERAL.—Where it is plain that a strict and literal construction of a contract relating to the manner or medium of payment of a debt, does not convey the real meaning of the parties, such construction is not to be entertained.<sup>61</sup>

2. PAYMENT IN "CURRENT MONEY."—The term "current money" is synonymous with "lawful money," and, therefore, an obligation to pay in current money must be liquidated in lawful currency.<sup>62</sup> But if there is a statute bearing on a contract to pay in current money, the contract must be construed in the light of the statute.<sup>63</sup> All the terms of the contract must be construed together to de-

769; *McBurney v. Carson*, 99 U. S. 567, 25 L. Ed. 378.

**Payment to agent during war in Confederate notes and Virginia bank notes.**—A citizen of Pennsylvania, just before the breaking out of the war, took the bond of a citizen of Virginia, secured by a deed of trust upon real estate. The attorney of the creditor was the trustee in the deed. During the war the attorney received payment in Confederate notes, and Virginia bank notes of no greater value, the entire capital of the bank having been converted into Confederate bonds. After the close of the war the creditor sued for his debt. It was held that the transaction between the attorney and the debtor was illegal, and void, and the enforcement of the bond and deed of trust was decreed. *Fretz v. Stover*, 22 Wall. 198, 22 L. Ed. 769. See ante, "Payment in Confederate Money," VI, G.

60. Principal must repudiate unauthorized transaction within reasonable time.—*Ward v. Smith*, 7 Wall. 447, 452, 19 L. Ed. 207.

61. Literal construction not entertained where real meaning of parties not conveyed.—*Serralles' Succession v. Esbri*, 200 U. S. 103, 113, 50 L. Ed. 391.

In 1894 a plantation in Porto Rico was sold to be paid for in money current in the province at the rate of 100 centavos for each peso of the debt. In 1901 Porto Rico having come under the control of the United States, the United States congress passed an act providing that United States money should be accepted in exchange at the rate of 60 cents for each peso of Porto Rican money. The seller attempted to enforce the payment of the purchase money at the rate of 100 cents for each peso, but it was held that the contract contemplated only such exchange in coins as might occur while Porto Rico was under the same political power; that a contract will not be literally enforced where the true meaning of the parties is not conveyed; and that the debt should be satisfied at the rate of 60 cents for each peso, according to the statute. *Serralles' Succession v. Esbri*, 200 U. S. 103, 50 L. Ed. 391.

This is the rule in Porto Rico under the civil code, arts. 1281, 1283. *Serralles' Succession v. Esbri*, 200 U. S. 103, 113, 50 L. Ed. 391.

62. Payment in "current money."—*Wharton v. Morris*, 1 Dall. 125, 126, 1 L. Ed. 65.

A bond conditioned for the payment in 1782, of a certain sum "in lawful current money of Pennsylvania," was payable in money emitted under the authority of congress. *Wharton v. Morris*, 1 Dall. 125, 1 L. Ed. 65.

"Current lawful money of New England."—An obligation entered into before the revolutionary war, to pay in "current lawful money of New England," could not be satisfied in bills of credit of one of the New England colonies. *Deering v. Parker*, 4 Dall., appx. xxiii, 1 L. Ed. 925.

A bond was given, payable July 30, 1735, "in good public bills of the Province of Massachusetts Bay, or current lawful money of New England, with interest." Many partial payments had been made in a depreciated currency and indorsed at their nominal amounts. In the year 1752, there had been a tender in bills of credit, current in New Hampshire. The province bills, contracted for, had been called in and the currency of the country had gradually depreciated. It was held that the tender was not good; that as to the balance due, the loss from the depreciated currency ought to be divided between the parties. *Deering v. Parker*, 4 Dall., appx. xxiii, 1 L. Ed. 925.

63. Virginia statute construed.—In 1779, when paper money was in circulation in Virginia, land was conveyed on a ground rent forever, of £26 per annum current money of Virginia. There was evidence that the parties to the contract believed that the sums to become due under it would at no distant period be payable in specie only, and this appeared to have been the only motive for disposing of the property on the terms on which it was parted with. In an action brought after paper money had been called out of circulation in Virginia, it was held that the rents were not to be reduced by the scale of depreciation provided by the 2nd section of the Virginia statute of November, 1781, but that under the 5th section of that act the actual annual value of the land, at the date of the contract, in specie, or in other money equivalent thereto ascertained by a jury, was the amount re-

termine its meaning.<sup>64</sup>

**Admissibility of Parol Evidence.**—In an action on a written contract to pay a specified number of pounds in annual installments, evidence of a parol agreement contemporaneous with the written contract, that the installments should be paid in whatever money was current at the time they became due, is admissible to explain the written contract.<sup>65</sup> But in an action on a written contract to pay in "current money," parol evidence, not to explain the contract, but to prove a new and different one in relation to the medium of payment, is not admissible.<sup>66</sup> Nor in such an action is parol evidence admissible to prove what the parties meant by the term "current money," if that meaning varies from the meaning of the term as defined by statute.<sup>67</sup>

3. **PAYMENT IN "CURRENT FUNDS."**—A negotiable instrument payable in "current funds," is salvable in whatever is receivable and current by law as money, whether in the form of notes or coin.<sup>68</sup>

4. **PAYMENT IN "CURRENCY."**—Where one contracts to pay a specified number of dollars in currency, the term, "in currency," means that the designated number of dollars is payable in an equal number of notes which are current in the community as dollars;<sup>69</sup> and such currency is demandable and receivable at the maturity of the contract, whatever change in its value by increase or depreciation may have taken place in the meantime.<sup>70</sup>

5. **PAYMENT IN "COIN," OR "BULLION"**—a. *Express Contracts.*—Demands upon contracts which stipulate in terms for the payment or delivery of coin or bullion, can be satisfied only in coin or bullion, and a tender of United States treasury notes, in payment thereof, is not a legal tender.<sup>71</sup> Thus express contracts payable in "gold and silver coin, lawful money of the United States," can only be satisfied by the payment of coined dollars, and cannot be discharged by notes of the United States.<sup>72</sup> Such a contract is in substance and legal effect a

coverable. *Faw v. Marsteller*, 2 Cranch 10, 2 L. Ed. 191.

**Pennsylvania contract made in 1779 not affected by depreciation act.**—In Pennsylvania a contract made in 1779 providing that payments should be made in whatever money was current when they became due, was not affected by the depreciation act. 1 Dall. Laws 880. *McMinn v. Owen*, 2 Dall. 173, 174, 1 L. Ed. 336.

64. **Contract payable in current foreign money exclusive of Spanish gold.**—Money due a gas company for lighting the street lamps of a municipality in Porto Rico, held under all the terms of the contract for such lighting, to be payable in current foreign money, exclusive of Spanish gold. *San Juan v. St. John's Gas Co.*, 195 U. S. 510, 519, 49 L. Ed. 299.

65. **Admissibility of parol evidence.**—*McMinn v. Owen*, 2 Dall. 173, 174, 1 L. Ed. 336.

66. *Bond v. Haas*, 2 Dall. 133, 134, 1 L. Ed. 320.

In a suit upon an obligation payable in current money, evidence that the debtor, who had since died, had expressed his intention to secure payment in specie, is not admissible. *Bond v. Haas*, 2 Dall. 133, 134, 1 L. Ed. 320.

67. *Lee v. Biddis*, 1 Dall. 175, 1 L. Ed. 88; *Bond v. Haas*, 2 Dall. 133, 134, 1 L. Ed. 320.

Generally, as to the admissibility of parol evidence, see the title PAROL EVIDENCE, ante, p. 12.

68. **Payment in "current funds."**—*Bull v. Bank*, 123 U. S. 105, 112, 31 L. Ed. 97. See, also, *Woodruff v. Mississippi*, 162 U. S. 291, 303, 40 L. Ed. 973.

69. **Payment in "currency."**—*Trebilcock v. Wilson*, 12 Wall. 687, 695, 20 L. Ed. 460.

70. *Effinger v. Kenney*, 115 U. S. 566, 575, 29 L. Ed. 495.

71. **Express contracts payable in coin or bullion.**—*Hepburn v. Griswold*, 8 Wall. 603, 607, 19 L. Ed. 513; *Dewing v. Sears*, 11 Wall. 379, 380, 20 L. Ed. 189.

Such demands are not included by legislative intention under the description of "debts, public and private," in the act of congress of Feb. 25, 1862, making United States notes a legal tender in payment of debts, public and private. *Hepburn v. Griswold*, 8 Wall. 603, 607, 19 L. Ed. 513; *Dewing v. Sears*, 11 Wall. 379, 380, 20 L. Ed. 189.

72. **Express contracts payable in "gold and silver coin."**—*Bronson v. Rodes*, 7 Wall. 229, 19 L. Ed. 141; *Bronson v. Kimp-ton*, 8 Wall. 444, 445, 19 L. Ed. 433; *Gregory v. Morris*, 96 U. S. 619, 625, 24 L. Ed. 740.

**Contract payable in "gold coin" of "present standard weight and fineness."**—Where an action is brought upon a bond and mortgage payable in "gold coin of the United States of the present standard weight and fineness," the plaintiffs are entitled to recover in lawful money of the United States, to be calculated according to the market rate of premium for gold

contract to deliver a certain weight of gold and silver of a certain fineness to be ascertained by count.<sup>73</sup>

b. *When Undertaking to Pay in Gold Will Be Implied.*—Although since the legal tender acts, an undertaking to pay in gold may be implied under special circumstances, and be as obligatory as if made in express words, yet the implication must be found in the language of the contract, and cannot be gathered from the mere expectations of the parties.<sup>74</sup> But if prior to the enactment of the legal tender acts the parties to a contract of sale had reference to the currency then recognized by law as legal tender, which consisted only of gold and silver coin, payment of the price can be made in that form only, in spite of the fact that subsequently United States notes were made legal tender.<sup>75</sup>

6. PAYMENT IN "SPECIE."—The terms "in specie," in a contract to pay a specified number of dollars in specie, are merely descriptive of the kind of dollars in which the contract is payable, there being different kinds in circulation, recognized by law; and mean that the designated number of dollars shall be paid in so many gold or silver dollars of the coinage of the United States.<sup>76</sup> They have acquired this meaning by general usage among traders, merchants, and bankers, and are the opposite of the terms, "in currency," which are used when it is desired to make a note payable in paper money.<sup>77</sup>

at the time of the breach of the contract. *Dutton v. Palarret*, 19 L. Ed. 165.

**73. Legal effect of contract to pay in gold and silver coin.**—*Butler v. Horwitz*, 7 Wall. 258, 19 L. Ed. 149; *Bronson v. Rodes*, 7 Wall. 229, 250, 19 L. Ed. 141; *Dutton v. Palarret*, 19 L. Ed. 165; *Gregory v. Morris*, 96 U. S. 619, 624, 24 L. Ed. 740.

"A contract to pay a certain number of dollars in gold or silver coins is, \* \* \* in legal import, nothing else than an agreement to deliver a certain weight of standard gold, to be ascertained by a count of coins, each of which is certified to contain a definite proportion of that weight. It is not distinguishable \* \* \* in principle from a contract to deliver an equal weight of bullion of equal fineness. It is distinguishable, in circumstance, only by the fact that the sufficiency of the amount to be tendered in payment must be ascertained, in the case of bullion, by assay and the scales, while in the case of coin it may be ascertained by count." *Bronson v. Rodes*, 7 Wall. 229, 250, 19 L. Ed. 141. See, also, *Gregory v. Morris*, 96 U. S. 619, 624, 24 L. Ed. 740.

**74. When undertaking to pay in gold implied since Legal Tender Acts.**—*Maryland v. Railroad Co.*, 22 Wall. 105, 22 L. Ed. 713; *Woodruff v. Mississippi*, 162 U. S. 291, 303, 40 L. Ed. 973.

"Neither the expectation of one party to the contract respecting its fruits, nor the anticipation of the other constitutes its obligation. There is a well-recognized distinction between the expectation of the parties to a contract and the duty imposed by it. Were it not so, the expectation of results would be always equivalent to a binding engagement that they should follow." *Legal Tender Cases*, 12 Wall. 457, 548, 20 L. Ed. 287; *Maryland v. Railroad Co.*, 22 Wall. 105, 112, 22 L. Ed. 713.

**Contracts not impliedly raising obligation to pay in gold.**—Where bonds were not expressly payable in gold coin, but

acknowledged an indebtedness in gold coin, and the interest coupons were payable specifically in currency, it was held that the obligation was to pay what the law recognized as money when the payment was to be made, and the bonds were, therefore, legally solvable in the money of the United States, whatever its description, and not in any particular kind of that money. *Woodruff v. Mississippi*, 162 U. S. 291, 302, 40 L. Ed. 973.

An implication that a railroad company having an unfinished road in which the state was largely interested should pay gold instead of currency to the state which has lent to the company sterling bonds of the state, of which the interest was payable abroad, and, of course, in coin, is not inferable from the fact that unless the contract between the company and the state be so interpreted, the state has not exacted from the company all that was necessary to its complete indemnification; this being especially true in the case of a contract, where, in other parts a complete indemnification was specifically and carefully provided for, and where at the time it was made there was no difference, existing or anticipated, in the value of currency and coin, the difference having been brought about by events supervening long afterwards. *Maryland v. Railroad Co.*, 22 Wall. 105, 22 L. Ed. 713.

**75. Contract prior to legal tender acts having reference to existing currency.**—*Willard v. Tayloe*, 8 Wall. 557, 19 L. Ed. 501.

**76. Payment in specie.**—*Trebilcock v. Wilson*, 12 Wall. 687, 20 L. Ed. 460.

A contract to pay "in specie or its equivalent," is not satisfied by a payment in the notes of a bank. *Paup v. Drew*, 10 How. 218, 223, 13 L. Ed. 394; *Trieg v. Drew*, 10 How. 224, 225, 13 L. Ed. 397.

**77. General usage has determined meaning of "in specie."**—*Trebilcock v. Wilson*,



7. **PAYMENT IN "DOLLARS."**—A contract to pay dollars, made between citizens of any state of the Union, while maintaining its constitutional relations with the national government, is a contract to pay lawful money of the United States, and cannot be modified or explained by parol evidence.<sup>78</sup> But it is equally clear, if in any other country, coins or notes denominated dollars should be authorized of different value from the coins or notes which are current here under that name, that, in a suit upon a contract to pay dollars, made in that country, evidence would be admitted to prove what kind of dollars were intended, and, if it should turn out that foreign dollars were meant, to prove their equivalent value in lawful money of the United States.<sup>79</sup> Such evidence does not modify or alter the contract. It simply explains an ambiguity, which, under the general rules of evidence, may be removed by parol evidence.<sup>80</sup>

8. **PAYMENT IN THE PAPER OF A BANK.**—Under a contract to pay in the paper of a bank or its equivalent, payment in the notes of the bank, or any other of equal value, is all the creditor has a right to demand; and in the event of a failure to pay at the time specified, the measure of recovery is only the specie value of the notes at that time.<sup>81</sup>

9. **PAYMENT IN COUNTY SCRIP OR WARRANTS.**—Where a contract obligation is payable in county scrip or warrants, the value of such scrip or warrants should be estimated at their market value at the time the payment is due.<sup>82</sup>

10. **PAYMENT OF INTEREST ON BONDS IN MONEY OR SCRIP.**—If a corporation contracts to pay interest on bonds in money or scrip on a certain day in each year, at its election, it cannot exercise its election after the day has passed.<sup>83</sup>

11. **PAYMENT IN PROMISSORY NOTES.**—If, by express agreement a promissory note is received as payment, it satisfies the original contract, and the party receiving it must take his remedy on it;<sup>84</sup> and this is so whether the note is made

12 Wall. 687, 695, 20 L. Ed. 460. See ante, "Payment in Currency," VI, O, 4.

78. **Contract to pay dollars between citizens of a state.**—*Thorington v. Smith*, 8 Wall. 1, 12, 19 L. Ed. 361; *Effinger v. Kenney*, 115 U. S. 566, 570, 29 L. Ed. 495.

79. **Contract to pay dollars made in a foreign country.**—*Thorington v. Smith*, 8 Wall. 1, 12, 19 L. Ed. 361; *Effinger v. Kenney*, 115 U. S. 566, 570, 29 L. Ed. 495.

80. *Effinger v. Kenney*, 115 U. S. 566, 571, 29 L. Ed. 495; *Thorington v. Smith*, 8 Wall. 1, 12, 19 L. Ed. 361. See the title **PAROL EVIDENCE**, ante, p. 12.

As to contracts payable in dollars made in the Confederate States during the Civil War, see post, "Payment in Confederate Currency," VI, O, 13.

81. **Payment in the paper of a bank.**—*Robinson v. Noble*, 8 Pet. 181, 198, 8 L. Ed. 910.

N. stipulated, in certain articles of agreement, to transport and deliver to R. a certain quantity of subsistence stores for the use of the United States; in consideration whereof, R. agreed to pay to N. on the delivery of the stores at St. Louis, at a certain rate per barrel, one-half in specie funds or their equivalent, and the other half to be paid in Cincinnati in the paper of banks current there, at the period of the delivery of the stores at St. Louis. Under the agreement was the following memorandum: "It is understood, that the payment to be made in Cincinnati, is to be in the paper of the Miami Exporting Company or its equivalent." In an action on this contract by the administra-

tors of N., it was held as to the payment to be made in Cincinnati, that they could recover only the specie value of the notes of the Miami Exporting Company Bank, at the time the payment should have been made. *Robinson v. Noble*, 8 Pet. 181, 8 L. Ed. 910.

82. **Payment in county scrip or warrants.**—*Hardin v. Boyd*, 113 U. S. 756, 767, 28 L. Ed. 1141.

83. **When election to pay interest in money or scrip must be exercised.**—*Texas, etc., R. Co. v. Marlor*, 123 U. S. 687, 702, 31 L. Ed. 303.

Where a railroad company issued bonds containing provisions that the interest thereon would be paid annually, and if the net earnings of the road in any year did not justify the payment of the interest in cash, the company would at its option issue scrip for the amount of the interest, it was held that in an absence of the exercise of the option, on the day the interest was due, to pay it in scrip, the bondholder had an immediate right of action for the interest in cash, and no demand by the plaintiff was necessary to entitle him to the payment of the interest in cash. *Texas, etc., R. Co. v. Marlor*, 123 U. S. 687, 699, 700, 701, 31 L. Ed. 303.

84. **Promissory note received as payment satisfies original contract.**—*Sheehy v. Mandeville*, 6 Cranch 253, 264, 3 L. Ed. 215; *Segrist v. Crabtree*, 131 U. S. 287, 289, 33 L. Ed. 125.

A promissory note, given and received for and in discharge of an open account, is a bar to an action upon the open ac-

by a party to the contract or by a third person.<sup>85</sup> The doctrine of nudum pactum does not apply to such a case; for a man may, if such be his will, discharge his debtor, without any consideration.<sup>86</sup> Where promissory notes have been given for the amount of a debt, the question whether or not there was an agreement at the time to receive the notes in satisfaction of the debt, or whether the circumstances attending the transaction warrant such an inference are questions for the jury.<sup>87</sup>

12. PAYMENT BY A CERTIFICATE OF DEPOSIT IN A BANK.—A certificate of deposit in a bank, payable at a future day, may, by express agreement, be received in payment of a debt.<sup>88</sup> The question whether or not there was such an agreement is one of fact for the jury.<sup>89</sup> Evidence showing that after the maturity of the certificate, the original debtor admitted his liability to make it good, conduces to prove that the certificate was not taken in payment and the jury should be so instructed.<sup>90</sup>

13. PAYMENT IN CONFEDERATE CURRENCY.—Under a contract made within the Confederate States during the Civil War, to pay a certain sum in Confederate currency, the amount recoverable is the value of that currency in lawful money of the United States,<sup>91</sup> at the date and in the locality of the contract;<sup>92</sup>

count, although the note be not paid. *Sheehy v. Mandeville*, 6 Cranch 253, 3 L. Ed. 215.

Notes were given in pursuance of a contract of sale, and the instructions and charge of the trial court were held to mean that if the sale was an unconditional one, and if the notes were given and accepted as absolute payment, the original debt was extinguished, and the remedy of the vendors was on the notes. It was held that there was in this no error to the prejudice of the vendors, for the facts thus hypothetically stated to the jury imported a special agreement between the parties that the notes were to be taken in payment. *Segrist v. Crabtree*, 131 U. S. 287, 291, 33 L. Ed. 125.

85. *Sheehy v. Mandeville*, 6 Cranch 253, 264, 3 L. Ed. 215.

86. *Sheehy v. Mandeville*, 6 Cranch 253, 264, 3 L. Ed. 215.

87. Question whether there was agreement to receive notes in payment is for jury.—*Lyman v. United States Bank*, 12 How. 225, 243, 13 L. Ed. 965.

88. Payment by a certificate of deposit in a bank.—*Downey v. Hicks*, 14 How. 240, 14 L. Ed. 404.

89. *Downey v. Hicks*, 14 How. 240, 14 L. Ed. 404.

90. *Downey v. Hicks*, 14 How. 240, 14 L. Ed. 404.

91. Amount recoverable under contract to pay in Confederate currency.—*Thorington v. Smith*, 8 Wall. 1, 19 L. Ed. 361; *Effinger v. Kenney*, 115 U. S. 566, 573, 29 L. Ed. 495; *Stewart v. Salamon*, 94 U. S. 434, 24 L. Ed. 275; *Cook v. Lillo*, 103 U. S. 792, 26 L. Ed. 460; *Rives v. Duke*, 105 U. S. 132, 26 L. Ed. 1031.

A decree, or a judgment, when rendered upon a contract payable in Confederate treasury notes, should be for a sum equal to the value of those notes, not in the gold coin, but in the legal tender currency

of the United States. *Bissell v. Heyward*, 96 U. S. 580, 24 L. Ed. 678.

92. *Effinger v. Kenney*, 115 U. S. 566, 575, 29 L. Ed. 495; *Thorington v. Smith*, 8 Wall. 1, 19 L. Ed. 361; *Stewart v. Salamon*, 94 U. S. 434, 24 L. Ed. 275; *Rives v. Duke*, 105 U. S. 132, 26 L. Ed. 1031.

The amount in actual money represented by a promissory note, executed during the war in the insurgent states, payable in Confederate treasury notes, is to be determined by the value of those notes in coin or legal currency of the United States, at the time when and the place where the promissory note was made. *Stewart v. Salamon*, 94 U. S. 434, 24 L. Ed. 275.

On the 5th of December, 1863, after the Proclamation of Emancipation, and in that part of Virginia the people of which were in rebellion against the United States, one resident therein sold and delivered to another a number of slaves, with warranty of title, but not of soundness, the purchaser covenanting "to pay on delivery the sum of \$25,000 in bankable Confederate currency, and, in addition, to give his note," with two persons named as sureties, "for the further sum of \$20,000, to be paid in twelve months after call, in equal annual payments thereafter, or at the purchaser's option it may be, on call, all or a part paid;" and the seller covenanting "not to call upon the purchaser for specie when it is at a premium, but engaging on his part to be satisfied with the bankable currency of the day, on the stipulation to choose his own time for the call." On the 1st of January, 1864, the purchaser, in lieu of the note, made to the seller two bonds, with the same persons as sureties, to pay \$8,000 "on demand or twelve months thereafter, at the option of the obligors," and \$12,000 "on demand, or two years thereafter, at the option of the obligors," "in the bankable

and evidence is admissible to show what that value was.<sup>93</sup> If the contract was to pay a certain sum in dollars, without specifying the kind of currency in which it was to be paid, it may be shown, by the nature of the transaction and the attendant circumstances as well as by the language of the contract itself, that it contemplated payment in Confederate currency.<sup>94</sup> If, at the time the contract was made, Confederate treasury notes constituted the principal currency of the state in which business transactions were conducted, and it was to them that reference was always made when dollars were mentioned, unless coin was specified, it will be presumed that the parties had such notes in contemplation.<sup>95</sup> But where it clearly appears that the parties intended that the debt should be liquidated in lawful money of the United States, payment must be made in that medium, without any deduction for the depreciated value of Confederate dollars;<sup>96</sup> and this understanding of the parties may be shown from the nature of the transaction and the attendant circumstances, as satisfactorily as from the language used.<sup>97</sup>

**14. PAYMENT IN GOODS OR CHATTELS.**—Where one contracts to pay a specified sum in chattels, as, for example, in lumber or fruit or grain, he has his option at the maturity of the contract either to furnish the articles designated or to

currency of the day, according to the agreement of the 5th of December last," "the said demand shall be made in writing by the obligee, his heirs or legal representatives only." Payment of the bonds was demanded in writing by the obligee after the end of the war of the rebellion, and when the bankable currency of Virginia consisted wholly of notes of the United States or of the national banks. It was held in an action on the bonds, that the plaintiff had no ground of exception to an instruction to the jury that, if they found that the bonds were made in reference to Confederate currency, the plaintiff was entitled to recover the amount, therein stipulated to be paid, at the value of Confederate money compared with national currency at the time of the making of the bonds. *Rives v. Duke*, 105 U. S. 132, 26 L. Ed. 1031.

**93. Evidence admissible to show value of Confederate currency.**—*Wilmington, etc., R. Co. v. King*, 91 U. S. 3, 23 L. Ed. 186; *Effinger v. Kenney*, 115 U. S. 566, 572, 29 L. Ed. 495; *The Confederate Note Case*, 19 Wall. 548, 559, 22 L. Ed. 196.

**94. Evidence admissible to show that payment in Confederate currency was contemplated.**—*Effinger v. Kenney*, 115 U. S. 566, 573, 29 L. Ed. 495; *Thorington v. Smith*, 8 Wall. 1, 19 L. Ed. 361; *Rives v. Duke*, 105 U. S. 132, 140, 26 L. Ed. 1031; *The Confederate Note Case*, 19 Wall. 548, 557, 22 L. Ed. 196. See the title **PAROL EVIDENCE**, ante, p. 12.

**95. Facts raising presumption that parties had Confederate treasury notes in contemplation.**—*Stewart v. Salamon*, 94 U. S. 434, 435, 24 L. Ed. 275. See, also, *Bissell v. Heyward*, 96 U. S. 580, 587, 24 L. Ed. 678.

**96. When payment must be made in lawful money of United States.**—*Cook v. Lillo*, 103 U. S. 792, 793, 26 L. Ed. 460; *The Confederate Note Case*, 19 Wall. 548, 22 L. Ed. 196.

A person in New Orleans during the Civil War gave his note for \$10,000. Soon afterward the city was occupied by United States troops. Payments to a large amount both of principal and interest were made always in lawful money or its equivalent. No claim was ever made that the notes called for Confederate dollars until the time this suit was commenced fifteen years after the note was given. It is held that the notes are payable in lawful money. *Cook v. Lillo*, 103 U. S. 792, 793, 26 L. Ed. 460.

**97. Evidence admissible to show that liquidation in lawful money of United States was contemplated.**—*The Confederate Note Case*, 19 Wall. 548, 559, 22 L. Ed. 196. See the title **PAROL EVIDENCE**, ante, p. 12.

The ordinance of North Carolina of 1865 declared that all existing contracts solvable in money, whether under seal or not, made after the depreciation of Confederate currency, before the 1st day of May 1865, and then unfulfilled (except official bonds, and penal bonds payable to the state), should "be deemed to have been made with the understanding that they were solvable in money of the value of the said currency;" but at the same time provided that it should be "competent for either of the parties to show, by parol or other relevant testimony, what the understanding was in regard to the kind of currency in which the same were solvable," and that in such case "the true understanding" should regulate the value of the contract. It was held that the understanding of the parties might be shown from the nature of the transaction, and the attendant circumstances, as satisfactorily as from the language used; and particularly that it might be shown from the length of time during which the contracts had to run before maturing; and that accordingly when bonds of a railroad company were issued in May, 1862, payable at



pay in money.<sup>98</sup> If at that time he is unable to furnish the articles, or neglects to do so, the number of dollars specified is the measure of recovery.<sup>99</sup> In equity, where a creditor agrees to receive specific articles in satisfaction of a debt, even although it be a debt upon bond, secured by mortgage, he will be held to the performance of his agreement.<sup>1</sup> But in order to bring a case within this principle there must be an agreement, not inequitable in its terms and effect; a valuable consideration for such agreement; readiness to perform and the absence of laches on the part of the debtor.<sup>2</sup> The act of February 25th, 1862, in declaring that the notes of the United States shall be lawful money and a legal tender for all debts, only applies to debts which are payable in money generally, and not to obligations payable in commodities or obligations of any other kind.<sup>3</sup> The terms of certain contracts providing for payment in goods or chattels have been construed by the supreme court.<sup>4</sup>

15. **PAYMENT BY ASSESSMENTS UPON STOCK.**—Where a corporation gives to a stockholder its note for the amount of a loan, under an agreement that assessments upon the payee's stock, shall when payable, be considered as payments upon the note, the note will be paid when assessments become payable in excess of the amount of the note.<sup>5</sup>

16. **PAYMENT BY A CONVEYANCE OF LAND.**—Where one agrees to make a payment by conveying a piece of land on a certain day and on that day he is not prepared or able to deliver the deed, the sum agreed upon becomes payable in cash on that day.<sup>6</sup>

17. **CONTRACTUAL OBLIGATION OF A STATE TO RECEIVE DESIGNATED SECURITIES IN PAYMENT OF TAXES AND OTHER OBLIGATIONS.**—See the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 758.

18. **AGREEMENT THAT PAYMENT IN ONE MEDIUM\* SHALL EXTINGUISH LARGER AMOUNT ESTIMATED IN ANOTHER MEDIUM.**—Where there is a bona

dates varying from seven to thirteen years afterwards, the inference was justified that the company intended at the time of issuing them, that the bonds should be paid in lawful money instead of Confederate notes. The Confederate Note Case, 19 Wall. 548, 22 L. Ed. 196.

The interest payable on a bond, issued as above mentioned, follows the character of the principal, and is payable in like currency. The Confederate Note Case, 19 Wall. 548, 22 L. Ed. 196.

98. **Option to furnish articles designated or pay in money.**—*Trebilcock v. Wilson*, 12 Wall. 687, 695, 20 L. Ed. 460.

99. **Measure of recovery where articles are not furnished.**—*Trebilcock v. Wilson*, 12 Wall. 687, 695, 20 L. Ed. 460.

1. **In equity, creditor held to performance of agreement.**—*Very v. Levy*, 13 How. 345, 14 L. Ed. 173.

2. *Very v. Levy*, 13 How. 345, 358, 14 L. Ed. 173. In this case it was held that all these essential requisites concurred.

3. **Legal tender act only applicable to debts payable in money generally.**—*Trebilcock v. Wilson*, 12 Wall. 687, 20 L. Ed. 460.

4. **A debtor gave to the creditor orders for twenty-five wagons, and the creditor gave a receipt stating that the debt was settled, by such wagons if they were in good condition, and when sold for the highest price obtainable, any surplus over the debt was to be refunded to the debtor.**

9 U S Enc - 22

Only twenty-one in bad condition were delivered, of which the creditor sold nineteen and sued the debtor for the balance of the debt. The court held that on the terms of the receipt which expressed the contract between the parties the creditor should have determined on receipt of the wagons whether they were in good condition, and was at liberty to reject them; that receiving and proceeding to sell the twenty-one was an acceptance of the twenty-one in payment pro tanto of the claim; that the contract was unfilled as to the nondelivered four; and that the price for which the nineteen sold and the selling value of the other two had no bearing on the case unless there was a surplus to be refunded to the debtor. *Winchester, etc., Mfg. Co. v. Funge*, 109 U. S. 651, 27 L. Ed. 1064.

**Consignment of goods to creditor.**—A. in the West Indies, being indebted to B. in Philadelphia, consigned goods to him, directing him to sell them on his (A's) account, and to apply the proceeds, after first satisfying himself, to the payment of other creditors. C., a creditor of A., attached the goods in the hands of B., before sale. It was held that B. was entitled to retain the goods for the payment of his own debt. *Stevenson v. Pemberton*, 1 Dall. 3, 1 L. Ed. 11.

5. **Payment by assessments upon stock.**—*Paine v. Central Vermont R. Co.*, 118 U. S. 152, 160, 30 L. Ed. 193.

6. **Payment by a conveyance of land.**—

fide dispute as to the medium in which a contract indebtedness is to be paid, and an agreement is reached that a payment in one medium shall extinguish a larger amount estimated in the other medium, such agreement is valid and binding on the parties.<sup>7</sup>

## VII. What Constitutes a Demand for Payment.

A draft drawn for the price of goods sold and delivered is equivalent to a demand of payment.<sup>8</sup>

## VIII. Acceptance of Payment.

**A. Authority to Accept.**—The acting financial manager of a corporation has authority to accept notes in payment of a contractual obligation due the corporation.<sup>9</sup>

**B. Acceptance of Less than Is Due in Full Satisfaction of a Debt.**—  
1. **WHERE THE SUM DUE IS LIQUIDATED.**—As a general rule where a liquidated sum is due, the payment of a less sum in satisfaction thereof, though accepted as satisfaction, is not binding as such for want of consideration.<sup>10</sup> This rule has been much questioned and qualified,<sup>11</sup> and is considered so far with disfavor as to be confined strictly to cases within it.<sup>12</sup> It only applies when the larger sum is liquidated, and when there is no consideration whatever for the surrender of part of it.<sup>13</sup> It does not apply where, at the time of the agreement, there was a dispute between the parties, the subject matter of which dispute is embraced in the agreement to extinguish a greater by a less amount.<sup>14</sup> But it must appear that the alleged dispute really existed and did not arise merely from an arbitrary denial by one party of an obligation which was obviously due.<sup>15</sup>

2. **WHERE THE DEBT IS UNLIQUIDATED.**—Where a debt is unliquidated and the amount is uncertain, a payment of less than is claimed, if made and accepted

McGillin v. Bennett, 132 U. S. 445, 33 L. Ed. 422.

7. **Agreement that payment in one medium shall extinguish larger amount estimated in another medium.**—San Juan v. St. John's Gas Co., 195 U. S. 510, 522, 49 L. Ed. 299. See post, "Acceptance of a Medium of Payment Different from That Promised," VIII, C.

8. **Draft drawn for price of goods sold and delivered.**—Cooper & Co. v. Coates & Co., 21 Wall. 105, 22 L. Ed. 481.

9. **Acting financial manager of corporation has authority to accept notes.**—Case Mfg. Co. v. Soxman, 138 U. S. 431, 439, 34 L. Ed. 1019.

10. **Effect of acceptance of less than is due, where debt is liquidated.**—San Juan v. St. John's Gas Co., 195 U. S. 510, 522, 49 L. Ed. 299; Chicago, etc., R. Co. v. Clark, 178 U. S. 353, 364, 44 L. Ed. 1099; Fire Ins. Ass'n v. Wickham, 141 U. S. 564, 35 L. Ed. 860. See, also, Baird v. United States, 96 U. S. 430, 431, 24 L. Ed. 703.

In some of the states the contrary rule has been established by statute. Chicago, etc., R. Co. v. Clark, 178 U. S. 353, 366, 44 L. Ed. 1099.

Whether such rule is controlling in Porto Rico, quare. San Juan v. St. John's Gas Co., 195 U. S. 510, 522, 49 L. Ed. 299.

11. Chicago, etc., R. Co. v. Clark, 178 U. S. 353, 364, 44 L. Ed. 1099.

12. Chicago, etc., R. Co. v. Clark, 178 U. S. 353, 365, 44 L. Ed. 1099.

"The rule is technical, and not very well

supported by reason. Courts therefore have departed from it upon slight distinctions." Nelson, J., in Kellogg v. Richards, 14 Wend. 116, quoted in Chicago, etc., R. Co. v. Clark, 178 U. S. 353, 365, 44 L. Ed. 1099.

13. Chicago, etc., R. Co. v. Clark, 178 U. S. 353, 365, 44 L. Ed. 1099. See, also, Baird v. United States, 96 U. S. 430, 431, 24 L. Ed. 703.

"This rule, which obviously may be urged in violation of good faith, is not to be extended beyond its precise import; and whenever a technical reason for its application does not exist, the rule itself is not to be applied. Hence judges have been disposed to take out of its application all those cases where there was any new consideration, or any collateral benefit received by the payee, which might raise a technical legal consideration, although it was quite apparent that such consideration was far less than the amount of the sum due." Brooks v. White, 2 Metcalf 283, quoted in Chicago, etc., R. Co. v. Clark, 178 U. S. 353, 365, 44 L. Ed. 1099.

14. San Juan v. St. John's Gas Co., 195 U. S. 510, 522, 49 L. Ed. 299; Fire Ins. Ass'n v. Wickham, 141 U. S. 564, 35 L. Ed. 860; Chicago, etc., R. Co. v. Clark, 178 U. S. 353, 44 L. Ed. 1099.

15. San Juan v. St. John's Gas Co., 195 U. S. 510, 522, 49 L. Ed. 299; Fire Ins. Ass'n v. Wickham, 141 U. S. 564, 35 L. Ed. 860.

in satisfaction of the debt, is binding and will discharge the debt.<sup>16</sup>

3. **PREPAYMENT OF PART OF A CLAIM.**—Prepayment of part of a claim may be a good consideration for the release of the residue provided the parties intended it to have that effect, and whether they did or not is a question for the jury.<sup>17</sup>

**C. Acceptance of a Medium of Payment Different from That Promised.**<sup>18</sup>—**Acceptance of Payment of Installments in a Different Medium.**

—Where a contractual obligation, payable in installments, is made payable in dollars, the fact that current funds have been received in payment of a number of installments though it does not constitute an absolute waiver of the right to demand coin or legal tender paper in payment of installments subsequently falling due, it does impose the obligation to give reasonable notice that only coin or legal tender paper will thereafter be received, and failure to give such notice will excuse payment in coin or legal tender on the day a subsequent installment falls due.<sup>19</sup>

**Acceptance of Payment under Protest.**—Where a creditor receives payment in a different medium from that which he asserts the contract requires, but does so under protest, asserting his right to be paid in another medium, the protest operates to prevent the inference that the medium actually received is admitted to be the one in which future payments shall be made.<sup>20</sup>

## IX. Receipt.

See the title RECEIPTS.

## X. Application of Payments.

**A. To What Debts Payments Are Applied**—1. **APPLICATION BY THE PARTIES**—a. *In the Absence of Contract.*—In the absence of contract, governing the appropriation of payments, the debtor has a right, if he pleases, to make

16. **Acceptance of less than is claimed binding where debt is unliquidated.**—*Baird v. United States*, 96 U. S. 430, 431, 24 L. Ed. 703.

**Facts under which acceptance cannot be avoided on ground of duress.**—"When a party, without force or intimidation, and with a full knowledge of all the facts in the case, accepts, on account of an unliquidated and controverted demand, a sum less than what he claims and believes to be due him, and agrees to accept that sum in full satisfaction, he will not be permitted to avoid his act on the ground of duress." *United States v. Old Settlers*, 148 U. S. 427, 473, 37 L. Ed. 509; *United States v. Child & Co.*, 12 Wall. 232, 244, 20 L. Ed. 360.

**But this rule was held not to apply to a case in which the facts were as follows:** The Western Cherokee Nation had a claim against the United States and such claim was settled by the payment of a sum of money to the Western Cherokees, which though less than they thought themselves entitled to, was accepted by them. Under these facts, congress afterwards being convinced that a mistake had been made in the accounting which the Indians from the first had called attention to, determined to rectify that mistake, passed an act leaving it open to the courts to readjust the amount notwithstanding the claim might have been theretofore settled. *United States v. Old Settlers*, 148 U. S. 427, 37 L. Ed. 509.

**Facts held equivalent to acceptance of**

**payment in satisfaction of claim.**—A. presented an unliquidated claim against the United States for \$151,588.17, which was audited by the accounting officers, and allowed for \$97,507.75. He was informed of this adjustment, and of the principles upon which it had been made; and a draft for the amount allowed, payable to his order, was sent to him, which he received and collected without objection. It was held that this was equivalent to an acceptance of the payment in satisfaction of the claim. *Baird v. United States*, 96 U. S. 430, 24 L. Ed. 703.

17. **Prepayment of part of a claim.**—*Fire Ins. Ass'n v. Wickham*, 141 U. S. 564, 579, 35 L. Ed. 860; *Very v. Levy*, 13 How. 345, 359, 14 L. Ed. 173.

The reason for this, as expressed in *Pennell's Case*, 5 Co., 117, is that peradventure parcel of the sum, before the day, would be more beneficial than the whole sum on the day. *Very v. Levy*, 13 How. 345, 359, 14 L. Ed. 173.

18. Generally, as to compromise and settlement, see the title COMPROMISE AND SETTLEMENT, vol. 3, p. 980. As to acceptance of payment of a claim against the United States in a medium different from that promised, see the title COMPROMISE AND SETTLEMENT, vol. 3, p. 992.

19. **Acceptance of payment of installments in a medium different from that promised.**—*Cheney v. Libby*, 134 U. S. 68, 79, 33 L. Ed. 818.

20. **Acceptance under protest.**—*San*



the appropriation.<sup>21</sup> It is essential to the application of this rule that the relation of debtor and creditor should exist between the person making the payment and the person receiving it.<sup>22</sup> The power may be exercised without any express direction given at the time. A direction may be evidenced by circumstances, as well as by words.<sup>23</sup> A positive refusal to pay one debt, and an acknowledgment of another, with a delivery of the sum due upon it, would be such a circumstance.<sup>24</sup> If the debtor fails to make an appropriation, the right to do so devolves upon the creditor.<sup>25</sup> If an immediate credit is to be given for bills of exchange, that credit must be given on a debt existing at the time, unless this legal operation of the credit is changed by express agreement.<sup>26</sup> But where the bills are to be credited, when paid, the power of application, which the creditor possesses if no agreement to the contrary exists, is then to be exercised.<sup>27</sup> The creditor is not bound to apply a payment immediately

*Juan v. St. John's Gas Co.*, 195 U. S. 510, 516, 49 L. Ed. 299.

**21. Right of debtor to apply payments.**

—*United States v. Kirkpatrick*, 9 Wheat. 720, 737, 6 L. Ed. 199; *Alexandria v. Patten*, 4 Cranch 316, 317, 320, 2 L. Ed. 633; *Field v. Holland*, 6 Cranch 8, 27, 3 L. Ed. 136; *National Bank v. Mechanics' Nat. Bank*, 94 U. S. 437, 439, 24 L. Ed. 176; *Jones v. United States*, 7 How. 681, 688, 12 L. Ed. 870; *United States v. Eckford*, 1 How. 250, 261, 11 L. Ed. 120; *United States v. January*, 7 Cranch 572, 575, 3 L. Ed. 443; *Tayloe v. Sandiford*, 7 Wheat. 13, 5 L. Ed. 384.

In the case of a running account between debtor and creditor the general rule is that the debtor has a right, if he pleases, to make the appropriation of payments. *Holly v. Missionary Society*, 180 U. S. 284, 292, 45 L. Ed. 531.

**Appropriation by one who subsequently becomes a bankrupt.**—Plaintiffs contended that they were entitled under the 20th section of the Bankrupt Act, act of March 2, 1867, to set off an unsecured account due them from the defendant, a bankrupt, against certain money remitted to them by him shortly before he was adjudged a bankrupt with directions to credit it on a mortgage debt due them from him and which they refused so to apply. It was held that the plaintiffs were liable for the remittance to the trustee in bankruptcy, since they held it in trust to be applied as the defendant directed. *Libby v. Hopkins*, 104 U. S. 303, 26 L. Ed. 769.

**22. Necessity of the relationship of debtor and creditor.**—Where A. made his check to his attorney, B., instructing him to use the proceeds to pay for property which A. had purchased from a third party; and B., who was the executor of C., paid the proceeds of the check to D., in payment of a legacy due him under C.'s will, it was held that there being no relation of debtor and creditor between A. and D., the rule as to the debtor's right to make appropriations of payments did not apply, and that A. could not complain of the application by D. of the money received from B. to the purposes prescribed by the testator, nor demand that moneys subsequently received by D. from third

persons for specific purposes should be used to indemnify him from loss occasioned by trusting his money with his attorney. *Holly v. Missionary Society*, 180 U. S. 284, 292, 45 L. Ed. 531.

**23. Application may be made without express direction.**—*Tayloe v. Sandiford*, 7 Wheat. 13, 5 L. Ed. 384.

**24.** *Tayloe v. Sandiford*, 7 Pet. 13, 5 L. Ed. 384.

**25. Right of creditor to apply payments.**—*National Bank v. Mechanics' Nat. Bank*, 94 U. S. 437, 439, 24 L. Ed. 176; *Jones v. United States*, 7 How. 681, 688, 12 L. Ed. 870; *United States v. Eckford*, 1 How. 250, 261, 11 L. Ed. 120; *United States v. January*, 7 Cranch 572, 575, 3 L. Ed. 443; *United States v. Kirkpatrick*, 9 Wheat. 720, 737, 6 L. Ed. 199; *Alexandria v. Patten*, 4 Cranch 316, 317, 320, 2 L. Ed. 633; *Field v. Holland*, 6 Cranch 8, 27, 3 L. Ed. 136.

Where there is a running account between debtor and creditor, and the debtor omits to make an appropriation of payments, the creditor may make it. *Holly v. Missionary Society*, 180 U. S. 284, 292, 45 L. Ed. 531.

Where debts of different dignities are due to a creditor of the estate of an intestate, and no specific application of a payment made by the administrator is directed by him, if the creditor applies the payment to either of his debts, by some unequivocal act, his right to do so cannot be questioned. *Backhouse v. Patton*, 5 Pet. 160, 8 L. Ed. 82.

**Election to apply payments to extinguishment of preceding balances.**—Where a running account is kept at the postoffice department between the United States and a postmaster, in which all postages are charged to him, and credit is given for all payments made, this amounts to an election by the creditor to apply the payments, as they are successfully made, to the extinguishment of preceding balances. *Jones v. United States*, 7 How. 681, 12 L. Ed. 870.

**26. Credit for bills of exchange.**—*Field v. Holland*, 6 Cranch 8, 28, 3 L. Ed. 136.

**27.** *Field v. Holland*, 6 Cranch 8, 28, 3 L. Ed. 136.

upon receiving it.<sup>28</sup> But neither the debtor nor the creditor can make the application after a controversy upon the subject has arisen between them, and a fortiori not at the trial.<sup>29</sup> Where the right of applying payments exists and is exercised by either a debtor or creditor, and notice given, no change can be made in the credit, except by the consent of both parties.<sup>30</sup> The rule that has been stated as to the right of the parties to apply payments does not apply to a case where different sureties under distinct obligations are interested.<sup>31</sup>

b. *Application by Contract.*—Where a debtor, by an agreement with a creditor, sets apart a fixed portion of a specific fund in the hands, or to come into the hands, of another person, whom he directs to pay it to the creditor, the agreement is, when assented to by such person, an appropriation, binding upon the parties and all who, having notice, subsequently claim under the debtor an interest in the fund.<sup>32</sup>

2. IN ABSENCE OF APPLICATION BY THE PARTIES.—If both the debtor and creditor fail to apply a payment, the law will make the application,<sup>33</sup> according to its own notions of justice.<sup>34</sup> The court in exercising this authority must use a sound discretion.<sup>35</sup> Where at the time of payment there is a debt due in cash, and debts represented by notes payable at a future date, the payment will be applied to the debt then due.<sup>36</sup> It is not a universal rule that a payment shall be applied to the extinguishment of a debt of the highest dignity.<sup>37</sup> It would seem reasonable that an equitable application should be made, and it being equitable that the whole debt should be paid, it cannot be inequitable to extinguish first those debts for which the security is most precarious.<sup>38</sup> In cases

**28. When the application must be made.**—*Alexandria v. Patten*, 4 Cranch 316, 317, 320, 2 L. Ed. 633.

**29. National Bank v. Mechanics' Nat. Bank**, 94 U. S. 437, 439, 24 L. Ed. 176; *United States v. Kirkpatrick*, 9 Wheat. 720, 737, 6 L. Ed. 199; *Jones v. United States*, 7 How. 681, 691, 12 L. Ed. 870.

Where an administrator has had a reasonable time to make his election, as to the appropriation of payments made by him, it is too late to do so, after a controversy has arisen. *Backhouse v. Patton*, 5 Pet. 160, 8 L. Ed. 82.

**30. Consent of both parties to change in application.**—*Page v. Patton*, 5 Pet. 304, 310, 8 L. Ed. 134; *Alexandria v. Patten*, 4 Cranch 316, 317, 320, 2 L. Ed. 633.

**31. Rule as to application by parties not applicable where sureties are affected.**—*United States v. Eckford*, 1 How. 250, 261, 11 L. Ed. 120; *United States v. January*, 7 Cranch 572, 575, 3 L. Ed. 443. See the title **PRINCIPAL AND SURETY**.

**32. Agreement by debtor and creditor applying payment.**—*Ketchum v. St. Louis*, 101 U. S. 306, 25 L. Ed. 999.

**33. In absence of application by parties, law will make application.**—*United States v. Eckford*, 1 How. 250, 261, 11 L. Ed. 120; *United States v. January*, 7 Cranch 572, 575, 3 L. Ed. 443; *Jones v. United States*, 7 How. 681, 688, 12 L. Ed. 870; *National Bank v. Mechanics' Nat. Bank*, 94 U. S. 437, 439, 24 L. Ed. 176; *United States v. Kirkpatrick*, 9 Wheat. 720, 737, 6 L. Ed. 199; *Field v. Holland*, 6 Cranch 8, 27, 3 L. Ed. 136; *Holly v. Missionary Society*, 180 U. S. 284, 292, 45 L. Ed. 531.

**34. National Bank v. Mechanics' Nat. Bank**, 94 U. S. 437, 439, 24 L. Ed. 176;

*United States v. Kirkpatrick*, 9 Wheat. 720, 737, 6 L. Ed. 199; *Field v. Holland*, 6 Cranch 8, 27, 3 L. Ed. 136; *Holly v. Missionary Society*, 180 U. S. 284, 292, 45 L. Ed. 531.

**Running account.**—This rule is applicable to a running account between the debtor and creditor. *Holly v. Missionary Society*, 180 U. S. 284, 292, 45 L. Ed. 531.

**35. Court must exercise a sound discretion.**—*Field v. Holland*, 6 Cranch 8, 27, 3 L. Ed. 136.

**36. Payment applied to debt due rather than to deferred payments.**—*McGillin v. Bennett*, 132 U. S. 445, 453, 33 L. Ed. 422.

**37. Payment not always applied to debt of highest dignity.**—*Backhouse v. Patton*, 5 Pet. 160, 168, 8 L. Ed. 82.

"That there are authorities which favor such an application is true, but they have been controverted by other adjudications." *Backhouse v. Patton*, 5 Pet. 160, 168, 8 L. Ed. 82.

**38. Not inequitable that most precarious debts should be first extinguished.**—*Field v. Holland*, 6 Cranch 8, 28, 3 L. Ed. 136.

**Credits applied to unsecured rather than to secured debt.**—A purchaser agreed to make payment for certain cattle by a conveyance of land for a part of the purchase price and his notes for the rest, payable at a future day, and secured by vendor's lien. He was unable to give a deed for the land which hence became a cash payment. He also failed to deliver the notes. It was held that any credits due from the seller should be applied to the payment to be made in land rather than to the deferred payments to be evidenced by notes. *McGillin v. Bennett*, 132 U. S. 445, 452, 33 L. Ed. 422.

of long and running accounts, where debits and credits are perpetually occurring, and no balances are otherwise adjudged than for the mere purpose of making rests, payments will be applied to extinguish the debts according to the priority of time. The credits will be deemed payments *pro tanto* of the debts antecedently due.<sup>39</sup>

**B. Application to Discharge of Principal or Interest**—1. **GENERAL RULE.**—The correct rule in general is that the creditor shall calculate interest, whenever a payment is made. To this interest the payment is first to be applied; and if it exceed the interest due, the balance is to be applied to diminish the principal. This rule is equally applicable, whether the debt is one which expressly draws interest, or on which interest is given in the name of damages.<sup>40</sup>

2. **APPLICATION OF SUM PAID INTO COURT WHERE A DECREE IS RENDERED FOR A GREATER AMOUNT.**—But where a defendant admits a certain sum to be due, and pays that amount with interest into court, and a decree is rendered against him for a greater amount, he is entitled in equity to have the sum so paid into court applied to that part of the principal and interest which was admitted to be due.<sup>41</sup>

3. **INTEREST PAID BEFORE IT IS DUE.**—Interest on money paid in, before the time, must be deducted from the interest of the whole sum due at the time appointed by the instrument for making the payment.<sup>42</sup>

## XI. Evidence of Payment.

**A. Presumptions and Burden of Proof**—1. **PRESUMPTION THAT EVERYTHING HAS BEEN PAID WHICH OUGHT NOT TO BE PAID.**—Where issue is joined upon a plea of payment, the jury may, and ought to presume everything to have been paid, which, *ex aequo et bono*, ought not to be paid.<sup>43</sup>

2. **PRESUMPTION ARISING FROM A RECEIPT.**—See the title **RECEIPTS**.

3. **PRESUMPTION ARISING FROM ACKNOWLEDGMENT OF PAYMENT.**—Upon the plea of payment, in an action upon an obligation conditioned to pay a specified sum, evidence may be received of the payment of a smaller sum, with an acknowledgment by the plaintiff that it was in full of all demands; and from such evidence, the jury may and ought to presume payment of the whole unless

**39. Running accounts with balances only for purpose of making rests.**—*United States v. Kirkpatrick*, 9 Wheat. 720, 737, 6 L. Ed. 199; *Jones v. United States*, 7 How. 681, 692, 12 L. Ed. 870.

**40. General rule as to application to principal or interest.**—*Story v. Livingston*, 13 Pet. 359, 10 L. Ed. 200; *Wayne J.*, in *United States v. McLemore*, 4 How. 286, 288, 11 L. Ed. 977.

**Money paid on account of a bond bearing interest**, must first be applied to discharge the interest due at the time of the payment, and the residue, if any, credited toward satisfaction of the principal. *Penrose v. Hart*, 1 Dall. 378, 379, 1 L. Ed. 185.

**41. Application of sum paid into court where decree is rendered for greater amount.**—*Massachusetts v. Western Union Tel. Co.*, 141 U. S. 40, 45, 35 L. Ed. 628.

A Massachusetts statute provided for the taxation of telegraph companies with twelve per cent interest on the amount of such taxes until paid. Where a telegraph company admitted its liability for a certain amount, and paid such amount with 12 per cent interest into court, and a decree was rendered against it for a

greater amount, it was held that the company was entitled to the benefit of the sum paid into court, and such sum was to be applied to that part of the principal sum and interest which was admitted to be due. *Massachusetts v. Western Union Tel. Co.*, 141 U. S. 40, 46, 35 L. Ed. 628.

**42. Interest paid before it is due.**—*Tracy v. Wikoff*, 1 Dall. 124, 1 L. Ed. 65.

For instance, in the case of a bond to pay £100, with annual interest at six per cent, if at the end of six months, £50 is paid in, the payment is not to be apportioned, £3 to the discharge of the half year's interest, and £47 to the diminution of the principal, so as to calculate the remaining interest at six per cent upon £53 for six months; but the interest must be charged at the end of the year upon the £100, and the payment of £50 deducted from the aggregate sum of £106 and the obligor receive a credit for £1, 10 s. as interest of £50 for six months. *Tracy v. Wikoff*, 1 Dall. 124, 1 L. Ed. 65.

**43. Presumption that everything has been paid which ought not to be paid.**—So held in an action of debt where the issue was joined upon a plea of payment. *Hollingsworth v. Ogle*, 1 Dall. 257, 260, 1 L. Ed. 126.



such presumption is repelled by other evidence.<sup>44</sup>

**It is well settled in Massachusetts, that a recital in a deed, acknowledging payment of the consideration stated, is only prima facie proof, and is subject to be controlled or rebutted by other evidence.**<sup>45</sup>

**4. PRESUMPTION WHERE A PROMISSORY NOTE IS GIVEN.**—If notes are taken as conditional payment only, they will be regarded as prima facie evidence of payment, so long as the payee holds them, and until by nonpayment they cease to have any force, if the payee elects to so treat them.<sup>46</sup> In Massachusetts the presumption of law is that a promissory note extinguishes the debt for which it is given. But this presumption may be repelled by evidence that such was not the intention of the parties; and this evidence may arise from the general nature of the transaction, as well as from direct testimony to the fact.<sup>47</sup>

**5. PRESUMPTION ARISING FROM LAPSE OF TIME.**—By the common law, the lapse of twenty years, without explanatory circumstances, affords a presumption of law that a debt has been paid, even though it be due by specialty.<sup>48</sup> The principle upon which this presumption arises is a reasonable principle, and may be rebutted by any facts which destroy the reason of the rule.<sup>49</sup> Thus the presumption may be met by circumstance which account for the delay in bringing suit.<sup>50</sup> No presumption of payment can arise while the creditor is under a legal disability to sue upon the debt; and in calculating the time that will raise such a presumption, the period of such disability must be excluded.<sup>51</sup>

**B. Admissibility or Competency of Evidence.**—Upon an issue raised by the plea of payment the rule applies that evidence to be admissible must be relevant and material to the issue.<sup>52</sup> The evidence of a witness who was present

**44. Acknowledgment of payment.**—*Henderson v. Moore*, 5 Cranch 11, 3 L. Ed. 22.

**45. Mills v. Dow**, 133 U. S. 423, 431, 33 L. Ed. 717.

**46. Notes taken as conditional payment only.**—*Segrist v. Crabtree*, 131 U. S. 287, 292, 33 L. Ed. 125.

**47. In Massachusetts law presumes prima facie, that note extinguishes debt.**—*The Kimball*, 3 Wall. 37, 18 L. Ed. 50.

Thus it is not to be presumed that the owner of a ship, having a lien upon a cargo for the payment of the freight, intended to waive his lien by taking the notes of the charterers drawn so as to be payable at the time of the expected arrival of the ship in port. The notes being unpaid, he may return them and enforce his lien. *The Kimball*, 3 Wall. 37, 18 L. Ed. 50. See the title *MARITIME LIENS*, vol. 8, p. 218.

**48. Lapse of twenty years affords a presumption of payment.**—*Higginson v. Mein*, 4 Cranch 415, 417, 2 L. Ed. 664; *Dunlop v. Ball*, 2 Cranch 180, 184, 2 L. Ed. 246; *Gaines v. Miller*, 111 U. S. 395, 399, 28 L. Ed. 466.

**This is the rule in Missouri**, where by statute the common law has been adopted. *Gaines v. Miller*, 111 U. S. 395, 399, 28 L. Ed. 466.

**49. Rebuttal of presumption.**—*Dunlop v. Ball*, 2 Cranch 180, 184, 2 L. Ed. 246.

**50. Higginson v. Mein**, 4 Cranch 415, 420, 2 L. Ed. 664.

**51. Period of creditor's legal disability to sue excluded from computation of time.**

—*Dunlop v. Ball*, 2 Cranch 180, 184, 2 L. Ed. 246.

To raise a presumption of payment, from the age of a bond, twenty years must have elapsed exclusive of the period of the plaintiff's disability. *Dunlop v. Ball*, 2 Cranch 180, 184, 2 L. Ed. 246.

**Effect of suspension of statute of limitations during Civil War.**—See the title *LIMITATION OF ACTIONS AND ADVERSE POSSESSION*, vol. 7, p. 900.

**52. Evidence of delivery of wheat and assignment of debts.**—Upon the plea of payment, to debt on bond, evidence was admitted that wheat was delivered to the plaintiff, on account of the bond, at a certain price, and that the defendant assigned sundry debts to the plaintiff, part of which were collected by the plaintiff, and part lost by his indulgence or negligence. It was held that this evidence was properly admitted. *Buddicum v. Kirk*, 3 Cranch 293, 2 L. Ed. 444.

**In Pennsylvania in an action of debt on a bond**, brought in 1768, it was held that as there was no court of chancery in the province, it was necessary in order to prevent a failure of justice, to admit evidence, under a plea of payment, of mistake or want of consideration. *Swift v. Hawkins*, 1 Dall. 17, 1 L. Ed. 18.

But in a similar action in this state it was held that under the plea of payment evidence of an injury in the nature of a tort for which the damages had not been ascertained was not admissible. *Kachlin v. Mulhallon*, 2 Dall. 237, 1 L. Ed. 363.

and cognizant of the whole transaction is admissible as to whether the delivery of money by one man to another was by way of payment or otherwise.<sup>53</sup> The insolvency and pecuniary embarrassment of a person may be shown as evidence that he has not paid all his debts; but they do not tend to show that he has not paid a particular debt.<sup>54</sup>

## **XII. Effect of Part Payment of a Claim against the United States.**

The payment by the United States of part of a claim is not a waiver of its right to withhold the residue on the ground that the claim is not a valid one.<sup>55</sup>

## **XIII. Recovery of Payments.**

**A. Doctrine as to Voluntary and Compulsory Payments.**—As a general rule where a payment is voluntary, the money paid cannot be recovered back.<sup>56</sup> But an action will lie to recover back money paid under compulsion.<sup>57</sup> Payments with knowledge and without compulsion are voluntary.<sup>58</sup> A payment is not to be regarded as compulsory, unless made to emancipate the person or property from an actual and existing duress imposed upon it by the party to whom the money is paid.<sup>59</sup> But it is not essential that there should be actual violence or any physical duress.<sup>60</sup> Virtual or moral duress is sufficient to prevent a payment made under its influence from being voluntary.<sup>61</sup> The coercion or duress which will render a payment involuntary must consist of some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment, over the person or property of another, from which the latter has no other means of immediate relief than by mak-

See the title SET-OFF, RECOUPMENT AND COUNTERCLAIM.

**53. Evidence admissible upon question whether money was delivered as payment.**—*Bank v. Kennedy*, 17 Wall. 19, 20, 21 L. Ed. 551.

**54. Evidence of insolvency and pecuniary embarrassment of debtor.**—*Xenia Bank v. Stewart*, 114 U. S. 224, 231, 29 L. Ed. 101.

**55. Effect of part payment of a claim against the United States.**—*McKnight v. United States*, 98 U. S. 179, 186, 25 L. Ed. 115.

"The mere payment of \$45,000 on a claim for a much larger sum, as compensation for services rendered in delivering captured or abandoned property to the government—for which services it was under no legal obligation, express or implied, to make compensation—cannot be deemed a recognition of a legal liability to make further payments on such claim." *Camp v. United States*, 113 U. S. 648, 655, 28 L. Ed. 1081.

**56. No right of recovery where payment is voluntary.**—*United States v. New York, etc., Steamship Co.*, 200 U. S. 488, 50 L. Ed. 569; *United States v. Edmondston*, 181 U. S. 500, 502, 45 L. Ed. 971; *United States v. Wilson*, 168 U. S. 273, 276, 42 L. Ed. 464; *Little v. Bowers*, 134 U. S. 547, 554, 33 L. Ed. 1016; *Railroad Co. v. Commissioners*, 98 U. S. 541, 25 L. Ed. 196; *Lamborn v. County Comm'rs*, 97 U. S. 181, 187, 24 L. Ed. 926.

**57. Money paid under compulsion recoverable.**—*Arkansas Bldg., etc., Ass'n v. Madden*, 175 U. S. 269, 273, 44 L. Ed. 159.

**58. What payments are voluntary.**—*Chesebrough v. United States*, 192 U. S.

253, 259, 48 L. Ed. 432; *United States v. New York, etc., Steamship Co.*, 200 U. S. 488, 494, 50 L. Ed. 569.

**59. When payments are compulsory.**—*Cleaveland v. Richardson*, 132 U. S. 318, 333, 33 L. Ed. 384; *Radich v. Hutchins*, 95 U. S. 210, 213, 24 L. Ed. 409. See, also, *Loneragan v. Buford*, 148 U. S. 581, 590, 37 L. Ed. 569.

**60. Robertson v. Frank Bros. Co., 132 U. S. 17, 22, 33 L. Ed. 236; *Maxwell v. Griswold*, 10 How. 242, 256, 13 L. Ed. 405; *Swift Co. v. United States*, 111 U. S. 22, 29, 28 L. Ed. 341.**

**61. Robertson v. Frank Bros. Co., 132 U. S. 17, 21, 33 L. Ed. 236.**

When moral duress not justified by law is exerted under circumstances sufficient to influence the apprehensions and conduct of a prudent business man, payment of money wrongfully induced thereby is not voluntary. "But the circumstances of the case are always to be taken into consideration. When the duress has been exerted by one clothed with official authority, or exercising a public employment, less evidence of compulsion or pressure is required." *Robertson v. Frank Bros. Co.*, 132 U. S. 17, 23, 33 L. Ed. 236.

"As where an officer exacts illegal fees." *Robertson v. Frank Bros. Co.*, 132 U. S. 17, 23, 33 L. Ed. 236. See the titles PUBLIC OFFICERS; REVENUE LAWS; SHERIFFS AND CONSTABLES.

"Or a common carrier excessive charges." *Robertson v. Frank Bros. Co.*, 132 U. S. 17, 23, 33 L. Ed. 236. See the title CARRIERS, vol. 3, p. 617.

"But the principle is applicable in all cases according to the nature and exigency

ing payment.<sup>62</sup> Where a party pays an illegal demand, with full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary.<sup>63</sup> And the fact that the party, at the time of making the payment, files a written protest does not make the payment involuntary.<sup>64</sup> But notice of intention to recover back money wrongfully exacted may serve to rebut the inference that it was a voluntary payment.<sup>65</sup> In several cases brought before the supreme court the doctrine as to voluntary and compulsory payments has been applied to the peculiar facts therein presented.<sup>66</sup> The application of the doctrine to particular kinds of pay-

of each." *Robertson v. Frank Bros. Co.*, 132 U. S. 17, 23, 33 L. Ed. 236.

62. *Radich v. Hutchins*, 95 U. S. 210, 24 L. Ed. 409; *Loneran v. Buford*, 148 U. S. 581, 590, 37 L. Ed. 569; *Cleveland v. Richardson*, 132 U. S. 318, 333, 33 L. Ed. 384.

When a person, by the compulsion of the color of legal process, or of seizure of his person or goods, pays money unlawfully demanded, the payment is involuntary. *Arkansas Bldg., etc., Ass'n v. Madden*, 175 U. S. 269, 273, 44 L. Ed. 159. See, also, *Robertson v. Bradbury*, 132 U. S. 491, 501, 33 L. Ed. 405.

"If a party has in his possession goods or other property belonging to another, and refuses to deliver such property to that other unless the latter pays him a sum of money which he has no right to receive, and the latter, in order to obtain possession of his property, pays that sum, the money so paid is a payment by compulsion." *Harmony v. Bingham*, 12 N. Y. 99, 117, quoted in *Loneran v. Buford*, 148 U. S. 581, 591, 37 L. Ed. 569.

63. **Payments deemed voluntary.**—*United States v. New York, etc., Steamship Co.*, 200 U. S. 488, 494, 50 L. Ed. 569; *Little v. Bowers*, 134 U. S. 547, 554, 33 L. Ed. 1016; *Railroad Co. v. Commissioners*, 98 U. S. 541, 25 L. Ed. 196; *Lamborn v. County Comm'rs*, 97 U. S. 181, 187, 24 L. Ed. 926.

64. **Written protest does not make payment involuntary.**—*Little v. Bowers*, 134 U. S. 547, 554, 33 L. Ed. 1016; *Railroad Co. v. Commissioners*, 98 U. S. 541, 543, 25 L. Ed. 196; *Lamborn v. County Comm'rs*, 97 U. S. 181, 187, 24 L. Ed. 926.

"There are, no doubt, cases to be found in which the language of the court, if separated from the facts of the particular case under consideration, would seem to imply that a protest alone was sufficient to show that the payment was not voluntary; but on examination it will be found that the protest was used to give effect to the other attending circumstances." *Railroad Co. v. Commissioners*, 98 U. S. 541, 544, 25 L. Ed. 196. See the title **REVENUE LAWS**.

65. **Effect of notice of intention to recover back money wrongfully exacted.**—*United States Bank v. Bank*, 6 Pet. 8, 19, 8 L. Ed. 299.

66. **Payments held to be voluntary and not recoverable.**—A., the owner of certain barges, executed charter parties of them to the United States for a stipulated sum per month so long as they should be retained in the service. After they had been for some time used, he was informed by the quartermaster-general that he must execute a new charter party specifying a reduced compensation. A. declined to comply, and made a demand for them, which was refused. On learning the intention of that officer to retain possession of them and withhold all compensation, A. executed the required charter party, stating at the time that he did so under protest and by reason of the pressure of financial necessity. He thereafter, from time to time, received, without protest or objection, payment according to the diminished rate, and then brought suit against the United States for the difference between it and the original rate, upon the ground that the last charter party was executed under such circumstances as amounted in law to duress. It was held that the payment was not made under duress but was voluntary and that A. was not entitled to recover. *Silliman v. United States*, 101 U. S. 465, 25 L. Ed. 987.

The act of congress of July 13th, 1861 (12 Stat. at Large, 257), prohibited commercial intercourse with the insurrectionary states, but provided that the president might, in his discretion, license and permit it in such articles, for such time, and by such persons, as he might think most conducive to the public interest, to be conducted and carried on only in pursuance of rules and regulations prescribed by the secretary of the treasury. In pursuance of this statute rules and regulations were adopted whereby, amongst other things, permission was given to purchase cotton in the insurrectionary states and export the same to other states, upon condition of paying (besides other fees) a fee or bonus of four cents per pound. It was held that the condition thus imposed was entirely in the option of any person to accept or not. If any did accept it, and engage in the trade, it was a voluntary act, and all payments made in consequence were voluntary payments, and could not be recovered back. *Hamilton*



ments is treated elsewhere in this title.<sup>67</sup>

**B. Payments under Mistake of Law.**—Where money has been voluntarily paid under a mistake of law, but with a full knowledge of all the facts of the case,<sup>68</sup> it cannot be recovered back,<sup>69</sup> for the construction of the law is open to both parties, and each is presumed to know it.<sup>70</sup> But this doctrine does not have such general application to public officers using the funds of the people as to individuals dealing with their own money where nobody but themselves suffer for their ignorance, carelessness or indiscretion, because in the former case the elements of agency and the authority and duty of officers, and their obligations to the public of which all persons dealing with them are bound to take notice, are always involved.<sup>71</sup>

**C. Payments under Mistake of Facts**—1. **RULE STATED.**—Where money is paid to another under the influence of a mistake of facts, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back.<sup>72</sup> Reasons for the application of the rule are much more potent in the case of contracts of the government than of contracts of individuals; for the government must necessarily rely upon the acts of agents, whose ignorance,

*v. Dillin*, 21 Wall. 73, 74, 22 L. Ed. 528.

Money paid by A., the assignee of a patent, to B., the assignor, voluntarily, and with full knowledge of the facts under an agreement between them as to royalties received by A. from licenses, cannot be recovered back on the ground that A. was subsequently obliged to pay to its licensees damages accruing to them by reason of a compromise made by him with another licensee. *Thorn Wire Hedge Co. v. Washburn, etc., Mfg. Co.*, 159 U. S. 423, 40 L. Ed. 203.

**Payments held to be compulsory and recoverable.**—Where a contract of sale provides that the property shall not be delivered until full payment is made and the purchaser makes the final payment, under protest that it is not due, and because it is the only way by which he can obtain the property, such payment is one under duress and can be recovered back. *Loneragan v. Buford*, 148 U. S. 581, 37 L. Ed. 569.

The plaintiffs, who were manufacturers of matches, and furnished their own dies for the stamps used by them, and were thereby entitled to a commission of 10 per cent on the price of such stamps, accepted for a long period their commissions in stamps (which, of course, were worth to them only ninety cents to the dollar), and they did this because the treasury department would pay in no other money. It was held that the apprehension of being stopped in their business by noncompliance with the treasury regulation was a sufficient moral duress to make the payments involuntary. *Swift Co. v. United States*, 111 U. S. 22, 28 L. Ed. 341.

<sup>67</sup> See post, the other subdivisions in this main division (XIII) of the analysis.

<sup>68</sup> See post, "Payments under Mistake of Facts," XIII, C.

<sup>69</sup> **Money paid under mistake of law not recoverable.** *Badeau v. United States*, 130 U. S. 439, 452, 32 L. Ed. 997; *Lam-*

*born v. County Comm'rs*, 97 U. S. 181, 185, 24 L. Ed. 926; *Railroad Co. v. Soutter*, 13 Wall. 517, 524, 20 L. Ed. 543; *Elliott v. Swartwout*, 10 Pet. 137, 9 L. Ed. 373; *Nichols v. United States*, 7 Wall. 122, 128, 19 L. Ed. 125.

<sup>70</sup> *Elliott v. Swartwout*, 10 Pet. 137, 9 L. Ed. 373. See the title MISTAKE AND ACCIDENT, vol. 8, p. 417.

**One who purchases land at a confiscation sale** is presumed to know the law, and so cannot maintain an action to recover back the purchase price because he did not acquire such an estate as he expected. *Waples v. United States*, 110 U. S. 630, 28 L. Ed. 272.

<sup>71</sup> **Doctrine not so generally applicable to payments by public officers.**—*Wisconsin Cent. R. Co. v. United States*, 164 U. S. 190, 212, 41 L. Ed. 399. See post, "Payments by or to Public Officers," XIII, J.

<sup>72</sup> **Money paid under mistake of fact recoverable.**—*United States v. Barlow*, 132 U. S. 271, 281, 33 L. Ed. 346; *United States v. Carr*, 132 U. S. 644, 651, 33 L. Ed. 483; *Louisiana v. Wood*, 102 U. S. 294, 298, 26 L. Ed. 153; *Espy v. Bank*, 18 Wall. 604, 21 L. Ed. 947; *Lamborn v. County Comm'rs*, 97 U. S. 181, 185, 24 L. Ed. 926. See, also, *Leather Manufacturers' Bank v. Merchants' Bank*, 128 U. S. 26, 35, 32 L. Ed. 342, and *Hoffman & Co. v. Bank*, 12 Wall. 181, 189, 20 L. Ed. 366.

**Money paid for municipal bonds apparently well executed**, when in fact they were not, may be recovered back. *Louisiana v. Wood*, 102 U. S. 294, 299, 26 L. Ed. 153.

**Payment not made under a mistake of fact.**—A railroad belonging to an incorporated company, and then under a first and second mortgage, was sold on execution and bought in by certain bondholders, whom the second or junior mortgage was given to secure. These purchasers organized themselves (as they were allowed to do by statute in the state where

carelessness or unfaithfulness would otherwise often bind it, to the serious injury of its operations.<sup>73</sup>

**2. MISTAKE IN ESTIMATE OF VALUE WHERE CONTRACT IS SPECULATIVE.**—Where the subjects in relation to which the contract of parties is made, are necessarily of an uncertain and speculative character or value, and that is known to the parties, a mere mistake by them in their estimate of the value is not sufficient to authorize a recovery of the moneys paid upon the erroneous estimate.<sup>74</sup>

**3. EFFECT OF NEGLIGENCE OR BREACH OF DUTY.**—In cases of money paid under a mistake of facts, if the party has been guilty of negligence, or of a breach of his proper duty in the transaction, he is not entitled to recover it back against the other party, whose rights or conduct have been affected by such negligence or breach of duty.<sup>75</sup>

**D. Payments Procured Through Imposition or Deceit.**—Payments procured through imposition or deceit may be recovered back.<sup>76</sup>

**E. Payments upon a Consideration Which Fails**—1. **IN GENERAL.**—Money paid upon a consideration which fails may be recovered back.<sup>77</sup>

**2. PAYMENTS UNDER A CONTRACT WHICH IS SUBSEQUENTLY RESCINDED.**—Purchase money paid upon a contract of sale which is subsequently rescinded, may be recovered back.<sup>78</sup>

**F. Payments under a Contract Procured Through Fraud.**—Where real estate is sold for a sum payable in installments, and circumstances occur show-

the road was) into a new corporation, and worked the road themselves, and for their own profit. After a certain time, the mortgagees under the first or senior mortgage pressed their debt to a decree of foreclosure; and to prevent a sale of the road the new corporation paid the mortgage debt. Subsequently to this, and on a creditor's bill, the sale made to the creditors under the second mortgage was set aside as fraudulent and void as against other creditors of the corporation which owned the road originally. It was held that no bill in equity would lie by the new corporation against the mortgagees under the first mortgage, to be paid back, as paid under a mistake of fact, what had been thus paid to them by the new corporation. *Railroad Co. v. Soutter*, 13 Wall. 517, 20 L. Ed. 543.

**73. Application of rule to payments under government contracts.**—*United States v. Barlow*, 132 U. S. 271, 282, 33 L. Ed. 346; *United States v. Carr*, 132 U. S. 644, 651, 33 L. Ed. 483.

**Payment due to misapprehension of secretary of treasury resulting from defendant's misrepresentations.**—A payment made by the United States to the defendant, due to a misapprehension upon the part of the secretary of the treasury as to the nature of his services, such misapprehension resulting from the defendant's misrepresentations to that officer may be recovered back by the United States. *United States v. Sanborn*, 135 U. S. 271, 281, 34 L. Ed. 112.

**As to recovery back of money paid by the postoffice department to a contractor under a mistake of fact, see the title POSTAL LAWS.**

**74. Mistake in estimate of value where contract is speculative.**—*United States v. Barlow*, 132 U. S. 271, 281, 33 L. Ed. 346.

**75. Effect of negligence or breach of duty.**—*Bend v. Hoyt*, 13 Pet. 263, 270, 10 L. Ed. 154.

**Thus, where money is paid on a raised check by mistake, neither party being in fault, the general rule is that it may be recovered back. But if either party has been guilty of negligence or carelessness by which the other has been injured, the negligent party must bear the loss.** *Espy v. Bank*, 18 Wall. 604, 21 L. Ed. 947.

**76. Payments procured through imposition or deceit.**—*Louisiana v. Wood*, 102 U. S. 294, 298, 26 L. Ed. 153.

**77. Money paid upon a consideration which fails.**—*Louisiana v. Wood*, 102 U. S. 294, 298, 26 L. Ed. 153; *United States v. Barlow*, 132 U. S. 271, 281, 33 L. Ed. 346.

Where a party pays money on a consideration which fails, and in equity should be refunded, he is entitled to recover back the sum paid and interest upon it. *Nash v. Towne*, 5 Wall. 689, 690, 18 L. Ed. 527.

**An action may be maintained to recover back money paid as the price of articles sold, or of work done, when the articles are not delivered or the work not done.** *United States v. Barlow*, 132 U. S. 271, 281, 33 L. Ed. 346; *Nash v. Towne*, 5 Wall. 689, 18 L. Ed. 527.

**Freight being the compensation for the carriage of goods, if paid in advance, may in all cases, unless there is a special agreement to the contrary be recovered back, if from any cause not attributable to the shipper the goods be not carried.** *The Kimball*, 3 Wall. 37, 44, 18 L. Ed. 50. See the title CARRIERS, vol. 3, p. 617.

**78. Money paid upon contract which is subsequently rescinded.**—*Ankeny v. Clark*, 148 U. S. 345, 353, 37 L. Ed. 475.

Where a contract for the sale of land is rescinded upon the ground that the vendor cannot make such a title as he agreed to

ing the existence of fraud, or that it would be inequitable to take the title, the purchaser can recover back the sum paid before notice of the fraud, but not that paid afterwards.<sup>79</sup>

**G. Payments under an Illegal Contract**—1. **IN GENERAL**.—Where money has been paid upon an illegal contract, it is a general rule that if the contract be executed and both parties are in *pari delicto*, neither of them can recover from the other the money so paid.<sup>80</sup> But if the contract continues executory and the party paying the money be desirous of rescinding it, he may do so and recover back the amount paid.<sup>81</sup> So a recovery may be had where the law that creates the illegality in the transaction was designed for the coercion of one party and the protection of the other, or where the one party is the principal offender and the other only criminal from a constrained acquiescence in such illegal conduct.<sup>82</sup>

2. **PAYMENTS OF USURIOUS INTEREST**.—See the title **USURY**.

**H. Payments of Void or Illegal Taxes or Assessments**.—See the titles **REVENUE LAWS**; **SPECIAL ASSESSMENTS**; **TAXATION**.

give, the vendee is entitled to recover money paid by him to the vendor in pursuance of the contract. *Adams v. Henderson*, 168 U. S. 573, 583, 42 L. Ed. 584; *Bank v. Hagner*, 1 Pet. 455, 468, 7 L. Ed. 219.

**79. Fraud in sale of real estate**.—*Dresser v. Missouri, etc.*, R. Const. Co., 93 U. S. 92, 94, 23 L. Ed. 815. See the titles **FRAUD AND DECEIT**, vol. 6, p. 394; **VENDOR AND PURCHASER**.

**80. Contract executed, and both parties in pari delicto**.—*Thomas v. Richmond*, 12 Wall. 349, 356, 20 L. Ed. 453; *Spring Co. v. Knowlton*, 103 U. S. 49, 58, 26 L. Ed. 347; *Harriman v. Northern Securities Co.*, 197 U. S. 244, 296, 49 L. Ed. 739.

When the party who might set up the illegality of a contract in defense to a demand for money chooses to waive it, and pays the money, he cannot afterwards reclaim it. *McBlair v. Gibbs*, 17 How. 232, 15 L. Ed. 132.

**81. Contract executory**.—*Spring Co. v. Knowlton*, 103 U. S. 49, 58, 26 L. Ed. 347.

"A recovery can be had as for money had and received when the illegality consists in the contract itself, and that contract is not executed; in such case there is a *locus penitentiae*; the delictum is incomplete; the contract may be rescinded by either party." *Spring Co. v. Knowlton*, 103 U. S. 49, 60, 26 L. Ed. 347; *Thomas v. Richmond*, 12 Wall. 349, 355, 20 L. Ed. 453.

"This distinction is taken in the books that where the action is in affirmance of an illegal contract, the object of which is to enforce the performance of an engagement prohibited by law, clearly such an action can in no case be maintained, but where the action proceeds in disaffirmance of such a contract, and instead of endeavoring to enforce it, presumes it to be void and seeks to prevent the defendant from retaining the benefit which he derived from an unlawful act, then it is consonant to the spirit and policy of the law that the plaintiff should recover." Comyn on Contracts 361, quoted in *Spring Co. v. Knowlton*, 103 U. S. 49, 58, 26 L. Ed. 347.

**82. Parties not in pari delicto**.—*Thomas v. Richmond*, 12 Wall. 349, 355, 20 L. Ed. 453.

"In such cases there is no parity of delictum at all between the parties, and the party so protected by the law, or so acting under compulsion, may, at any time, resort to the law for his remedy, though the illegal transaction be completed." *Thomas v. Richmond*, 12 Wall. 349, 355, 20 L. Ed. 453.

In cases of bills, or other obligations, illegally issued by a banking or other private corporation, which has received the consideration therefor, it would seem that the corporation cannot repudiate the illegal obligations, and also retain the proceeds. The corporation issuing the bills contrary to law, and against penal sanctions, is deemed more guilty than the members of the community who received them whenever the receiving of them is not expressly prohibited. The latter are regarded as the persons intended to be protected by the law; and, if they have not themselves violated an express law in receiving the bills, the principles of justice require that they should be able to recover the money received by the bank from them. *Thomas v. Richmond*, 12 Wall. 349, 356, 20 L. Ed. 453.

"But if the parties are in *pari delicto*, as, if the consideration as well as the bills or other obligation is tainted with illegality or immorality as it would be if loaned or advanced for the purpose of aiding in any illegal or immoral transaction, or if the receiving as well as passing or issuing the bills is forbidden by law, then the holder is without legal remedy, and the parties are left to themselves." *Thomas v. Richmond*, 12 Wall. 349, 356, 20 L. Ed. 453.

"But, in the case of municipal and other public corporations, another consideration intervenes. They represent the public, and are themselves to be protected against the unauthorized acts of their officers and agents, when it can be done without injury to third parties. This is necessary in order to guard against fraud and speculation. Persons dealing with such officers



**I. Money Paid by the United States under an Unauthorized Certificate.**—Money paid by the United States under a certificate from persons not authorized by law to give it, may be recovered back.<sup>83</sup>

**J. Payments by or to Public Officers.**—See the titles AMBASSADORS AND CONSULS, vol. 1, p. 283; PUBLIC LANDS; PUBLIC OFFICERS; REVENUE LAWS; SHERIFFS AND CONSTABLES; TAXATION; UNITED STATES.

**K. Payment in Currency That Has Been Embezzled.**—One, who has in good faith received currency in payment of an existing debt, cannot be compelled to repay the same because it subsequently develops that it had been embezzled by the one who made the payment.<sup>84</sup> In such case the burden of showing fraud is on the person demanding repayment.<sup>85</sup>

#### XIV. Pleading.

**A. Plea of Payment**—1. **WHEN PROPER.**—Where presumption of payment from the time permitted to elapse before the institution of a suit upon the debt is relied on, such defense must be set up by a plea of payment.<sup>86</sup>

2. **WHAT MUST BE AVERRED.**—**Where Promissory Note Is Pleaded as Payment.**—In an action on an assumpsit for goods, wares and merchandise sold and delivered to the defendants, if the defendants plead in bar a promissory note which is averred to have been given and received for and in discharge of the obligation, the payment of the note need not be averred.<sup>87</sup>

**Where Suit Is Brought by One Person for Use of Another.**—**Under a statute** which provides that where suit is brought in the name of the person having the legal right for the use of another, the beneficiary must be considered as the sole party to the record, if a suit is brought by one person for the use of another, a plea of payment which does not allege a payment to the beneficial plaintiff or to the person holding the legal title, before the person holding the beneficial interest acquired his right, is bad on demurrer.<sup>88</sup>

**B. Demurrer to Plea of Payment.**—Where payment is properly pleaded, the effect of a demurrer to the plea is to admit the truth thereof.<sup>89</sup>

and agents are chargeable with notice of the powers which the corporation possesses, and are to be held responsible accordingly. The issuing of bills as a currency by such a corporation without authority is not only contrary to positive law, but, being ultra vires, is an abuse of the public franchises which have been conferred upon it; and the receiver of the bills, being chargeable with notice of the wrong, is in pari delicto with the officers, and should have no remedy even for money had and received, against the corporation upon which he has aided in inflicting the wrong." *Thomas v. Richmond*, 12 Wall. 349, 356, 20 L. Ed. 453. See the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES, vol. 8, p. 650.

**83. Money paid by the United States under an unauthorized certificate.**—*United States v. Todd*, note, 13 How. 52, 14 L. Ed. 47. See the title PENSIONS.

**84. Payment in currency that has been embezzled.**—*Rankin v. Chase Nat. Bank*, 188 U. S. 557, 565, 47 L. Ed. 594.

**85. Rankin v. Chase Nat. Bank**, 188 U. S. 557, 565, 47 L. Ed. 594.

**86. Plea of payment proper where defense is lapse of time.**—*Dox v. Postmaster-*

*General*, 1 Pet. 318, 326, 7 L. Ed. 160.

**87. Promissory note pleaded as payment.**—*Sheehy v. Mandeville*, 6 Cranch 253, 264, 3 L. Ed. 215. See ante, "Bills of Exchange and Promissory Notes," VI, I, 1; "Payment in Promissory Notes," VI, O, 11.

**88. Suit brought by one person for use of another—Statute construed.**—*Mobile, etc., R. Co. v. Jurey*, 111 U. S. 584, 595, 28 L. Ed. 527.

**89. Effect of demurrer to plea of payment.**—*Sheehy v. Mandeville*, 6 Cranch 253, 264, 3 L. Ed. 215.

In an action on an assumpsit for goods, wares and merchandise sold and delivered to the defendants, the defendants pleaded in bar a promissory note which they averred was given and received for and in discharge of an account or bill of goods, wares and merchandise sold and delivered by the plaintiff to the defendants, which were the same goods, etc., mentioned in the plaintiff's declaration. The plaintiff did not take issue on this averment but demurred to the plea. It was held that as the demurrer admitted the truth of the plea, action was barred. *Sheehy v. Mandeville*, 6 Cranch 253, 3 L. Ed. 215.

## PAYMENT INTO COURT.

BY S. BLAIR FISHER.

- I. When Proper, 350.
- II. Motions and Orders as to Payment, 351.
- III. Receipt and Deposit of Funds by Clerk of Court, 351.
- IV. Control and Disbursement of Funds by Court, 352.
- V. Restitution of Moneys Improperly Withdrawn from Registry of Court, 353.
- VI. Liability of Funds in Court to Garnishment or Execution, 353.
- VII. Liability of Funds in Court for Attorneys' Fees and Costs, 353.
- VIII. Taking of Funds as Embezzlement, 353.

### I. When Proper.

**Where Ownership of Fund Is in Litigation.**—A court may properly order the payment of a fund into the registry of the court for preservation during the pendency of the litigation as to its ownership.<sup>1</sup> The money when paid into the registry will be in the hands of the court for the benefit of whomsoever it shall in the end be found to belong to.<sup>2</sup>

**Where Money Held by Defendant with Notice of Complainant's Equity.**—Where it appears that the defendant in an equity suit has received money pending the litigation, with notice of the complainant's equity therein, he may be required to pay the amount of money received by him into court.<sup>3</sup>

**Right of Defendant to Discharge Himself from Liability for Interest by Payment into Court.**—It is in the power of a defendant to discharge himself from the payment of interest on whatever balance he conceives to be due, by bringing into court such balance, and paying it over under the order of the court.<sup>4</sup>

**Payment into Court by Appropriating Party in Eminent Domain Proceedings.**—By the payment of money into court, the appropriating party is

1. **Preservation of fund pending litigation as to ownership.**—*Louisiana Bank v. Whitney*, 121 U. S. 284, 30 L. Ed. 961.

Generally, as to orders for payment or delivery into court, and the custody and control of effects in garnishment proceedings, see the title ATTACHMENT AND GARNISHMENT, vol. 2, pp. 693, 697.

2. *Louisiana Bank v. Whitney*, 121 U. S. 284, 30 L. Ed. 961.

3. **Money held by defendant with notice of complainant's equity.**—*Texas v. White*, 131 U. S., appx. xcv, 19 L. Ed. 532.

"This is a motion in behalf of the complainant for an order upon the defendant, Stewart, to pay the amount of the money received by him pending the litigation into court. The decree in this cause heretofore rendered, found that the complainant was entitled to recover certain bonds and coupons, and any proceeds thereof which had come into the possession or control of the defendant, with notice of the equity of the complainant; and further that the defendant, Stewart, was accountable to the complainant to make restitu-

tion of four of said bonds, numbered 4230, 4231, 4235, and 4236, with the coupons attached, or make good the proceeds thereof. The decree as to Stewart was rendered pro confesso, and a motion was made to set it aside, and for a new hearing, on the ground that the proceeds of the bonds were paid to him before serving of process; but on consideration, the court being satisfied that the payment of the bonds was received by him pending the litigation, and, though before service of process on him, with notice of the equity of the complainant, denied the motion. Upon the principle of this decision the complainant is entitled to the order for which the motion asks, and it will be allowed." *Texas v. White*, 131 U. S., appx. xcv, 19 L. Ed. 532.

4. **Payment into court as discharging from liability for interest.**—See the title INTEREST, vol. 7, p. 236.

So, also, as to the rule that money in the possession of the court carries no interest, see *Himely v. Rose*, 5 Cranch 313, 3 L. Ed. 111.

freed from all responsibility, and his right to the land is not affected by the disposal which the court may make of the money.<sup>5</sup>

**Attorney with Set-Off against Client Not Required to Pay in Moneys Collected.**—See the title *ATTORNEY AND CLIENT*, vol. 2, p. 722.

**As to custody and distribution of funds in courts of admiralty**, see the title *ADMIRALTY*, vol. 1, p. 180.

**As to payment into court in supplementary proceedings**, see the title *EXECUTIONS*, vol. 6, p. 117.

**As to payment over to trustee of bankrupt's funds**, see the title *BANKRUPTCY*, vol. 2, p. 870.

**As to bringing money into court in cases of suits for specific performance**, see the title *SPECIFIC PERFORMANCE*.

**As to bringing into court moneys tendered**, see the title *TENDER*.

## II. Motions and Orders as to Payment.

**Manner of Obtaining Payment into Court.**—The usual method of obtaining the payment into court of money held by a defendant is by a motion on behalf of the complainant, for an order upon the defendant requiring such payment.<sup>6</sup> Motions for a rule nisi to show cause why money should not be paid into court ought regularly to be accompanied by an affidavit verifying the facts on which they are grounded, and when not so supported, they will not in general be entertained by the court for affirmative action.<sup>7</sup> Such affidavit may, however, it seems, be dispensed with under some circumstances.<sup>8</sup>

**Nature of Order Directing the Payment into Court.**—An order directing the payment of money into court during the pendency of litigation as to its ownership, is interlocutory only,<sup>9</sup> and an appeal will not lie therefrom.<sup>10</sup>

**Disobedience of Order Punishable as Contempt.**—Disobedience to the order of a court, requiring the payment of money into court, is punishable as for contempt.<sup>11</sup>

**Allowance of Interest on Failure to Bring Money into Court.**—See the title *INTEREST*, vol. 7, p. 226.

## III. Receipt and Deposit of Funds by Clerk of Court.

**Duty of Clerk of Court to Receive, Pay, and Account for Funds.**—See the title *CLERKS OF COURT*, vol. 3, p. 852.

**As to compensation of clerks of court for receiving and keeping funds**, see the title *CLERKS OF COURT*, vol. 3, p. 862.

**As to liability of clerks of court for funds received**, see the title *CLERKS OF COURT*, vol. 3, p. 853.

**Deposit of Funds.**—By express provision of the United States Revised Statutes, it is made the duty of a clerk of a United States court, upon receiving

5. **Payment into court by appropriating party in eminent domain proceedings.**—See the title *EMINENT DOMAIN*, vol. 5, p. 787.

6. **Motion for order requiring payment into court.**—*Texas v. White*, 131 U. S., appx. xcv, 19 L. Ed. 532. And see *In re Paschal*, 10 Wall. 483, 19 L. Ed. 992.

7. **Necessity for motion to be accompanied by affidavit.**—*Texas v. White*, 131 U. S., appx. xcv, 19 L. Ed. 532.

8. **Affidavit dispensed with.**—*Texas v. White*, 131 U. S., appx. xcv, 19 L. Ed. 532, in which case the court, after laying down the usual rule as to necessity for affidavits, said: "The docket entries and papers in the case show that due notice was given to the respondent before the hearing, and inasmuch as the respondent appeared by counsel and admitted that

he had received the amount alleged in the motion, and expressed through his counsel his readiness to answer the motion upon the merits, the court think it proper to grant the rule nisi, giving leave to the parties respectively to file, at the hearing on the rule now ordered, such affidavits, pertinent to the issue involved in the rule, as they shall be advised are necessary to the present inquiry."

9. **Order directing payment into court interlocutory.**—*Foray v. Conrad*, 6 How. 201, 12 L. Ed. 404; *Louisiana Bank v. Whitney*, 121 U. S. 284, 30 L. Ed. 961.

10. **Order not appealable.**—See the title *APPEAL AND ERROR*, vol. 1, p. 973.

11. **Disobedience of order punishable as contempt.**—*Hovey v. Elliott*, 167 U. S. 409, 42 L. Ed. 215.



money paid into such court, under its sanction, to forthwith deposit the amount with the proper depository, in the name and to the credit of the court.<sup>12</sup>

#### IV. Control and Disbursement of Funds by Court.

**In General.**—Moneys paid into court in a cause remain under the control and subject to the orders of such court,<sup>13</sup> and can be paid out only upon order of the court<sup>14</sup> in such cause.<sup>15</sup>

**Refusal of Mandamus to Compel Paying Over Money Not Adjudged to Belong to Petitioner.**—A petition for mandamus directing the payment to the petitioner of money alleged to have been paid into court for the petitioner, will be refused, where it appears that it had not been adjudged that the money belonged to the petitioner, but that the litigation was still pending.<sup>16</sup>

**Conclusiveness of Decree of Distribution.**—Where there is a fund in court to be distributed among different claimants, a decree of distribution will not

**12. Money to be deposited in name and to credit of court.**—Howard *v.* United States, 184 U. S. 676, 46 L. Ed. 754; Gregory *v.* Boston Safe Deposit, etc., Co., 144 U. S. 665, 36 L. Ed. 585.

"All moneys paid into any court of the United States, or received by the officers thereof, in any cause pending or adjudicated in such court, shall be forthwith deposited with the treasurer, an assistant treasurer, or a designated depository of the United States, in the name and to the credit of such court; provided, that nothing herein shall be construed to prevent the delivery of any such money upon security, according to agreement of parties, under the direction of the court." U. S. Rev. Stat., § 995; Howard *v.* United States, 184 U. S. 676, 46 L. Ed. 754.

**13. Control of court over funds deposited.**—Gregory *v.* Boston Safe Deposit, etc., Co., 144 U. S. 665, 36 L. Ed. 585; Osborne *v.* United States, 91 U. S. 474, 23 L. Ed. 388; Louisiana Bank *v.* Whitney, 121 U. S. 284, 30 L. Ed. 961.

The proceeds of property confiscated, paid into court, are under its control until an order for their distribution is made, or they are paid into the hands of the informer entitled to them, or into the treasury of the United States. Osborne *v.* United States, 91 U. S. 474, 23 L. Ed. 388. See the title WAR.

**14. Disbursement to be on order of court.**—Howard *v.* United States, 184 U. S. 676, 46 L. Ed. 754; Gregory *v.* Boston Safe Deposit, etc., Co., 144 U. S. 665, 36 L. Ed. 585; Potter *v.* Gardner, 5 Pet. 718, 8 L. Ed. 285.

**Statutory provision as to necessity, manner and sufficiency of order.**—By § 996 of the United States Revised Statutes it is provided, that "no money deposited as aforesaid shall be withdrawn except by order of the judge or judges of said court respectively, in term or in vacation, to be signed by such judge or judges, and to be entered and certified of record by the clerk; and every such order shall state the cause in or on account of which it is drawn." Howard *v.* United States, 184 U. S. 676, 46 L. Ed. 754.

**15. Must be disposed of in suit to whose**

**credit fund deposited.**—Gregory *v.* Boston Safe Deposit, etc., Co., 144 U. S. 665, 36 L. Ed. 585.

**Necessity that interested persons be parties.**—No order for the disbursement and distribution of moneys deposited in court can properly be made in a suit which does not include as parties some of the persons who are parties to the suit to the credit of which such moneys were deposited. Gregory *v.* Boston Safe Deposit, etc., Co., 144 U. S. 665, 36 L. Ed. 585.

Where a fund is brought into court upon proceedings under a bill to foreclose a mortgage, it is altogether irregular for the court to order an investigation into the general accounts between the attorney and his client during past years, and to order that the attorney shall be paid, out of the fund in court, the balance which the master may report to be due. The persons interested in this decree were not properly before the court as parties. Wolfe *v.* Lewis, 19 How. 280, 15 L. Ed. 643.

"The whole proceeding in behalf of Lewis, as against the complainants, was irregular and void, the court having no jurisdiction of the matter. The order was of no importance that the decree should be without prejudice to either party, and not pleadable in bar to any subsequent litigation between them upon the same subject matter, as the proceedings were invalid. But, as regards the complainants, it was error in the court to order any part of its original decree in their favor to be paid to one who was not properly before it as a party. For this purpose, neither complainants, nor the defendant, Lewis, were before the court, or amenable to its jurisdiction. The decree is therefore reversed, with costs. And the court direct that an order be transmitted to the circuit court, to require the defendant, Lewis, to pay over any money received by him under the decree to the proper officer of the court, that it may be paid to the complainants." Wolfe *v.* Lewis, 19 How. 280, 15 L. Ed. 643.

**16. Refusal of mandamus to compel paying over money not adjudged to belong to petitioner.**—Ex parte Hughes, 114 U.

preclude a claimant not embraced in its provisions, but having rights similar to those of other claimants who are thus embraced, from asserting by appeal or petition, previous to the distribution, his right to share in the fund, and in the prosecution of his suit he is entitled, upon a proper showing, to all the remedies by injunction, or order, which a court of equity usually exercises to prevent the relief sought from being defeated.<sup>17</sup>

**V. Restitution of Moneys Improperly Withdrawn from Registry of Court.**

Where moneys belonging to the registry of the court are withdrawn from it without authority of law, the court can, by summary proceeding, compel their restitution; and any one entitled to the moneys may apply to the court by petition for a delivery of them to him.<sup>18</sup>

**VI. Liability of Funds in Court to Garnishment or Execution.**

**As to garnishment of property in custodia legis**, see the title ATTACHMENT AND GARNISHMENT, vol. 2, p. 695.

**As to levy on money in hands of sheriff under levy by him**, see the titles EXECUTIONS, vol. 6, p. 89; SHERIFFS', CONSTABLES' AND MARSHALS' SALES.

**VII. Liability of Funds in Court for Attorneys' Fees and Costs.**

**As to allowance of attorneys' fees from funds in court**, liens of attorneys on such funds, etc., see the title ATTORNEY AND CLIENT, vol. 2, p. 729.

**As to liability of funds in court for payment of costs and expenses**, see the titles BANKRUPTCY, vol. 2, p. 852; COSTS, vol. 4, p. 846.

**VIII. Taking of Funds as Embezzlement.**

It is expressly provided by § 5505 of the United States Revised Statutes, that "every person who knowingly receives from the clerk or other officer of a court of the United States, any money belonging in the registry of such court as a deposit, loan or otherwise, is guilty of embezzlement, and shall be punished as prescribed in the preceding section."<sup>19</sup>

**PAYROLLS OF SUPERVISORS OF ELECTIONS.**—See the title ELECTIONS, vol. 5, p. 726.

**PEBBLES.**—See note 1.

**PECUNIARY LEGACIES.**—See the titles MARSHALING ASSETS AND SECURITIES, vol. 8, p. 268; WILLS.

**PEDDLER.**—See the titles HAWKERS AND PEDDLERS, vol. 6, p. 680; INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 472.

S. 147, 29 L. Ed. 134. See the title MAN-DAMUS, vol. 8, p. 1.

17. Decree of distribution not conclusive as to claimant not embraced in its provisions.—In the *Matters of Howard*, 9 Wall. 175, 19 L. Ed. 634. See the title RES ADJUDICATA.

18. Restitution of moneys improperly withdrawn, etc.—*Osborne v. United States*,

91 U. S. 474, 23 L. Ed. 388.

19. Taking of funds punishable as embezzlement.—*Howard v. United States*, 184 U. S. 676, 46 L. Ed. 754. See, generally, the title EMBEZZLEMENT, vol. 5, p. 742.

1. Pebbles.—See *Arthur v. Sussfield*, 96 U. S. 128, 24 L. Ed. 772. And see, generally, the title REVENUE LAWS.

# PEDIGREE.

BY WALTER CARRINGTON.

**I. Rule as to Admissibility of Hearsay Evidence to Prove Pedigree, 354.**

**II. Character of Hearsay That Is Admissible, 354.**

A. In General, 354.

B. Declarations of Deceased Relatives, 355.

C. General Reputation, 355.

D. Recitals in Deeds, 356.

E. Statements in Wills, 356.

F. Registers of Births, Baptisms, Marriages, Deaths and Burials, 356.

G. Entries in a Family Bible, 356.

H. Entry of Marriage in a Private Memorandum Kept by a Clergyman, 356.

I. Entry of Age in Minute Book of Lodge of Odd Fellows, 356.

## CROSS REFERENCES.

See the titles DECLARATIONS AND ADMISSIONS, vol. 5, p. 214; DOCUMENTARY EVIDENCE, vol. 5, p. 431; EVIDENCE, vol. 5, p. 1004; HEARSAY EVIDENCE, vol. 6, p. 686; INDIANS, vol. 6, p. 906; INSURANCE, vol. 7, p. 66; PRESUMPTIONS AND BURDEN OF PROOF; RES ADJUDICATA.

### **I. Rule as to Admissibility of Hearsay Evidence to Prove Pedigree.**

As a general rule, hearsay evidence is not admissible.<sup>1</sup> But to this rule an exception exists where such evidence is introduced for the purpose of proving pedigree, provided it emanates from a source which the law recognizes as giving to it a strong probability of truth.<sup>2</sup> Such evidence is admissible to prove marriages, births and deaths, and their respective times.<sup>3</sup> This relaxation of the general rule is founded on principles of public convenience and necessity.<sup>4</sup>

### **II. Character of Hearsay That Is Admissible.**

**A. In General.**—Hearsay evidence is admissible to prove pedigree only when the tradition comes from persons intimately connected or in close relation, with the family, or from sources of a kindred nature, which, in a general sense, may be said to import verity, there being no *lis mota*, or other interest, to effect the

1. See the title HEARSAY EVIDENCE, vol. 6, p. 686.

2. Hearsay evidence admissible to prove pedigree.—*Strickland v. Poole*, 1 Dall. 14, 1 L. Ed. 17; *Mima Queen v. Hepburn*, 7 Cranch 290, 296, 3 L. Ed. 348; *Davis v. Wood*, 1 Wheat. 6, 4 L. Ed. 22; *Chirac v. Reinecker*, 2 Pet. 613, 7 L. Ed. 538; *Ellicott v. Pearl*, 10 Pet. 412, 434, 9 L. Ed. 475; *Stein v. Bowman*, 13 Pet. 209, 10 L. Ed. 129; *Fulkerson v. Holmes*, 117 U. S. 389, 397, 29 L. Ed. 915. See post, "Character of Hearsay That Is Admissible," II.

3. Hearsay admissible to prove marriages, births and deaths.—*Ellicott v. Pearl*, 10 Pet. 412, 438, 9 L. Ed. 475. See post, "Character of Hearsay That Is Admissible," II.

But hearsay as to the place of birth is not admissible, for it turns upon a single fact, that of locality; and that ought to

be proved by the ordinary course of evidence. *Ellicott v. Pearl*, 10 Pet. 412, 438, 9 L. Ed. 475.

4. Hearsay admitted upon principles of public convenience and necessity.—*Chirac v. Reinecker*, 2 Pet. 613, 7 L. Ed. 538; *Ellicott v. Pearl*, 10 Pet. 412, 434, 9 L. Ed. 475; *Stein v. Bowman*, 13 Pet. 209, 10 L. Ed. 129; *Fulkerson v. Holmes*, 117 U. S. 389, 397, 29 L. Ed. 915.

"This exception has been recognized on the ground of necessity; for, as in inquiries respecting relationship or descent, facts must often be proved which occurred many years before the trial, and were known to but few persons, it is obvious that the strict enforcement in such cases of the rules against hearsay evidence would frequently occasion a failure of justice." *Fulkerson v. Holmes*, 117 U. S. 389, 397, 29 L. Ed. 915. See, also, *Ellicott v. Pearl*, 10 Pet. 412, 434, 9 L. Ed. 475.



credit of their statement.<sup>5</sup>

**B. Declarations of Deceased Relatives.**—Declarations of deceased persons who were de jure related by blood or marriage to the family in question may be given in evidence in matters of pedigree.<sup>6</sup> But before such declarations can be admitted, it must be shown that the declarant is dead,<sup>7</sup> and his relationship to the family must be established by independent testimony.<sup>8</sup>

**A declaration made post litem motam** is not admissible.<sup>9</sup>

**C. General Reputation.**—It is competent to prove death and heirship by reputation.<sup>10</sup>

**Evidence of general reputation in a family** is admissible to prove pedi-

**5. Character of hearsay that is admissible.**—*Ellicott v. Pearl*, 10 Pet. 412, 9 L. Ed. 475.

**6. Declarations of deceased relatives.**—*Elliott v. Peirsol*, 1 Pet. 328, 337, 7 L. Ed. 164; *Stein v. Bowman*, 13 Pet. 209, 10 L. Ed. 129; *Blackburn v. Crawfords*, 3 Wall. 175, 187, 18 L. Ed. 186; *Fulkerson v. Holmes*, 117 U. S. 389, 397, 29 L. Ed. 915; *Throckmorton v. Holt*, 180 U. S. 552, 580, 45 L. Ed. 663. But see *Blackburn v. Crawfords*, 3 Wall. 175, 18 L. Ed. 186.

In matters of pedigree, declarations by members of the family are admissible in evidence, because the question in such cases is generally one concerning the parentage or descent of the individual, and in order to ascertain that fact it is material to know how he was acknowledged and treated by those who were interested in him or sustained towards him any relations of blood or affinity. *Throckmorton v. Holt*, 180 U. S. 552, 580, 45 L. Ed. 663. See, also, *Blackburn v. Crawfords*, 3 Wall. 175, 187, 18 L. Ed. 186.

"Evidence showing how he was acknowledged and treated is frequently only to be shown by declarations made at the time, and though unsworn are received as the best that the nature of the case permits." *Throckmorton v. Holt*, 180 U. S. 552, 580, 45 L. Ed. 663.

**A letter from a deceased member of a family**, stating the pedigree of the family, and testified by the wife to have been written by her husband, she also swearing in her deposition that the facts stated in the letter had been frequently mentioned by her husband in his lifetime, is admissible in evidence. *Elliott v. Peirsol*, 1 Pet. 328, 7 L. Ed. 164.

**On a question of marriage and legitimacy**, it is competent, in order to prove an heirship asserted, to give in evidence the declarations of any deceased member of that family, to which the person from whom the estate descends belonged. *Blackburn v. Crawfords*, 3 Wall. 175, 18 L. Ed. 186.

But it is not competent to give the declarations of a person belonging to another family—such person being connected, if at all, with the person from whom the estate descends only by the asserted intermarriage which his declaration is offered

to prove. *Blackburn v. Crawfords*, 3 Wall. 175, 18 L. Ed. 186.

The declarations of a deceased member of a family that the parents of it never were married, are admissible in evidence, whether his connection with that family was by blood or marriage. *Jewell v. Jewell*, 1 How. 219, 11 L. Ed. 108.

**In Pennsylvania, it has been held that a person's age cannot be proved by evidence of the declarations of his parents.** *Albertson v. Robeson*, 1 Dall. 9, 1 L. Ed. 14.

**7. Death of declarant must be proved.**—*Stein v. Bowman*, 13 Pet. 209, 220, 10 L. Ed. 129. But see *Elliott v. Peirsol*, 1 Pet. 328, 337, 7 L. Ed. 164.

**8. Relationship must be established by independent testimony.**—*Blackburn v. Crawfords*, 3 Wall. 175, 187, 18 L. Ed. 186; *Fulkerson v. Holmes*, 117 U. S. 389, 397, 29 L. Ed. 915.

But only slight proof of the relationship will be required, since the relationship of the declarant with the family might be as difficult to prove as the very fact in controversy. *Fulkerson v. Holmes*, 117 U. S. 389, 397, 29 L. Ed. 915.

**9. Declaration made post litem motam not admissible.**—*Stein v. Bowman*, 13 Pet. 209, 220, 10 L. Ed. 129. See, also, *Elliott v. Peirsol*, 1 Pet. 328, 337, 7 L. Ed. 164, and *Strickland v. Poole*, 1 Dall. 14, 1 L. Ed. 17. See the title DECLARATIONS AND ADMISSIONS, vol. 5, p. 216.

**10. Death and heirship may be proved by reputation.**—*Secrist v. Green*, 3 Wall. 744, 751, 18 L. Ed. 153.

In an action of trespass for mesne profits the evidence showed that an intestate under whom the plaintiffs claimed title died in 1799; that the father of such intestate who also died intestate left two sons, A., the intestate, and B. A witness who was no relation of the family testified that before 1797 she resided in St. Domingo and lived on a plantation near that of the intestate; that she heard in St. Domingo that his brother, B., came to the intestate's residence there, and it was publicly reported in the neighborhood that he had died; that she heard this at the house of a friend where the intestate visited, and heard it very often, and that it was generally stated as a fact; that she never saw B. and never heard that he was

gree.<sup>11</sup> But the tradition must be from persons having such a connection with the party to whom it relates, that it is natural and likely, from their domestic habits and connections, that they are speaking the truth, and that they could not be mistaken.<sup>12</sup>

**D. Recitals in Deeds.—Recitals in Ancient Deed.**—The declaration of one since deceased, deliberately made in an ancient deed, to the effect that the declarant was the only child and heir of a person named and that the latter was dead, is admissible in evidence, as tending to prove the facts so recited.<sup>13</sup>

**In Pennsylvania**, it has been held that recitals in deeds, with respect to pedigree, are admissible in evidence.<sup>14</sup>

**E. Statements in Wills.**—A will made a short time before a testator's death acknowledging a child as his legitimate and only daughter, is admissible on the question of legitimacy.<sup>15</sup>

**F. Registers of Births, Baptisms, Marriages, Deaths and Burials.**—See the title DOCUMENTARY EVIDENCE, vol. 5, p. 443.

**G. Entries in a Family Bible.**—A leaf cut out of a family Bible, on which are written the names of the children of one under whom the lessor of the plaintiff claims, with the time of their respective births, certified by a notary in another state, is admissible in evidence, to prove pedigree.<sup>16</sup>

**H. Entry of Marriage in a Private Memorandum Kept by a Clergyman.**—See the title DOCUMENTARY EVIDENCE, vol. 5, p. 461.

**I. Entry of Age in Minute Book of Lodge of Odd Fellows.**—See the title INSURANCE, vol. 7, p. 164.

**PELTRY.**—See note 1.

**PENAL.**—In the municipal law of England and America, the words "penal" and "penalty" have been used in various senses. Strictly and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the state, for a crime or offense against its laws.<sup>2</sup> But they are also commonly used as including any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered. They are so elastic in meaning as even to be familiarly applied to cases of private contracts, wholly independent of statutes, as when we speak of the "penal sum" or "penalty" of a bond.<sup>3</sup>

**PENAL LAW OR STATUTE.**—See the titles CONFLICT OF LAWS, vol. 3, p. 1073; PENALTIES AND FORFEITURES; STATUTES.

married. It was held that this testimony was legal and competent evidence of pedigree. *Chirac v. Reinecker*, 2 Pet. 613, 620, 7 L. Ed. 538.

In an action of ejectment, in order to prove the time of the death of an intestate through whom the plaintiffs claim title, testimony of a witness that in a certain year she was at the place of residence of the intestate and was then told that he was dead, is admissible. *Scott v. Ratcliffe*, 5 Pet. 81, 86, 8 L. Ed. 54.

**11. General reputation in a family.**—*Stein v. Bowman*, 13 Pet. 209, 220, 10 L. Ed. 129.

As to the admissibility of the declarations of deceased relatives, see ante, "Declarations of Deceased Relatives," II. B.

As to admissibility of evidence of belief of family of an assured that he is dead, see the title INSURANCE, vol. 7, p. 213.

**12. Stein v. Bowman**, 13 Pet. 209, 220, 10 L. Ed. 129.

**13. Recital in ancient deed.**—*Fulkerson v.*

*Holmes*, 117 U. S. 389, 399, 29 L. Ed. 915. See, also, *Deery v. Cray*, 5 Wall. 795, 18 L. Ed. 653.

**14. Recitals in deeds admissible in Pennsylvania.**—*Morris v. Vanderen*, 1 Dall. 64, 67, 1 L. Ed. 38.

**15. Statement in will admissible on question of legitimacy.**—*Gaines v. New Orleans*, 6 Wall. 642, 18 L. Ed. 950.

**16. Entries of births.**—*Douglass v. Sanderson*, 2 Dall. 116, 118, 1 L. Ed. 312.

**As to admissibility of entries of deaths, in a family Bible**, see the title DOCUMENTARY EVIDENCE, vol. 5, p. 461.

**1. Peltry.**—See *Seeberger v. Schlesinger*, 152 U. S. 581, 585, 38 L. Ed. 560. And see, generally, the title REVENUE LAWS.

**2. Huntington v. Attrill**, 146 U. S. 657, 666, 36 L. Ed. 1123, citing *United States v. Reisinger*, 128 U. S. 398, 402, 32 L. Ed. 480; *United States v. Chouteau*, 102 U. S. 603, 611, 26 L. Ed. 246.

**3. Huntington v. Attrill**, 146 U. S. 657, 666, 36 L. Ed. 1123.

## PENALTIES AND FORFEITURES.

BY JOHN D. PARKER.

- I. Definition, 358.
- II. Penalties and Forfeitures Not Favored, 360.
- III. Penalties in the District of Columbia, 362.
- IV. Sale of Intoxicating Liquors to Indians, 362.
- V. Necessity for Consent to Act to Incur Forfeiture, 362.
- VI. Forfeiture of Estates, 362.
- VII. Forfeiture of Thing with or in Respect to Which Offense Is Committed, 363.
- VIII. Seizure and Condemnation for Forfeiture, 363.
- IX. Power to Impose, Enforce and Dispose of Penalties and Forfeitures, 364.
- X. Remission of Penalty or Forfeiture, 364.
  - A. By Legislature, 364.
  - B. By Secretary of the Treasury, 364.
- XI. Penalties and Forfeitures under Contracts, 365.
- XII. License and Taxation Laws, 365.
- XIII. Time and Effect of Forfeiture, 366.
- XIV. Proceedings to Recover Penalties, 367.
  - A. In the District of Columbia, 367.
  - B. Nature of Proceedings, 367.
  - C. Institution and Conduct of Suits for Municipal Forfeitures, 368.
  - D. Libel and Informations, 368.
  - E. Declarations and Pleas, 368.
  - F. Evidence, 368.
    - 1. In General, 368.
    - 2. Burden of Proof, 368.
  - G. Limitations, 369.
  - H. Waiver, 369.

### CROSS REFERENCES.

See the titles ADMIRALTY, vol. 1, p. 119; BANKS AND BANKING, vol. 3, p. 1; CONSTITUTIONAL LAW, vol. 4, p. 1; CORPORATIONS, vol. 4, p. 621; CURTESY, vol. 5, p. 155; DUE PROCESS OF LAW, vol. 5, p. 499; EMBARGO AND NONINTERCOURSE LAWS, vol. 5, p. 732; INSURANCE, vol. 7, p. 66; PIRACY; PRESUMPTIONS AND BURDEN OF PROOF; PRIZE; REVENUE LAWS; SALVAGE; SEARCHES AND SEIZURES; SLAVERY AND INVOLUNTARY SERVITUDE; SPECIFIC PERFORMANCE; STATUTES; STOCKS AND STOCKHOLDERS; TELEGRAPHS AND TELEPHONES; TREATIES; USURY; WAR; WITNESSES.

As to what law governs in action for penalty, see the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 21. As to abatement of actions on penal statutes, see the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 23. As to jurisdiction of district court of Alaska in proceedings to forfeit vessels, see the title ADMIRALTY, vol. 1, p. 152. As to forfeitures of allowances by officers of army and navy, see the title ARMY AND NAVY, vol. 2, p. 521. As to forfeitures of pay and allowances by privates of army and navy, see the title ARMY AND NAVY, vol. 2, p. 531. As to allowance of debts due as penalty or forfeiture, see



the title *BANKRUPTCY*, vol. 2, p. 883. As to ultra vires acts of banks where statute does not impose any penalty or forfeiture, see the title *BANKS AND BANKING*, vol. 3, p. 20. As to recovery of damages and penalties on bonds, see the title *BONDS*, vol. 3, pp. 439, 440. As to penalty for breach of blockade, see the title *BLOCKADE*, vol. 3, p. 378. As to remission of penalty for breach of blockade, see the title *BLOCKADE*, vol. 3, p. 379. As to enforcement of penal laws of foreign state or country, see the title *CONFLICT OF LAWS*, vol. 3, p. 1073. As to forfeitures of goods on attainder, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 515. As to action for damages for infringement of copyright, see the title *COPYRIGHT*, vol. 4, p. 617. As to penalties under the copyright laws, see the title *COPYRIGHT*, vol. 4, p. 618. As to jurisdiction of United States district courts, see the title *COURTS*, vol. 4, p. 898. As to jurisdiction over suits for penalties and forfeitures under revenue laws, see the title *COURTS*, vol. 4, p. 921. As to forfeitures of estate of curtesy, see the title *CURTESY*, vol. 5, p. 155. As to distinction between penalties and liquidated damages, see the title *DAMAGES*, vol. 5, p. 176, et seq. As to forfeitures of wines for violation of embargo and nonintercourse law, see the title *EMBARGO AND NONINTERCOURSE LAWS*, vol. 5, p. 735. As to penalty for noncompliance with terms of admission of foreign corporation, see the title *FOREIGN CORPORATIONS*, vol. 6, p. 322. As to forfeiture of lands by Indians, see the title *INDIANS*, vol. 6, p. 924. As to forfeiture of buildings on Indian lands, see the title *INDIANS*, vol. 6, p. 946. As to recovery of excessive charge in the nature of a penalty for violation of interstate commerce, see the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 504. As to termination of lease by forfeiture, see the title *LANDLORD AND TENANTS*, vol. 7, p. 830. As to effect of forfeiture of vessels on insurance, see the title *MARINE INSURANCE*, vol. 8, p. 149. As to forfeiture of mining claims, see the title *MINES AND MINERALS*, vol. 8, p. 364. As to forfeiture for violation of neutrality laws, see the title *NEUTRALITY*, vol. 8, p. 894. As to power of president to release penalties and forfeitures, see the title *PARDON*, ante, p. 1. As to forfeiture of grants of public lands, see the title *PUBLIC LANDS*. As to forfeiture of rights of individual to community of separatist, see the title *RELIGIOUS SOCIETIES*. As to forfeiture under revenue laws, see the title *REVENUE LAWS*. As to construction of statutes to prevent frauds upon the revenue, see the title *REVENUE LAWS*. As to amount of penalty to which informers are entitled under the revenue laws, see the titles *INFORMERS*, vol. 6, 1020; *REVENUE LAWS*. As to forfeiture of rights of salvage, see the title *SALVAGE*. As to power to remit penalties, see the titles *REVENUE LAWS*; *SHIPS AND SHIPPING*. As to penalties under laws relating to ships, see the title *SHIPS AND SHIPPING*. As to forfeiture for violation of laws, in reference to enrollment and registry of ships, see the title *SHIPS AND SHIPPING*. As to forfeiture under acts prohibiting the slave trade, see the title *SLAVERY AND INVOLUNTARY SERVITUDE*. As to construction of penal laws, see the title *STATUTES*. As to whether liability of stockholders under New York statute is a contract or penalty, see the title *STOCK AND STOCKHOLDERS*. As to penalties for nonpayment of taxes, see the title *TAXATION*.

### I. Definition.

The term penalty involves the idea of punishment.<sup>1</sup> As a general thing, the im-

1. **The term elastic.**—"In the municipal law of England and America, the words 'penal' and 'penalty' have been used in various senses. Strictly and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the state, for a crime or offense against its laws. *United States v. Reisinger*, 128 U. S. 398, 402, 32 L. Ed. 480; *United States v. Chouteau*, 102 U. S. 603, 611, 26 L. Ed. 246. But they are also commonly used as including

any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered. They are so elastic in meaning as even to be familiarly applied to cases of private contracts, wholly independent of statutes, as when we speak of the 'penal sum' or 'penalty' of a bond. In the words of Chief Justice Marshall: 'In general, a sum of money in gross, to be paid for the nonperformance of an agree-

position of a penalty implies delinquency by the party on whom it is imposed.<sup>2</sup> The words "penalty," "liability" and "forfeiture" have been used as synonymous with the word "punishment" in connection with crimes of the highest grade.<sup>3</sup> A thing must be acquired before it is forfeited.<sup>4</sup> The failure of a statute to designate a sum of money as a penalty but describing it as "a further sum" or an additional duty will not work a statutory alteration of the nature of the imposition and it will be regarded as a penalty when by its very nature it is a penalty.<sup>5</sup> Rent reserved in advance to become due and enforceable by distress upon removal of goods from premises, or subletting, is not a penalty but rent.<sup>6</sup>

ment, is considered as a penalty, the legal operation of which is to cover the damages which the party, in whose favor the stipulation is made, may have sustained from the breach of contract by the opposite party.' *Taylor v. Sandiford*, 7 Wheat. 13, 5 L. Ed. 384." *Huntington v. Attrill*, 146 U. S. 657, 666, 36 L. Ed. 1123. See, also, dissenting opinion of Harlan, J., in *Schick v. United States*, 195 U. S. 65, 76, 49 L. Ed. 99.

**Idea of punishment.**—"The term 'penalty' involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution." *United States v. Chouteau*, 102 U. S. 603, 611, 26 L. Ed. 246; *United States v. Ulrici*, note, 102 U. S. 612, 26 L. Ed. 249. See, also, *United States v. Reisinger*, 128 U. S. 398, 402, 32 L. Ed. 480; *Schick v. United States*, 195 U. S. 65, 49 L. Ed. 99.

**Fines.**—Fines are pecuniary penalties. *The Strathairly*, 124 U. S. 558, 571, 31 L. Ed. 580.

**Interest as penalty.**—A penalty in the name of interest should not be inflicted upon the owners of a mortgage lien for resisting claims which the court has disallowed. *Thomas v. Western Car Co.*, 149 U. S. 95, 116, 37 L. Ed. 663.

"A suit against a national bank to recover back twice the amount of interest illegally taken by it is a suit to recover a penalty incurred under a law of the United States." *Charlotte Nat. Bank v. Morgan*, 132 U. S. 141, 144, 33 L. Ed. 282. See, generally, the title INTEREST, vol. 7, p. 217.

**Commutation of toll.**—In 1843, the legislature of Maryland passed an act imposing a toll upon all passengers in mail coaches, and if it were not paid, a toll of one dollar for each coach for every time that it passed over the road. The imposition of toll being inconsistent with the compact made between Maryland and congress and the toll per coach, of one dollar, being more properly a commutation of tolls than a penalty, was therefore void. *Achison v. Huddleson*, 12 How. 293, 13 L. Ed. 993.

**2. Delinquency implied.**—*Savings Bank v. Archbold*, 104 U. S. 708, 710, 26 L. Ed. 901.

**3. United States v. Reisinger**, 128 U. S.

398, 32 L. Ed. 480; *Schick v. United States*, 195 U. S. 65, 76, 49 L. Ed. 99.

In § 13 of the Revised Statutes, providing that the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture of liability incurred under such statute, unless it be so provided by the repealing act, the words "penalty," "forfeiture," "liability," and "prosecution," were used by congress to include all forms of punishment for crime. *United States v. Reisinger*, 128 U. S. 398, 403, 32 L. Ed. 480.

**Application to act of July 20th, 1878, relating to offenses by pension attorneys.**—*United States v. Reisinger*, 128 U. S. 398, 32 L. Ed. 480.

**4. Necessity for acquisition.**—"Forfeiture is of that which a party hath, but he cannot be said to have forfeited what he never had acquired, as the title to that which he had never acquired must always have been in the state or in another person." *United States v. Castillero*, 2 Black 17, 18, 196, 17 L. Ed. 360. See the title MINES AND MINERALS, vol. 8, p. 364.

**5. The statutory designation.**—*Helwig v. United States*, 188 U. S. 605, 612, 47 L. Ed. 614. Compare post, "License and Taxation Laws," XII.

**6. Rent distinguished from penalty.**—Where a lease at \$3,000 a year, payable in monthly installments, stipulated that if the tenant underlet or attempted to remove any of the goods on the premises without the landlord's consent, then, at the sole option and election of the landlord, the term should cease, and, moreover, in either of said cases "one whole year's rent, to wit, the rent of \$3,000 over and above all such rents" as have already accrued, shall be and is hereby reserved and shall immediately accrue and become due and owing, and shall and may be levied on by distress and sale of all such goods as may be found on the premises, held,—in a case where a removal and consequent levy had been made while the lease had yet more than a year to run—that although the clause in the lease was obscure, the \$3,000 was "rent," intended to be secured in advance and in a gross sum instead of in the monthly shape, and was not a penalty above and independent of the other and usual rents. *Dermott v. Wallach*, 1 Wall. 61, 17 L. Ed. 680.



## II. Penalties and Forfeitures Not Favored.

Courts do not favor forfeitures<sup>7</sup> and penalties.<sup>8</sup> Penal statutes are strictly construed,<sup>9</sup> but statutes imposing a penalty may sometimes be said to be remedial.<sup>10</sup> The general rule is that strict proof is required to enforce a forfeiture.<sup>11</sup> Equity never, under any circumstances, lends its aid to enforce a forfeiture or penalty, or anything in the nature of either.<sup>12</sup> Courts of law cannot avoid enforcing forfeitures when the party by whose default they are incurred cannot show some good and suitable ground in the conduct of the other party on which to base a reasonable excuse for the default.<sup>13</sup> Equity in some

**7. Forfeitures not favored.**—Hartford, etc., Ins. Co. v. Unsell, 144 U. S. 439, 449, 36 L. Ed. 496; Insurance Co. v. Eggleston, 96 U. S. 572, 577, 24 L. Ed. 841; Insurance Co. v. Norton, 96 U. S. 234, 242, 24 L. Ed. 689; Henderson v. Carbondale Coal, etc., Co., 140 U. S. 25, 33, 35 L. Ed. 332; Wheeler v. National Bank, 96 U. S. 268, 270, 24 L. Ed. 833; Harrison v. Vose, 9 How. 372, 378, 13 L. Ed. 179.

The law does not favor forfeitures and in such cases the court holds to a rigid and strict compliance with the law imposing the penalty. Fowler v. Equitable Trust Co., 141 U. S. 384, 403, 35 L. Ed. 786.

"The law leans strongly against forfeiture, and it is incumbent on the party who seeks to enforce one, to show plainly his right to it." Philadelphia, etc., R. Co. v. Howard, 13 How. 307, 340, 14 L. Ed. 157.

Forfeitures are not favored in the law. Courts always incline against them. Marshall v. Vicksburg, 15 Wall. 146, 156, 21 L. Ed. 121; Farmers', etc., Nat. Bank v. Dearing, 91 U. S. 29, 35, 23 L. Ed. 196.

Forfeitures are never favored. Equity always leans against them and only decrees in their favor when there is full, clear and strict proof of a legal right thereto. Henderson v. Carbondale Coal, etc., Co., 140 U. S. 25, 33, 35 L. Ed. 332; Farnsworth v. Minnesota, etc., R. Co., 92 U. S. 49, 68, 23 L. Ed. 530.

**Spirit of the common law.**—A forfeiture will not be enforced on principles which, if not forbidden by the common law, would be utterly inconsistent with its spirit. United States v. Arredondo, 6 Pet. 691, 745, 8 L. Ed. 547.

**Discharge of forfeiture.**—"Forfeitures are not favored in the law. They are often the means of great oppression and injustice. And, where adequate compensation can be made, the law in many cases, and equity in all cases, discharges the forfeiture, upon such compensation being made." Insurance Co. v. Norton, 96 U. S. 234, 242, 24 L. Ed. 689.

**Forfeiture of grant.**—Gonzales v. Ross, 120 U. S. 605, 30 L. Ed. 801. See the title PUBLIC LANDS.

**8. Penalties not favored.**—Greely v. Thompson, 10 How. 225, 241, 13 L. Ed. 397.

A penalty is not to be readily implied, and, on the contrary, a person or corporation is not to be subjected to a penalty unless the words of the statute plainly impose it. Tiffany v. National Bank, 18

Wall. 409, 410, 21 L. Ed. 862; Keppel v. Tiffin Savings Bank, 197 U. S. 356, 362, 49 L. Ed. 790. See the title BANKRUPTCY, vol. 2, p. 882.

Penalties are never extended by implication. Unless expressly imposed, they cannot be enforced. Elliott v. Railroad Co., 99 U. S. 573, 25 L. Ed. 292. See, also, Greely v. Thompson, 10 How. 225, 238, 13 L. Ed. 397.

**9. Penal statutes strictly construed.**—Cliquot's Champagne, 3 Wall. 114, 115, 18 L. Ed. 116. See, generally, the title STATUTES.

**10. Penal laws.**—"In one sense, every law imposing a penalty or forfeiture may be deemed a penal law. In another sense, such laws are often deemed, and truly reserved to be called, remedial. The judge was therefore strictly accurate, when he stated that 'It must not be understood that every law which imposes a penalty is, therefore, legally speaking, a penal law, that is, a law which is to be construed with great strictness in favor of the defendant. Laws enacted for the prevention of fraud, for the suppression of a public wrong, or to effect a public good, are not, in the strict sense, penal acts, although they may inflict a penalty for violating them.' And he added, 'It is in this light I view the revenue laws, and I would construe them so as most effectually to accomplish the intention of the legislature in passing them.'" Taylor v. United States, 3 How. 197, 210, 11 L. Ed. 559. See the title REVENUE LAWS.

**11. Convincing proof.**—"Since the courts uniformly incline against the declaration of a forfeiture, the party seeking such declaration should be held to make convincing proof of every fact essential to forfeiture." Wheeler v. National Bank, 96 U. S. 268, 270, 24 L. Ed. 833.

**12. Enforcement in equity.**—Marshall v. Vicksburg, 15 Wall. 146, 149, 21 L. Ed. 121. See, also, Stevens v. Gladding, 17 How. 447, 15 L. Ed. 155.

A court of equity abhors forfeitures, and will not lend its aid to enforce them. Marshall v. Vicksburg, 15 Wall. 146, 21 L. Ed. 121; Jones v. Guaranty, etc., Co., 101 U. S. 622, 628, 25 L. Ed. 1030.

A court of chancery is not the proper tribunal to enforce a forfeiture; the remedy for the same being at law. Horsburg v. Baker, 1 Pet. 232, 7 L. Ed. 125.

**13. Enforcement at law.**—Hartford, etc.,



cases will relieve against forfeiture.<sup>14</sup> It seems admiralty may also grant relief against penalties in the administration of equitable principles.<sup>15</sup> Equity will not, in order to relieve against a penalty, run directly contrary to statutory requirements.<sup>16</sup>

*Ins. Co. v. Unsell*, 144 U. S. 439, 450, 36 L. Ed. 496; *Thompson v. Insurance Co.*, 104 U. S. 252, 26 L. Ed. 765. See, also, *Phoenix Ins. Co. v. Doster*, 106 U. S. 30, 27 L. Ed. 65.

**14. Relief against forfeiture.**—"The ground, nature, and limits of the jurisdiction of courts of equity to relieve against penalties in such instruments is well stated by Mr. Justice Story, in this language: 'In short, the general principle now adopted is that, wherever a penalty is inserted merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument, and the penalty is deemed only as accessory, and, therefore, as intended only to secure the due performance thereof or the damage really incurred by the nonperformance. In every such case the true test generally, if not universally, by which to ascertain whether relief can or cannot be had in equity, is to consider whether compensation can be made or not. If it cannot be made, then courts of equity will not interfere. If it can be made, then, if the penalty is to secure the mere payment of money, courts of equity will relieve the party, upon paying the principal and interest. If it is to secure the performance of some collateral act or undertaking, then courts of equity will retain the bill, and will direct an issue of quantum damnificatus; and when the amount of damages is ascertained by a jury, upon the trial of such an issue, they will grant relief upon the payment of such damages.' Story's Eq. Jur., § 1314." *Clark v. Barnard*, 108 U. S. 436, 455, 27 L. Ed. 780; *Klein v. Insurance Co.*, 104 U. S. 88, 26 L. Ed. 662.

It has been uniformly held, in cases too numerous for citation, that courts of equity will not interfere in cases of forfeiture for the breach of covenants and conditions where there cannot be any just compensation decreed for the breach; for, as was said by Lord Chancellor Macclesfield, in *Peachy v. Duke of Somerset*, 1 Strange, 447; S. C. Prec. Ch. 568, 2 Eq. Ca. Abr. 227, "it is the recompense that gives this court a handle to grant relief." *Clark v. Barnard*, 108 U. S. 436, 456, 27 L. Ed. 780.

"Though a court of law must decide according to the legal construction of the condition, and call on the party for a strict performance, yet a court of equity, acting on more liberal principles, will soften the rigor of law, and though the party cannot show a legal compliance with the condition, if he can do it cy pres, they will protect and save him from forfeiture. 4 Dall. 203, 2 Fonb. 217-18, 220; 1 Vern. 224-5; 2 Ibid. 267, and note." *United States v.*

*Arredondo*, 6 Pet. 691, 745, 8 L. Ed. 547.

"In considering this subject two propositions are obvious: First, where the forfeiture from which relief is sought has been occasioned by the gross negligence of the person claiming to be relieved, the default so occasioned is not one brought about by accident or mistake; and, second, that even where accident or mistake has been shown, especially in the absence of culpability or fraud on the part of the other party, a court of equity will not grant relief from the forfeiture, unless it can be done with justice to that party." *Kann v. King*, 204 U. S. 43, 57, 51 L. Ed. 360. See the title LANDLORD AND TENANT, vol. 7, p. 827.

**Reverter to original rights.**—"Where a certain sum of money is due, and the creditor enters into arrangements with his debtor to take a lesser sum, provided that sum is secured in a certain way and paid at a certain day, but if any of the stipulations of the arrangement are not performed as agreed upon, the creditor is to be entitled to recover the whole of the original debt, such remitter to his original rights does not constitute a penalty, and equity will not interfere to prevent its observance." *United States Mortgage Co. v. Sperry*, 138 U. S. 313, 348, 34 L. Ed. 969. See the title MORTGAGES AND DEEDS OF TRUST, vol. 8, p. 452.

**Dismissal of bill.**—A bill had been filed originally for discovery, and afterwards became a bill for relief; the relief prayer for was a forfeiture, which might be enforced at law; under such circumstances, it was proper to dismiss the bill, so far as it sought for relief against the forfeiture; but the dismissal should have been without prejudice to the legal rights of the parties, as absolute dismissal might be considered as a decree against the title the plaintiff claimed, and which, by the bill and the evidence obtained under it, he sought to establish. *Horsburg v. Baker*, 1 Pet. 232, 7 L. Ed. 125.

**15. Relief against forfeiture in admiralty.**—*Watts v. Camors*, 115 U. S. 353, 29 L. Ed. 406. See the title ADMIRALTY, vol. 1, p. 147.

**16. Relief against statutory penalty.**—Where it was the intention of congress to provide a specific penalty for failure to comply with a statute, it is not within the province of courts of equity to mitigate the harshness of penalties or forfeitures, for such relief would run directly counter to the statutory requirements. *United States v. Dieckerhoff*, 202 U. S. 302, 50 L. Ed. 1041. See the title REVENUE LAWS.

"Where any penalty or forfeiture is imposed by statute upon the doing or omis-

### III. Penalties in the District of Columbia.

The levy court of Washington county are not entitled to one-half of all the fines, penalties and forfeitures imposed by the circuit court in cases of common law, and under the acts of congress, as well as the acts of assembly of Maryland, adopted by congress as the law of the District of Columbia.<sup>17</sup>

### IV. Sale of Intoxicating Liquors to Indians.

The act of 30th of March, 1802, having described what should be considered as the Indian country at that time, as well as at any future time, when purchase of territory should be made of the Indians, the carrying of spiritous liquors into a territory so purchased, after March 1802, although the same should be, at the time, frequented and inhabited exclusively by Indians, would not to be an offense within the meaning of the before-mentioned act of congress, so as to subject the goods of the trader, found in company with those liquors, to seizure and forfeiture.<sup>18</sup>

### V. Necessity for Consent to Act to Incur Forfeiture.

The owner of goods cannot forfeit them, by an act done without his consent or connivance, or that of some person employed or trusted by him.<sup>19</sup>

### VI. Forfeitures of Estates.

The provision of a federal statute that the act should not be construed to work a forfeiture of the real estate of the offender beyond his natural life, has been said not to apply to confiscation of enemies' property under the law of nations.<sup>20</sup>

sion of a certain act, there courts of equity will not interfere to mitigate the penalty or forfeiture, if incurred, for it would be in contravention of the direct expression of the legislative will. Story's Eq. Jur., § 1326." *Clark v. Barnard*, 108 U. S. 436, 457, 27 L. Ed. 789.

**Forfeiture to secure consideration of public works.**—"But it is said that provisions for forfeiture are regarded with disfavor and construed with strictness, and that courts of equity will lean against their enforcement. This, as a general rule, is true when applied to cases of contract, and the forfeiture relates to a matter admitting of compensation or restoration; but there can be no leaning of the court against a forfeiture which is intended to secure the construction of a work, in which the public is interested, where compensation cannot be made for the default of the party, nor where the forfeiture is imposed by positive law. 'Where any penalty or forfeiture,' says Mr. Justice Story, 'is imposed by statute upon the doing or omission of a certain act, there courts of equity will not interfere to mitigate the penalty or forfeiture, if incurred; for it would be in contravention of the direct expression of the legislative will.' Story's Eq. Jur., § 1326. The same doctrine is asserted in the case of *Peachy v. Duke of Somerset*, reported in 1st Strange, and that of *Keating v. Sparrow*, reported in 1st Ball & Beatty. In the first case, Lord Macclesfield said that 'cases of agreement and conditions of the party and of the laws are certainly to be distinguished. You can never say that the law has determined hardly; but you may that the party has made a hard bargain.' In the second case,

Lord Manners, referring to this language and taking the principle from it, said that 'it is manifest, that, in cases of mere contract between parties, this court will relieve when compensation can be given; but against the provisions of a statute no relief can be given.'" *Farnsworth v. Minnesota, etc., R. Co.*, 92 U. S. 49, 68, 23 L. Ed. 530.

Where a grant of land and connected franchises is made to a corporation for the construction of a railroad by a statute, which provides for their forfeiture upon failure to perform the work within a prescribed time, the forfeiture may be declared by legislative act without judicial proceedings to ascertain and determine the failure of the grantee. Any public assertion by legislative act of the ownership of the state after the default of the grantee—such as an act resuming control of the road and franchises, and appropriating them to particular uses, or granting them to another corporation to perform the work—is equally effective and operative. *Farnsworth v. Minnesota, etc., R. Co.*, 92 U. S. 49, 23 L. Ed. 530. See, generally, the title RAILROADS.

**17. Levy court of Washington county.**—*Levy Court v. Ringgold*, 5 Pet. 451, 8 L. Ed. 188.

**18. Sale to Indians.**—*American Fur Co. v. United States*, 2 Pet. 358, 7 L. Ed. 450. See, generally, the titles INDIANS, vol. 6, p. 906; INTOXICATING LIQUORS, vol. 7, p. 518.

**19. Necessity for consent.**—*Peisch v. Ware*, 4 Cranch 347, 2 L. Ed. 643.

**20. Forfeiture of estates.**—The act of July 17, 1862, provided for the suppression of insurrection, punishment of treason



## VII. Forfeiture of Thing with or in Respect to Which Offense Is Committed.

To inflict a forfeiture of the thing, in respect to which an offense is committed, or because it is the instrument of the offense, is within established principles of legislation. In such cases the offense is primarily attached to the thing; ally forfeited, and was seized as forfeited.<sup>20</sup>

## VIII. Seizure and Condemnation for Forfeiture.

At common law, any person may, at his peril, seize for a forfeiture to the government, and if the government adopt his seizure, and the property is condemned, he is justified. By the act of the 18th of February, 1793, § 27, officers of the revenue are authorized to make seizures of any ship or goods, for any breach of the laws of the United States.<sup>22</sup> Any citizen may seize any property forfeited to the use of the government, either by the municipal law, or as prize of war, in order to enforce the forfeiture, and it depends upon the government, whether it will act upon the seizure; if it proceed to enforce the forfeiture by legal process, this is a sufficient confirmation of the seizure.<sup>23</sup> A forfeiture incurred under a penal statute, temporary in its terms, cannot be enforced after the statute has expired, and a repeal of a penal statute has the same effect, unless the repealing law contains a saving clause as to pending prosecutions.<sup>24</sup> A

and rebellion, seizure and confiscation of the property of the participants and for other purposes; but provided that no punishment or proceedings under the act should be construed to work a forfeiture of the real estate of the offender beyond his natural life. It was said in the dissenting opinion that the terms "forfeiture" of the estate of the "owner" have no application to the confiscation of enemies' property under the law of nations; that they are strictly and exclusively applicable to punishment for crime. *Miller v. United States*, 11 Wall. 268, 320, 20 L. Ed. 135, dissenting opinion of Judge Field. See, generally, the titles ABANDONED AND CAPTURED PROPERTY, vol. 1, p. 1; REVENUE LAWS; STATES; TREASON; WAR.

**21. Forfeiture of the thing.**—*Smith v. Maryland*, 18 How. 71, 75, 15 L. Ed. 269; *Harmony v. United States*, 2 How. 210, 233, 11 L. Ed. 239; *The Palmyra*, 12 Wheat. 1, 6 L. Ed. 531. See, also, *Reagan v. United States*, 157 U. S. 301, 304, 39 L. Ed. 709; *United States v. Grundy*, 3 Cranch 337, 2 L. Ed. 459.

Thus a forfeiture of a vessel on account of the misconduct of those on board may be inflicted. *Smith v. Maryland*, 18 How. 71, 75, 15 L. Ed. 269; *Harmony v. United States*, 2 How. 210, 233, 234, 11 L. Ed. 239; *The Palmyra*, 12 Wheat. 1, 6 L. Ed. 531.

**22. Seizure and condemnation.**—*Gelston v. Hoyt*, 3 Wheat. 246, 4 L. Ed. 381. See the titles ABANDONED AND CAPTURED PROPERTY, vol. 1, p. 1; PRIZE; REVENUE LAWS; STATES; TREASON; WAR.

"But the objection itself has no just foundation in law. At the common law any person may, at his peril, seize for a forfeiture to the government, and, if the

government adopts his seizure, and institutes proceedings to enforce the forfeiture, and the property is condemned, he will be completely justified. So that it is wholly immaterial in such a case who makes the seizure, or whether it is irregularly made or not, or whether the cause assigned originally for the seizure be that for which the condemnation takes place, provided the adjudication is for a sufficient cause. This doctrine was fully recognized by this court in *Gelston v. Hoyt*, 3 Wheat. 246, 247, 310, 4 L. Ed. 381, and in *Wood v. United States*, 16 Pet. 342, 358, 10 L. Ed. 987. And from these decisions we feel not the slightest inclination to depart." *Taylor v. United States*, 3 How. 197, 205, 11 L. Ed. 559.

American ships offending against our own laws may be seized upon the ocean and foreign ships thus offending within our territorial jurisdiction may be pursued and seized upon the ocean and brought into our ports for adjudication, but in such cases the party seizes at his peril and is liable to costs and damages if he fail to establish the forfeiture. *The Marianna Flora*, 11 Wheat. 1, 6 L. Ed. 405. See the title PRIZE.

**23. Confirmation by government.**—*The Caledonian*, 4 Wheat. 160, 4 L. Ed. 523.

**24. Expiration of statute.**—*The Reform*, 3 Wall. 617, 629, 18 L. Ed. 105.

A vessel having violated a law of the United States, cannot be seized for such violation, after the law has expired, unless some special provision be made therefor by statute. *The Ship Helen*, 6 Cranch 203, 3 L. Ed. 199.

No sentence of condemnation can be affirmed, if the law under which the forfeiture accrued has expired, although a condemnation and sale had taken place,



sale of goods is not always avoided by a forfeiture.<sup>25</sup> A plea, alleging a seizure for a forfeiture, as a justification, should not only state the facts relied on to establish the forfeiture, but aver that thereby the property became and was actually forfeited, and was seized as forfeited.<sup>26</sup>

### IX. Power to Impose, Enforce and Dispose of Penalties and Forfeitures.

"The power of the state to impose fines and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced, whether at the suit of a private party, or at the suit of the public, and what disposition shall be made of the amounts collected, are merely matters of legislative discretion."<sup>27</sup>

### X. Remission of Penalty or Forfeiture.

**A. By Legislature.**—A clause of forfeiture in a law is to be construed differently from a similar clause in an engagement between individuals. A legislature can impose it as a punishment, but individuals can only make it a matter of contract. Being a penalty imposed by law, the legislature had a right to remit it.<sup>28</sup>

**B. By Secretary of the Treasury.**—See the title *REVENUE LAWS*.

and the money had been paid over to the United States, before the expiration of the law. The federal supreme court, in reversing the sentence, will not order the money to be repaid, but will award restitution of the property, as if no sale had been made. *The Rachel*, 6 Cranch 329, 3 L. Ed. 239.

**25. Sale of goods.**—When property was seized as forfeited on the grounds that it was the property of an enemy, it was held that a bona fide sale to a citizen during the occupation of the enemy was valid as against the forfeiture, even though the sale was on credit and though there was a condition that if the property was destroyed or taken by the enemy the contract should be null and void. *Wilcox v. Henry*, 1 Dall. 69, 1 L. Ed. 41. See the title *SALES*.

**26. Plea alleging seizure for forfeiture.**—*Gelston v. Hoyt*, 3 Wheat. 246, 4 L. Ed. 381.

**27. Legislative discretion.**—*Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 523, 29 L. Ed. 463. See, generally, the title *CONSTITUTIONAL LAW*, vol. 4, p. 1.

**28. By legislature.**—*Maryland v. Baltimore, etc.*, R. Co., 3 How. 534, 11 L. Ed. 714.

"Undoubtedly, in the case of individuals, the word forfeit is construed to be the language of contract, because contract is the only mode in which one person can become liable to pay a penalty to another for a breach of duty, or the failure to perform an obligation. In legislative proceedings, however, the construction is otherwise, and a forfeiture is always to be regarded as a punishment inflicted for a violation of some duty enjoined upon the party by law; and such, very clearly, is the meaning of the word in the act in question. In this aspect of the case, and upon this construction of the act of assembly, we do not understand that the right of the state to release it is disputed.

Certainly the power to do so is too well settled to admit of controversy. The repeal of the law imposing the penalty is of itself a remission. 1 Cranch 104; 5 Id. 281; 6 Id. 203, 329. And in the case of the *United States v. Morris*, 10 Wheat. 246, 287, 6 L. Ed. 314, this court held, that congress had clearly the power to authorize the secretary of the treasury to remit any penalty or forfeiture incurred by the breach of the revenue laws, either before or after judgment; and if remitted before the money was actually paid, it embraced the shares given by law in such cases to the officers of the customs, as well as the shares of the United States. The right to remit a penalty like this stands upon the same principles." *Maryland v. Baltimore, etc.*, R. Co., 3 How. 534, 552, 11 L. Ed. 714.

The state of Maryland, in 1836, passed a law directing a subscription of \$3,000,000 to be made to the capital stock of the Baltimore and Ohio Railroad Company, with the following proviso, "That if the said company shall not locate the said road in the manner provided for in this act, then, and in that case, they shall forfeit \$1,000,000 to the state of Maryland for the use of Washington county." It was a penalty, inflicted upon the company as a punishment for disobeying the law; and the assent of the company to it, as a supplemental charter, is not sufficient to deprive it of the character of a penalty. In March, 1841, the state passed another act repealing so much of the prior act as made it the duty of the company to construct the road by the route therein prescribed, remitting and releasing the penalty, and directing the discontinuance of any suit brought to recover the same. The proviso was a measure of state policy, which it had a right to change, if the policy was afterwards discovered to be erroneous, and neither the commissioners, nor the county, nor any

### XI. Penalties and Forfeitures under Contracts.

Where a penalty or a forfeiture is inserted in a contract merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument, and the penalty is deemed only as accessory.<sup>29</sup> There is a wide difference both in fact and in law, between indemnity and forfeiture.<sup>30</sup> The distinction between penalties and liquidation damages will be found in the title *DAMAGES*, vol. 5, p. 176.

Where a contract between the parties contained a stipulation that the payment of the purchase money of the property should be secured by the execution of a deed of trust on the whole amount of a claim the purchaser had on the United States, the penalty which was to be paid on the nonperformance of the contract, being substituted for the purchase money, it should retain the same protection.<sup>31</sup>

### XII. License and Taxation Laws.

Where the sum demanded by a state statute for a license is a tax, the provision for the punishment of one who pursues his profession without a license is a part of the revenue system of the state, and is a means merely of enforcing payment of the tax itself, or of a penalty for not paying it. It is legally equivalent to a civil action of debt upon the statute, and its substantial character is not changed by calling the default a misdemeanor, and providing for its prosecution by information.<sup>32</sup> A state statute is not void, which, for the purposes of taxation, requires, under a penalty for his neglect or refusal, the cashier of each national bank within the state to transmit, on or before the fifteenth day of April in each year, to the clerks of the several towns in the state in which any stock or share holders of such bank shall reside, a true list of the names of such stock or share holders on the books of such bank, together with the amount of money actually paid in on each share on the first day of that month.<sup>33</sup>

**Statutory Designation.**—The fact that a statute denominates an assessment a "tax" and provides proceedings appropriate for the collection of a tax, but not for the enforcement of a penalty, and does not contemplate a criminal proceeding, should be given effect.<sup>34</sup>

one of its citizens acquired any separate or private interest under it, which could be maintained in a court of justice. *Maryland v. Baltimore, etc., R. Co.*, 3 How. 534, 11 L. Ed. 714.

**29. Performance of collateral object.**—*Klein v. Insurance Co.*, 104 U. S. 88, 90, 26 L. Ed. 662; *Clark v. Barnard*, 108 U. S. 436, 455, 27 L. Ed. 780.

**30. Indemnity and forfeitures distinguished.**—*Philadelphia, etc., R. Co. v. Howard*, 13 How. 307, 342, 14 L. Ed. 157.

Where the contract authorized the company to retain fifteen per cent of the earnings of the contractor, this was by way of indemnity, and not forfeiture; and they were bound to pay it over, unless the jury should be satisfied that the company had sustained an equivalent amount of damage by the default, negligence, or misconduct of the contractor. *Philadelphia, etc., R. Co. v. Howard*, 13 How. 307, 308, 14 L. Ed. 157.

**31. Penalties substituted for purchase money.**—*Cathcart v. Robinson*, 5 Pet. 264, 8 L. Ed. 120.

**32. Royall v. Virginia**, 116 U. S. 572, 583, 29 L. Ed. 735. See, generally, the titles *LICENSES*, vol. 7, p. 869; *TAXA-*

*TION*. See, also, post, "Nature of Proceedings," XIV, B.

**33. Validity of statute.**—*Waite v. Dowley*, 94 U. S. 527, 27 L. Ed. 181.

**34.** "It is not easy to draw an exact line of demarkation between a tax and a penalty, but in view of the fact that the statute denominates the assessment a 'tax,' and provides proceedings appropriate for the collection of a tax, but not for the enforcement of a penalty, and does not contemplate a criminal prosecution, we cannot go far afield in treating it as a tax rather than a penalty. Section 5006 does indeed impose a penalty, but § 5007 imposes a tax, with an additional provision that the payment of the tax shall not absolve the party from the penalty. It would be a distortion of the words employed to speak of § 5007 as imposing an additional penalty. The act itself provides in terms that such tax shall be an addition to all other taxes and penalties, and elaborate provision is made for its enforcement. The mere fact that the charge, whatever it may be, is made a lien upon the real estate and a personal claim against the landlord indicates that it is the nature of a tax rather than a pen-



### XIII. Time and Effect of Forfeiture.

In all forfeitures accruing at common law, nothing vests in the government, until some legal step shall be taken for the assertion of its right, after which, for any purposes, the doctrine of relation carries back the title to the commission of the offense.<sup>35</sup> The general rule at common law was that forfeitures did not attach where the proceeding was in rem until the offender was convicted.<sup>36</sup> Where a forfeiture is given by a statute, the rules of the common law may be dispensed with, and the thing forfeited may either vest immediately, or on the performance of some particular act, as shall be the will of the legislature. This must depend upon the construction of the statute.<sup>37</sup>

alty." *Hodge v. Muscatine County*, 196 U. S. 276, 279, 49 L. Ed. 477. See ante, "Definition," I. See, generally, the title TAXATION.

**35. At common law.**—*United States v. Grundy*, 3 Cranch 337, 351, 2 L. Ed. 459.

Compare the following quotation.—"By the common law of England, even in the case of the forfeiture of all the real and personal estate of an offender, while the forfeiture of his goods and chattels was only upon conviction and had no relation backwards, the forfeiture of his lands had relation to the time of the offence committed, so as to avoid all subsequent sales and incumbrances. 4 Bl. Com. 387." *United States v. Stowell*, 133 U. S. 1, 18, 33 L. Ed. 555.

**36. Conviction of offender.**—"Forfeitures, in many cases of felony, did not attach at common law where the proceeding was in rem until the offender was convicted, as the crown, Judge Story says, had no right to the goods and chattels of the felon, without producing the record of his conviction; but that rule, as the same learned magistrate says, was never applied to seizures and forfeitures created by statute in rem, cognizable on the revenue side of the exchequer court, for the reason that the thing in such a case is primarily considered as the offender, or rather that the offense is attached primarily to the thing, whether the offense be *malum prohibitum* or *malum in se*; and he adds that the same principles apply to proceedings in rem in the admiralty. *The Palmyra*, 12 Wheat. 1, 6 L. Ed. 531." *Dobbins's Distillery v. United States*, 96 U. S. 395, 399, 24 L. Ed. 637.

"Cases arise, undoubtedly, where the judgment of forfeiture necessarily carries with it, and as part of the sentence, a conviction and judgment against the person for the crime committed; and in that state of the pleadings it is clear that the proceeding is one of a criminal character; but where the information, as in this case, does not involve the personal conviction of the wrongdoer for the offense charged, the remedy of forfeiture claimed is plainly one of a civil nature; as the conviction of the wrongdoer must be obtained, if at all, in another and wholly independent proceeding. 1 Bish. Crim. Law (6th Ed.), § 835, note 1; *United States v. Three Tons of Coal*, 6 Biss. 371." *Dobbins's Distillery*

*v. United States*, 96 U. S. 395, 399, 24 L. Ed. 637. See the title REVENUE LAWS.

**37. Statutory forfeiture.**—"By the settled doctrine of this court, whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the United States, although their title is not perfect until judicial condemnation; the forfeiture constitutes a statutory transfer of the right to the United States at the time the offense is committed; and the condemnation, when obtained, relates back to that time, and avoids all intermediate sales and alienations, even to purchasers in good faith." *United States v. Stowell*, 133 U. S. 1, 16, 33 L. Ed. 555.

"Where the forfeiture is made absolute by statute, the decree of condemnation when entered relates back to the time of the commission of the wrongful acts, and takes date from the wrongful acts and not from the date of the sentence or decree." *Henderson's Distilled Spirits*, 14 Wall. 44, 56, 20 L. Ed. 815.

When the act has been done which the law declares to work a forfeiture of the property, the right of the government to seize the property and assert the forfeiture attaches at once and may be pursued by the government whenever and in whosoever hands that property may be found. *Thacher's Distilled Spirits*, 103 U. S. 679, 682, 26 L. Ed. 535. See *Henderson's Distilled Spirits*, 14 Wall. 44, 20 L. Ed. 815.

A forfeiture under the 3d section of the act of June 28th, 1809, ch. 9, entitled, "An act to amend and continue in force certain parts of the act, entitled an act to interdict the commercial intercourse," will overreach a bond sale to a purchaser for a valuable consideration, without notice of the offense. *The Mars*, 1 Gallis reversed. *The Mars*, 8 Cranch 417, 3 L. Ed. 609.

The forfeiture of goods, for violation of the nonintercourse act of March 1st, 1809, takes place upon the commission of the offense, and avoids a subsequent sale to an innocent purchaser, although there may have been a regular permit for landing the goods, and although the duties may have been paid. *United States v. 1960 Bags of Coffee*, 8 Cranch 398, 3 L. Ed. 602.



#### XIV. Proceedings to Recover Penalties.

**A. In the District of Columbia.**—The acts of congress of February 27th and March 3d, 1801, concerning the District of Columbia, have not changed the laws of Maryland and Virginia, adopted by congress as the law of that district, any further than the change of jurisdiction rendered a change of laws necessary. Fines, forfeitures and penalties, arising from a breach of those laws, are to be sued for and recovered in the same manner as before the change of jurisdiction, *mutatis mutandis*.<sup>38</sup>

**B. Nature of Proceedings.**—The act of June 3, 1864 (13 Stat. 99, § 30), having prescribed that, as a penalty for such taking, the person paying such unlawful interest, or his legal representatives, may, in any action of debt against the bank, recover back twice the amount so paid, he can resort to no other mode or form of procedure.<sup>39</sup> The act of 1866 to prevent smuggling contemplated a criminal proceeding.<sup>40</sup> Suits for penalties and forfeitures incurred by the commission of offenses against the law are of a quasi criminal nature.<sup>41</sup>

**38. In the District of Columbia.**—United States *v.* Simms, 1 Cranch 242, 2 L. Ed. 98. See the title DISTRICT OF COLUMBIA, vol. 5, p. 404.

**39. Action of debt.**—Barnet *v.* National Bank, 98 U. S. 555, 25 L. Ed. 212. See the title DEBT, THE ACTION OF, vol. 5, p. 208.

**40. Where criminal proceeding is contemplated.**—An action of debt cannot be maintained by the United States to recover the penalties prescribed by the fourth section of the act of congress approved July 18, 1866 (14 Stat. 179), entitled "An act to prevent smuggling, and for other purposes." That act contemplated a criminal proceeding and not a civil remedy. United States *v.* Claffin, 97 U. S. 546, 24 L. Ed. 1028, distinguishing Stockwell *v.* United States, 13 Wall. 531, 20 L. Ed. 491.

**41. Quasi criminal.**—Suits for penalties and forfeitures incurred by the commission of offenses against the law, are of a quasi criminal nature, and they are within the reason of criminal proceedings for all the purposes of the fourth amendment of the constitution, and of that portion of the fifth amendment which declares that no person shall be compelled in any criminal case to be a witness against himself. Boyd *v.* United States, 116 U. S. 616, 634, 29 L. Ed. 746; Lees *v.* United States, 150 U. S. 476, 37 L. Ed. 1150; United States *v.* Zucker, 161 U. S. 475, 480, 40 L. Ed. 777; Stone *v.* United States, 167 U. S. 178, 187, 42 L. Ed. 127. See, also, The City of Norwich, 118 U. S. 468, 504, 30 L. Ed. 134; Clifton *v.* United States, 4 How. 242, 250, 11 L. Ed. 957; Snyder *v.* United States, 112 U. S. 216, 28 L. Ed. 697; Friedenstien *v.* United States, 125 U. S. 224, 238, 31 L. Ed. 736.

Although the owner of goods, sought to be forfeited by a proceeding in rem, is not the nominal party, he is, nevertheless, the substantial party to the suit; he certainly is so, after making claim and defense; and, in a case like the present (a forfeiture proceedings for fraud on customs), he is entitled to all the privileges which appertain to a person who is prose-

cuted for a forfeiture of his property by reason of committing a criminal offense. Boyd *v.* United States, 116 U. S. 616, 638, 29 L. Ed. 746.

"If the government prosecutor elects to waive an indictment, and to file a civil information against the claimants—that is, civil in form—can he by this device take from the proceedings its criminal aspect and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one. As showing the close relation between the civil and criminal proceedings on the same statute in such cases, we may refer to the recent case of Coffey *v.* The United States, ante, 436; in which we decided that an acquittal on a criminal information was a good plea in bar to a civil information for the forfeiture of goods, arising upon the same acts." Boyd *v.* United States, 116 U. S. 616, 634, 29 L. Ed. 746. See, also, United States *v.* Zucker, 161 U. S. 475, 479, 40 L. Ed. 777.

"We are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the fifth amendment to the constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the fourth amendment. Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose." United States *v.* Zucker, 161 U. S. 475, 479, 40 L. Ed. 777.

**Answer exposing to penalties.**—The plaintiffs, as creditors of an unincorporated bank, filed a bill against the cashier and a number of persons, stockholders of the bank, for a discovery and relief, who, in reply to the bill, stated that their

**C. Institution and Conduct of Suits for Municipal Forfeitures.**—Informations, to recover municipal forfeitures, whether the seizure was made on navigable waters or on land, must be instituted in the name of the United States, and they must be prosecuted, in the subordinate courts, by the district attorney, and in the federal supreme court, when brought here by appeal, or by writ of error, by the attorney general.<sup>42</sup>

**D. Libel and Informations.**—A libel for a forfeiture must be particular and certain in all the material circumstances which constitute the offense,<sup>43</sup> but an information for forfeiture of a vessel need not be more technical in its language, or specific in its description of the offense, than an indictment.<sup>44</sup>

**E. Declarations and Pleas.**—It is settled practice to allow declarations in *qui tam* actions to be amended.<sup>45</sup> An acquittal on a criminal information is a good plea in bar to a civil information for the forfeiture of goods, arising upon the same acts.<sup>46</sup> In suits for penalties the declaration must bring the case within the statute.<sup>47</sup>

**F. Evidence**—1. **IN GENERAL.**—See the title EVIDENCE, vol. 5, p. 1044.

2. **BURDEN OF PROOF.**—One who is seeking to recover a penalty is bound by

answers to the bill would subject them to penalties, under the laws of Virginia, prohibiting incorporated banks. Held, that the defendants were not bound to make any discovery, which would expose them to penalties. *United States v. Saline Bank*, 1 Pet. 100, 7 L. Ed. 69.

**Revenue laws.**—Informations under the revenue laws for the forfeiture of goods, seeking no judgment of fine or imprisonment against any person, are civil actions, although so far in the nature of criminal proceedings that a general verdict on several counts in an information is upheld if one count is good. *Snyder v. United States*, 112 U. S. 216, 28 L. Ed. 697; *Locke v. United States*, 7 Cranch 339, 3 L. Ed. 364; *Clifton v. United States*, 4 How. 242, 250, 11 L. Ed. 957; *Coffey v. United States*, 116 U. S. 436, 442, 29 L. Ed. 684; *The Palmyra*, 12 Wheat. 1, 12, 6 L. Ed. 531; *Friedenstein v. United States*, 125 U. S. 224, 231, 31 L. Ed. 736. See, also, *Lilienthal's Tobacco v. United States*, 97 U. S. 237, 271, 24 L. Ed. 901. See the title REVENUE LAWS.

**42. Municipal forfeitures.**—Confiscation Cases, 7 Wall. 454, 462, 19 L. Ed. 196; *Whiskey Cases*, 99 U. S. 594, 597, 25 L. Ed. 399.

**43. Certainty.**—*The Caroline*, 7 Cranch 496, 3 L. Ed. 417.

Where the libel is so informal and defective that the court cannot enter up a decree upon it, and evidence discloses a case of forfeiture, the federal supreme court will not amend the libel itself, but will remand the cause to the court below, with directions to permit it to be amended. *The Mary Ann*, 8 Wheat. 380, 5 L. Ed. 641.

A libel of information, under the 9th section of the state-trade act of March 2d, 1807, c. 77, alleging that the vessel sailed from the ports of New York and Perth Amboy, without the master's having delivered the manifests required by law, to the collector or surveyor of New York

and Perth Amboy, is defective—the act requiring the manifest to be delivered to the collector or surveyor of a single port. *The Mary Ann*, 8 Wheat. 380, 5 L. Ed. 641.

Under the same section, the libel must charge the vessel to be of the burden of forty tons or more. In general, it is sufficient to charge the offense in the words directing the forfeiture; but if the words are general, embracing a whole class of individual subjects, but must necessarily be so construed as to embrace only a subdivision of that class, the allegation must conform to the legislative sense and meaning. *The Mary Ann*, 8 Wheat. 380, 5 L. Ed. 641.

**44. Information compared with indictment.**—*United States v. Brig Neurea*, 19 How. 92, 94, 15 L. Ed. 531. See the title ADMIRALTY, vol. 1, p. 163, et seq.

**Substantial statement of offense.**—An information in the admiralty for a forfeiture must contain a substantial statement of the offense. A general reference to the provisions of the statute is not sufficient. If the information be defective in that respect, the defect is not cured, by evidence of the facts omitted to be averred in the information. *The Hoppet*, 7 Cranch 389, 3 L. Ed. 380.

**45. Qui tam actions.**—*Jones v. Ross*, 2 Dall. 143, 1 L. Ed. 324. See, generally, the title AMENDMENTS, vol. 1, p. 288.

**46. Plea in bar.**—*Coffey v. United States*, 116 U. S. 427, 436, 29 L. Ed. 681; *Boyd v. United States*, 116 U. S. 616, 634, 29 L. Ed. 746. See the titles CONSTITUTIONAL LAW, vol. 4, p. 1; WITNESSES.

**47. Within statute.**—In an action of debt for a penalty, under the act of congress of 1793 for concealing and harboring a fugitive slave, it was said: "It is admitted that, this prosecution being a penal one, the declaration must bring it within the statute clearly, whether looking to its language or spirit." *Jones v. Van Zandt*, 5 How. 215, 228, 12 L. Ed. 122.

the rule of strict proof.<sup>48</sup> The necessity of proof beyond a reasonable doubt in suits and prosecutions for penalties and forfeitures is treated in the title EVIDENCE, vol. 5, pp. 1043, 1044, and in the references there given.

**G. Limitations.**—The act of April 30, 1790, limiting prosecutions upon penal statutes, extends as well to penalties created after, as before, that act, and to actions of debt, as well as to informations and indictments.<sup>49</sup> The Revised Statutes provide for a limitation of five years in a suit and prosecution for penalties and forfeitures.<sup>50</sup>

**H. Waiver.**—The right to enforce a forfeiture may be waived.<sup>51</sup>

**48. Strict proof.**—*Parsons v. Chicago*, etc., R. Co., 167 U. S. 447, 455, 42 L. Ed. 231.

"It is settled, too, that, where penalties are to be recovered, greater fullness of evidence is necessary to make out such a case as the law contemplates. *United States v. Wilson*, 1 Baldw. 101; *Greenl. on Ev.*, § 65." *Harrison v. Vose*, 9 How. 372, 378, 13 L. Ed. 179. See, generally, the title PRESUMPTIONS AND BURDEN OF PROOF.

**49. Act of April 30, 1790.**—*Adams v. Woods*, 2 Cranch 336, 2 L. Ed. 297.

**Mode of recovering penalty.**—"Almost every fine or forfeiture under a penal statute, may be recovered by an action of debt, as well as by information; and to declare that the information was barred, while the action of debt was left without limitation, would be to attribute a capriciousness on this subject to the legislature which could not be accounted for; and to declare that the law did not apply to cases on which an action of debt is maintainable, would be to overrule express words, and to give the statute almost the same construction which it would receive, if one distinct member of the sentence was expunged from it. In this particular case, the statute which creates the forfeiture does not prescribe the mode of demanding it; consequently, either debt or information would lie. It would be singular if the one remedy should be barred and the other left unrestrained." *Adams v. Woods*, 2 Cranch 336, 341, 2 L. Ed. 297.

**50. Limitation for five years.**—"The limitation of five years in Rev. Stat., § 1047, to any 'suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States,' does not apply (to an action for threefold damages for injury to a city 'in its business or property' under the federal anti-trust act of July 2, 1890.) The construction of the phrase 'suit for a penalty,' and the reasons for that construction have been stated so fully by this court that it is not necessary to repeat them. Indeed the proposition hardly is disputed here. *Huntington v. Attrill*, 146 U. S. 657, 668, 36 L. Ed. 1123; *Brady v. Daly*, 175 U. S. 148, 155, 156, 44 L. Ed. 109." The matter is left

to the local law by the silence of the statutes of the United States. Rev. Stat., § 721; *Campbell v. Haverhill*, 155 U. S. 610, 39 L. Ed. 280, *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U. S. 390, 397, 51 L. Ed. 241.

Section 2776 of the Tennessee Code (Shannon, 4473), which provides the limitation of ten years after the cause of action accrued for certain enumerated actions, "and all other cases not expressly provided for," applies to such an action as this under the federal anti-trust law, rather than the section (2772) touching actions for statute penalties, or the section touching injuries to personal property (2773). Although some wrongs may be included within the latter section besides physical damage to tangible property, there is a sufficiently clear distinction between injuries to property and "injured in his business or property," which is the language of the act of congress, and that section includes only injuries to property falling upon some object more definite than the total wealth of the injured party. *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U. S. 390, 51 L. Ed. 241.

**51.** A filed a bill in equity to enforce a forfeiture, and obtain compensation for breach of agreement. The defendant demurred by a single demurrer. The court sustained the demurrer as respected the forfeiture, and overruled it as to the residue of the bill. The complainant amended his bill in conformity to the opinion of the court. The defendant answered. Testimony was taken, and the complainant got a decree for so much money; less, however, than he claimed. He thereupon appealed to the federal supreme court. The defendant did not appeal. Held, that though the court below had erred in sustaining in part and overruling in part a demurrer which was single, yet that the complainant by amending his bill, and the defendant by answering afterwards, had both waived their right to object anywhere: as the defendant specially had in the supreme court by not appealing; and that the question of forfeiture was withdrawn from the supreme court. *Marshall v. Vicksburg*, 15 Wall. 146, 21 L. Ed. 121.



**PENDING.**—See the titles ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 42; COURTS, vol. 4, p. 1036. An action is pending when it is duly entered in court. The entry of an action in court is made, by an entry on the docket, of the title of the case, by the proper officer, in the due course of his official duty. Proof of such an entry being made by the proper officer, accompanied by the presumption which the law entertains, that he has done his duty in making it, is proof that the action was duly entertained in court, and so proof that the action was pending; and if the other party asserts that it had been disposed of, at any particular time after it was entered, he must show it.<sup>1</sup>

**PENITENTIARIES.**—See the titles PRISONS AND PRISONERS; SENTENCE AND PUNISHMENT. As to power of court-martial to sentence to penitentiary, see the title MILITARY LAW, vol. 8, p. 352.

**PENNSYLVANIA.**—As to whether common law is in force in, see the title COMMON LAW, vol. 3, p. 964. As to mode of trying title to land, see the title EJECTMENT, vol. 5, p. 699. See, also, the title MECHANICS' LIENS, vol. 8, p. 332.

1. Philadelphia, etc., R. Co. v. Howard, 13 How. 307, 332, 14 L. Ed. 157.

# PENSIONS.

BY S. BLAIR FISHER.

- I. Definition, Nature and Classification, 372.**
- II. Origin of Pension System, 372.**
- III. Statutory Provisions Relating to Pensions, 372.**
  - A. Power of Congress to Grant, Regulate and Control, 372.
  - B. Construction of Statutes, 373.
- IV. Who Entitled to Pension, 373.**
- V. Right to Double Pensions, 373.**
- VI. Commencement, Duration and Termination of Pension, 374.**
- VII. Applications for Pensions and Proceedings Thereon, 375.**
- VIII. Payment and Recovery Back of Pensions, 376.**
  - A. Payment, 376.
  - B. Recovery Back of Pension Money Fraudulently Obtained, 376.
- IX. Sale, Transfer, or Mortgage of Pensions, 377.**
- X. Exemption of Pension Moneys from Attachment, Levy or Seizure. 377.**
- XI. Fees of Claim Agents or Attorneys in Pension Cases, 377.**
- XII. Offenses against Pension Laws, 378.**
  - A. Making or Procuring False Affidavits, etc., Concerning Claims for Pensions, 378.
    - 1. Statutory Provisions, 378.
    - 2. Indictment, 379.
    - 3. Punishment, 379.
  - B. Demanding or Receiving Excessive Fees for Prosecution of Pension Claims, 379.
    - 1. Statutory Provisions Stated and Construed, 379.
    - 2. Effect of Repeal of Statute, 379.
    - 3. Indictment, 380.
    - 4. Punishment, 380.
  - C. Withholding of Pension, 380.
    - 1. Statutory Provisions Stated and Construed, 380.
    - 2. Limitation of Prosecution, 382.
    - 3. Punishment, 382.
  - D. Embezzlement of Pension Money by Guardian, 382.

## CROSS REFERENCES.

See the titles BOUNTIES, vol. 3, p. 508; PUBLIC LANDS; WAR.

As to surrender of pension to soldiers' home, on becoming an inmate thereof, see the title ARMY AND NAVY, vol. 2, p. 539. As to the rights of individual members of a police force in police benefit funds, see the title CONSTITUTIONAL LAW, vol. 4, p. 430. As to admissibility in evidence of copies of records of the pension office, when properly verified, manner and sufficiency of verification, etc., see the title DOCUMENTARY EVIDENCE, vol. 5, p. 466. As to mandamus to commissioner of pensions, see the title MANDAMUS, vol. 8, p. 1. As to perjury in application for pension, see the title PERJURY. As to construction of statutes relating to pensions, see the title STATUTES.

### I. Definition, Nature and Classification.

**Definition and Purpose.**—Regular allowances paid to an individual by government in consideration of services rendered, or in recognition of merit, civil or military, are called pensions.<sup>1</sup>

**Pension a Matter of Bounty and Not of Right.**—Pensions are the bounties of the government, which congress has the right to give, withhold, distribute, or recall at its discretion.<sup>2</sup> No pensioner has a vested legal right to his pension.<sup>3</sup>

**Classification of Military Pensions.**—Military pensions are divisible into two classes—invalid and gratuitous, or such as are granted as rewards for eminent services, irrespective of physical disability.<sup>4</sup>

### II. Origin of Pension System.

The pension system of the country had its origin in the Revolution, and beyond all question was sanctioned by the framers of the constitution who were members of the first congress, and enacted the laws for putting the new government into operation.<sup>5</sup>

### III. Statutory Provisions Relating to Pensions.

**A. Power of Congress to Grant, Regulate and Control.**—Congress being at liberty to give or withhold a pension, may prescribe who shall receive it, and determine all the circumstances and conditions under which any application therefor shall be prosecuted. No man has a legal right to a pension, and no man has a legal right to interfere in the matter of obtaining pensions for himself or others. The whole control of that matter is within the domain of congressional power.<sup>6</sup> It is undoubtedly competent for the United States to attach such conditions as they may see fit to the granting of a pension, and to fix by law the time and manner in which the property shall finally pass to the pensioner.<sup>7</sup> Power to protect the fund from misappropriation, fraud, and unauthorized conversion to the use of another, and to secure its safe and unimpaired transmission to the beneficiary, has been claimed and exercised through the whole period since congress, under

1. Pensions defined.—United States *v.* Hall, 98 U. S. 343, 25 L. Ed. 180.

"Congress, from high motives of policy, by granting pensions, alleviate, as far as they may, a class of men who suffered in the military service by the hardships they endured and the dangers they encountered." Walton *v.* Cotton, 19 How. 355, 15 L. Ed. 658.

2. Pensions a matter of bounty and not of right.—Frisbie *v.* United States, 157 U. S. 160, 39 L. Ed. 657; Walton *v.* Cotton, 19 How. 355, 15 L. Ed. 658; United States *v.* Teller, 107 U. S. 64, 27 L. Ed. 352.

3. Pensioner has no vested legal right.—Frisbie *v.* United States, 157 U. S. 160, 39 L. Ed. 657. And see post, "Power of Congress to Grant, Regulate and Control," III, A.

4. Classification of military pensions into invalid and gratuitous.—United States *v.* Hall, 98 U. S. 343, 25 L. Ed. 180.

5. Origin of pension system.—United States *v.* Hall, 98 U. S. 343, 25 L. Ed. 180.

The power to grant pensions was exercised by the states and by the continental congress during the War of the Revolution; and the exercise of the power is coeval with the organization of the government under the present constitution and has been continued without interruption or question to the present time.

United States *v.* Hall, 98 U. S. 343, 25 L. Ed. 180.

"Laws of the kind in this country granting invalid pensions were passed by the states during the Revolution, and were followed by similar provisions passed by the continental congress. 1 Laws U. S. (Bioren & Duant's Ed.) 687-692; 2 Id. 73. Many of those provisions were in force when the constitution was adopted, and some of the early laws of the congress under the new constitution were passed to fulfill and make good the obligations which were acknowledged by continental legislation. Such laws had their origin in the patriotic service, great hardships, severe suffering, and physical disabilities contracted while in the public service by the officers, soldiers, and seaman who spent their property, lost their health, and gave their time for their country in the great struggle for liberty and independence, without adequate or substantial compensation." United States *v.* Hall, 98 U. S. 343, 25 L. Ed. 180.

6. Congressional control of pensions.—Frisbie *v.* United States, 157 U. S. 160, 39 L. Ed. 657; United States *v.* Hall, 98 U. S. 343, 25 L. Ed. 180. See, also, Walton *v.* Cotton, 19 How. 355, 15 L. Ed. 658.

7. United States *v.* Hall, 98 U. S. 343, 25 L. Ed. 180.



the constitution, commenced to grant such bounties.<sup>8</sup> Congress having power to legislate on the whole matter, and to prescribe the conditions under which parties may assist in procuring pensions, has the equal power to enforce by penal provisions compliance with its requirements. There can be no reasonable question of the constitutionality of such provisions.<sup>9</sup>

**B. Construction of Statutes.**—In construing statutes relating to pensions, the usual rules governing the construction of statutes generally, would seem to apply.<sup>10</sup>

#### IV. Who Entitled to Pension.

**Grandchildren of Deceased Pensioner.**—Under the act of congress passed on the 2nd of June, 1832, providing for the relief of certain surviving officers of the Revolution, and its several supplements, the word children in the act embraces the grandchildren of a deceased pensioner, whether their parents died before or after his decease. And they are entitled per stirpes to a distributive share of the deceased parent's pension.<sup>11</sup>

**Widows of Soldiers, Sailors, etc.**—As to the commencement of a pension granted by statute to widows of Revolutionary soldiers, see post, "Commencement, Duration and Termination of Pension," VI. As to the application to widows of pensioners, of the general prohibition against receiving a double pension, see post, "Right to Double Pensions," V. Where it is provided that the widow of a pensioner shall be entitled to receive the same pension as the husband would have been entitled to had he been totally disabled, to commence from the death of the husband, and to continue to the widow during her widowhood, and where the statute expressly provides the amount of the pension in case of total disability of officers of a certain rank, the widow of such an officer is entitled only to the same amount, notwithstanding the fact that her husband at the time of his death, was actually in receipt of a much larger pension.<sup>12</sup>

#### V. Right to Double Pensions.

It is now expressly provided under the United States Revised Statutes "that

**8. Protection of fund from misappropriation, fraud and unauthorized conversion.**—United States *v.* Hall, 98 U. S. 343, 25 L. Ed. 180.

As to the exercise of this power in provisions relating to the sale, transfer, or mortgage of pensions, see post, "Sale, Transfer or Mortgage of Pensions," IX.

As to the exercise of this power by providing for the exemption of pension money from attachment, levy or seizure under legal or equitable process, see post, "Exemption of Pension Moneys from Attachment, Levy or Seizure," X.

**9. Power of congress to punish violations of pension regulations.**—*Frisbie v. United States*, 157 U. S. 160, 39 L. Ed. 657.

For a full treatment of the penal statutes relating to pensions, see post, "Offenses against Pension Laws," XII.

**10. Application of usual rules governing construction of statutes.**—See, generally, the title STATUTES.

In *Walton v. Cotton*, 19 How. 355, 15 L. Ed. 658, the court held that in construing such a statute congress "will be presumed to have acted under the ordinary influence which lead to an equitable and not a capricious result. And where the language used may be so construed as to carry out a benign policy, within the

reasonable intent of congress, it should be done."

**11. Grandchildren of deceased pensioner.**—*Walton v. Cotton*, 19 How. 355, 15 L. Ed. 658.

**12. Pension of widow limited to amount prescribed in case of total disability of pensioner.**—*Burnett v. United States*, 116 U. S. 158, 29 L. Ed. 586.

"Section 4695 provides that 'the pension for total disability shall be \* \* \* for lieutenant-colonels and all officers of higher rank in the military service \* \* \* thirty dollars per month.' Other sections fix the amount of pensions in cases of disabilities known as permanent specific disability and inferior disability. It is then provided, by § 4702, that 'if any person embraced within the provisions of sections forty-six hundred and ninety-two and forty-six hundred and ninety-three has died since the fourth day of March, eighteen hundred and sixty-one, or hereafter dies by reason of any wound, injury, or disease, which, under the conditions and limitations of such sections, would have entitled him to an invalid pension had he been disabled, his widow \* \* \* shall be entitled to receive the same pension as the husband or father would have been entitled to had he been totally disabled, to commence from the death of the

no person who is now receiving or shall hereafter receive a pension under a special act, shall be entitled to receive, in addition thereto, a pension under the general law, unless the special act expressly states that the pension granted thereby is in addition to the pension which said person is entitled to receive under the general law."<sup>13</sup> This rule would seem to have been followed even prior to the enactment of this statute.<sup>14</sup>

## VI. Commencement, Duration and Termination of Pension.

**In General.**—As has been already seen, pensions, being the bounty of the government, congress has the right to give, withhold, or recall them at its discretion,<sup>15</sup> and to fix the time and manner in which the property shall finally pass to the pensioner.<sup>16</sup>

husband or father, to continue to the widow during her widowhood,' etc. It would seem to be too clear for discussion that the construction which the court placed upon these statutory provisions is correct. It is not to be doubted that the words 'total disability' in the pension laws has a technical signification which cannot be disregarded. And when the statute fixes \$30 per month as the pension, in case of total disability, of an officer of the rank of General Burnett, and declares that his widow shall receive the same pension as her husband would have received had he been 'totally disabled,' there is no room left for a construction that would give her a pension in excess of that amount." *Burnett v. United States*, 116 U. S. 158, 29 L. Ed. 586.

**13. Statutory prohibition of double pensions.**—*United States v. Teller*, 107 U. S. 64, 27 L. Ed. 352, in which it was held that the contention of the relator that, having received the pension of seventy-two dollars under the general law, he is also entitled to the pension of fifty dollars granted him by the special act, was without ground to rest on.

**14. Application of rule prior to statute.**—On the 3d of March, 1837, congress passed an act giving to the widow of any officer who had died in the naval service of the United States authority to receive, out of the navy pension fund, half the monthly pay to which the deceased officer would have been entitled, under the acts regulating the pay in the navy, in force on the 1st day of January, 1835; on the same day, a resolution was adopted by congress, giving to Mrs. Decatur, widow of Captain Stephen Decatur, a pension for five years, out of the navy pension fund, and in conformity with the act of June 30th, 1834, and the arrearages of the half-pay of a post captain, from the death of Commodore Decatur to June 30th, 1834; the arrearages to be vested in trust for her by the secretary of the treasury. The pension and arrearages, under the act of 1837, were paid to Mrs. Decatur, on her application to Mr. Dickerson, the secretary of the navy, under a protest by her, that by receiving the same she did not prejudice her claim under the resolution of the same date; she applied to the secretary of the navy for the pension and

arrears, under the resolution, which were refused by him; afterwards, she applied to Mr. Paulding, who succeeded Mr. Dickerson, as secretary of the navy, for the pension and arrears, which were refused by him. The circuit court of the county of Washington, in the District of Columbia, refused to grant a mandamus to the secretary of the navy, commanding him to pay the arrears, and to allow the pension under the resolution of March 3d, 1837. Held, that the judgment of the circuit court was correct. *Decatur v. Paulding*, 14 Pet. 497, 10 L. Ed. 559.

"I concur with the court in not interfering with the proceeding of the circuit court, refusing the mandamus prayed for by the relator, on the ground that she is not entitled to the benefits of the general pension law of the 3d of March, 1837, and of the special resolution passed on the same day in her favor. My opinion is not founded on any special proceedings in the passage of the law and resolution, which have been referred to from the journals of the two houses, but from the intention of congress, apparent in the provisions of the two acts, not to give cumulative pensions, and the general principle of law, that where provision is expressly made by law for a particular case, it does not come within the general provisions of another law, which may embrace it by its general terms. 4 Story 2542, 2556. Had it been the intention to give both, the presumption is, it would have been so declared; and the nature of the pensions, one being for life, and the other for five years and arrearages, shows the intention to be contrary, and to give her the election which she should claim; she has yet that election, as it appears from the return to the rule, and the affidavits in the case, that the receipt of the pension under the general law, was, under such circumstances, no waiver of the pension specially given to her, should she now elect to take it, in preference to the general provision under the contemporary law." *Decatur v. Paulding*, 14 Pet. 497, 10 L. Ed. 559. Baldwin, J., concurring.

**15. Power of congress to give, withhold, or recall pensions.**—See ante, "Definition, Nature and Classification," I.

**16. Power to fix time and manner in which property shall pass.**—See ante,

**Commencement of Pensions to Widows of Revolutionary Soldiers.**—Under the act of congress of Feb. 23, 1853, granting to the widows of Revolutionary soldiers, who were married subsequently to a certain specified date, "a pension in the same manner as those who were married before that date," the widows do not take, like these last, from the date of the act which gives them the pension, but take only from the date of the said act of Feb. 23, 1853.<sup>17</sup>

**Duration of Pension to Widows of Pensioners.**—It is a usual provision of statutes providing for pensions to widows of pensioners, that such pension shall continue to the widow during her widowhood.<sup>18</sup>

## VII. Applications for Pensions and Proceedings Thereon.

**As to power of congress to determine circumstances and conditions under which applications for pensions shall be prosecuted,** see ante, "Power of Congress to Grant, Regulate and Control," III, A.

**As to punishment for false affidavits, etc., on applications for pensions,** see post, "Offenses against Pension Laws," XII.

**By Whom Decided.**—Applications for pensions are decided by the commissioner of pensions.<sup>19</sup> Such decisions are made in the exercise of his official functions, and are not merely ministerial acts, and the courts have no appellate power over the commissioner, and no right to review his decisions.<sup>20</sup> The power to hear and determine appeals from the commissioner of pensions, while nowhere expressly given to the secretary of the interior, is exercised daily without question.<sup>21</sup>

**Power of Commissioner of Pensions to Examine into Merits of Claims to Prevent Fraud.**—Under the present statutes provision is made for special examinations into the merits of pension claims by the commissioner of pensions.<sup>22</sup>

**Appointment by Commissioner of Civil Surgeons to Examine Applicants.**—Express provision is made by statute for the appointment by the com-

"Power of Congress to Grant, Regulate and Control," III, A.

17. **Commencement of pension under act of Feb. 23, 1853.**—United States *v.* Alexander, 12 Wall. 177, 20 L. Ed. 381, in which case it was held that the terms "in the same manner" refer to the mode in which the pension was to be obtained, and to the rules, regulations, and prescriptions provided by law for the payment of the same.

18. **Duration of pensions to widows of pensioners.**—See *Burnett v. United States*, 116 U. S. 158, 29 L. Ed. 586.

19. **Applications decided by commissioner of pensions.**—Generally, as to the appointment, powers and duties of the commissioner of pensions and his deputies, see United States Rev. Stats., §§ 470-474.

The commissioner of pensions is not the head of a department, within the meaning of § 2, article 2, of the constitution, prescribing by whom officers of the United States shall be appointed. *United States v. Germaine*, 99 U. S. 508, 25 L. Ed. 482. See the title PUBLIC OFFICERS.

20. **Nature of decision—Review.**—*United States v. Black*, 128 U. S. 40, 32 L. Ed. 354. And see *Miller v. Raum*, 135 U. S. 200, 34 L. Ed. 105.

**As to mandamus to commissioner,** see the title MANDAMUS, vol. 8, p. 1.

21. **Appeal from commissioner of pen-**

sions to secretary of interior.—*Knight v. United States Land Ass'n*, 142 U. S. 161, 35 L. Ed. 974, in which case the court states that such power was expressly asserted in *United States v. Black*, 128 U. S. 40, 32 L. Ed. 354, and was impliedly recognized in *Miller v. Raum*, 135 U. S. 200, 34 L. Ed. 105.

22. **Power of commissioner of pensions to make special examinations into merits of claims.**—By § 4744 of the Revised Statutes, as amended by the act of July 25, 1882, c. 349, it is provided that "the commissioner of pensions is authorized to detail from time to time clerks or persons employed in his office to make special examinations into the merits of such pension or bounty land claims, whether pending or adjudicating, as he may deem proper, and to aid in the prosecution of any party appearing on such examinations to be guilty of fraud, in the presentation or in procuring the allowance of such claims; and any person so detailed shall have power to administer oaths and take affidavits and depositions in the course of such examinations, and to orally examine witnesses, and may employ a stenographer, when deemed necessary by the commissioner of pensions, in important cases," etc. *Markham v. United States*, 160 U. S. 319, 40 L. Ed. 441.

**As to punishment for perjury in a dep-**



missioner of pensions, of civil surgeons, to examine applicants for pensions.<sup>23</sup>

### VIII. Payment and Recovery Back of Pensions.

#### A. Payment.—Statutory Provisions as to Time and Place of Payment.

—By the act of the 15th of June, 1832, authority was given to the secretary of the treasury to pay pensions at such places and times as he might direct.<sup>24</sup> Under the present statute the payment of pensions is made through pension agents at pension agencies in the various states and territories.<sup>25</sup>

**To Whom Payment Made.**—The earlier acts of congress granting donations to officers, soldiers and seamen, or to their widows or children, in some cases directed that the payment might be made to the attorney or agent of the beneficiary; in other acts the direction was that the payment might be made to the guardian of the party, and in still another class of such acts the requirement was that the money should be paid directly to the beneficiary.<sup>26</sup> Prior regulations having proved inadequate to effect the intention that the pension should enure solely to the benefit of the pensioner, congress on the 8th of July, 1870, enacted that thereafter no pension should be paid to any person other than the pensioner entitled thereto, nor otherwise than according to that act, and that no warrant, power of attorney, or other paper executed or purporting to be executed by any pensioner, attorney, claim agent, broker or other person, should be recognized by any agent for the payment of pensions nor should any pension be paid thereon, subject to provisos: 1. That payment to persons laboring under legal disabilities might be made to the guardian of such persons in the manner the act provides. 2. That pensions payable in foreign countries might be made according to the provisions of existing laws.<sup>27</sup> In the corresponding section of the present statutes, in addition to the above-mentioned provisos, additional provision is made for payment to other persons under certain circumstances.<sup>28</sup>

**B. Recovery Back of Pension Money Fraudulently Obtained.**—The United States may maintain an action to recover back certain moneys paid upon the granting of an application for a pension, where such pension was obtained through the fraudulent acts and representations of the defendant; but in such an action the usual rule prevails that the evidence of fraud must be clear, unequivocal and convincing and not merely preponderating.<sup>29</sup>

osition before an examiner of the pension bureau, see the title PERJURY.

**23. Appointment of civil surgeons to examine applicants for pensions, etc.**—By § 4777 of the United States Revised Statutes it is provided that "the commissioner of pensions be, and he is hereby, empowered to appoint, at his discretion, civil surgeons to make the periodical examination of pensioners which are or may be required by law, and to examine applicants for pension, where he shall deem an examination by a surgeon appointed by him necessary; and the fee for such examination, and the requisite certificates thereof in duplicate, including postage on such as are transmitted to pension agents, shall be two dollars, which shall be paid by the agent for paying pensions in the district within which the pensioner or claimant resides, out of any money appropriated for the payment of pensions, under such regulations as the commissioner of pensions may prescribe." *United States v. Germaine*, 99 U. S. 508, 25 L. Ed. 482.

Such surgeons not punishable, as officers of the United States, for extortion under act of 1825, in taking fees from

pensioners. See the title EXTORTION, vol. 6, p. 214.

**24. Provision of act of June 15th, 1832, as to payment of pensions.**—*United States v. Hall*, 98 U. S. 343, 25 L. Ed. 180.

**25. As to appointment of pension agents and establishment of pension agencies, time and manner of paying pensions, see** *United States Rev. Stats.*, §§ 4778-4780.

**26. Statutory provision as to payees.**—*United States v. Hall*, 98 U. S. 343, 25 L. Ed. 180.

Requirement of oath or affirmation from persons claiming pension under power of attorney, etc.—See ante, "Sale, Transfer or Mortgage of Pensions," IX.

**27. Provisions of July 8th, 1870, as to payment of pensions.**—*United States v. Hall*, 98 U. S. 343, 25 L. Ed. 180.

**28. Additional provisos as payees under present statutes.**—*United States Revised Statutes*, § 4766.

Under the Pensions Appropriations Act of March 14th, 1898, ch. 60, it is provided "that hereafter no pensions shall be paid upon power of attorney from pensioners residing in foreign countries."

**29. Recovery back of pension moneys fraudulently obtained—Evidence.**—*Laloue*

### IX. Sale, Transfer, or Mortgage of Pensions.

Even in the early acts relating to pensions it was provided that no sale, pledge, mortgage, assignment or other kind of conveyance of the whole or any part of a pension or arrearages of pension before the same should become due, should be valid,<sup>30</sup> and with a view to enforcing such prohibitions, it was expressly provided that agents employed to collect pension moneys should make oath that they had no interest in such moneys by any such pledge, mortgage, transfer, agreement, or arrangement, and that they knew of none, and provision was expressly made for their punishment if they should swear falsely.<sup>31</sup> Section 4745, of the United States Revised Statutes as they now stand, prohibits the sale, pledge, assignment, etc., "of any right, claim, or interest in any pension which has been, or may hereafter be granted," and provides for the punishment of any one who shall pledge or receive as a pledge, mortgage, sale, etc., or any such right, claim or interest, or who shall hold the same as collateral security, and for the punishment of any person who shall retain the certificate of a pensioner and refuse to surrender it upon the proper demand. Such section does not require the oath denying interest, mentioned in the preceding text.

### X. Exemption of Pension Moneys from Attachment, Levy or Seizure.

Under earlier acts of congress, as well as under the present statute, express provision was made for exemption of the pay of pensioners from attachment, levy, or seizure or any legal process whatever, and that it should inure wholly to the personal benefit of the individual entitled to the same.<sup>32</sup> These provisions of the federal statutes as to exemption have been expressly construed to protect the fund only while in the course of transmission to the pensioner. When the money has been paid to him it has "inured wholly to his benefit," within the meaning of the statute, and is liable to seizure as opportunity presents itself.<sup>33</sup> State courts have, however, in more than one instance, decided that money received as pension from the United States is not liable to attachment, levy, or seizure by or under any legal or equitable process whatever.<sup>34</sup>

### XI. Fees of Claim Agents or Attorneys in Pension Cases.

**Provisions Fixing Amount of Fees.**—By the act of July 14, 1863, con-

*v. United States*, 164 U. S. 255, 41 L. Ed. 425. See, generally, the title **FRAUD AND DECEIT**, vol. 6, p. 442.

**30. Statutory prohibition of sale, transfer, or mortgage of pensions not due.**—*United States v. Hall*, 98 U. S. 343, 25 L. Ed. 180.

**31. Requirement of sworn denial of interest of agents collecting pension money.**—*United States v. Hall*, 98 U. S. 343, 25 L. Ed. 180; *Ballew v. United States*, 160 U. S. 187, 40 L. Ed. 388. See, generally, the title **PERJURY**.

**32. Statutory provisions relating to exemption of pension money from attachment, levy, or seizure.**—By the act of the 15th of June, 1832, it was provided that the pay of the pensioner should not be in any way transferable or liable to attachment, levy or seizure by any legal process whatever, and that it should inure wholly to the personal benefit of the individual entitled to the same. *United States v. Hall*, 98 U. S. 343, 25 L. Ed. 180.

Section 4747 of the Revised Statutes of the United States, is to the effect that "no sum of money due, or to become due, to any pensioner, shall be liable to attachment, levy or seizure, by or under any legal or equitable process whatever,

whether the sum remains with the pension officer, or any officer, or agent thereof or is in course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner." *McIntosh v. Aubrey*, 185 U. S. 122, 46 L. Ed. 834.

**33. Statutory provision construed.**—*McIntosh v. Aubrey*, 185 U. S. 122, 46 L. Ed. 834.

**Property purchased with pension money** is not exempt from seizure or sale on execution under § 4747. *McIntosh v. Aubrey*, 185 U. S. 122, 46 L. Ed. 834.

**34. View of state courts as to exemptions of pension money from seizure.**—*United States v. Hall*, 98 U. S. 343, 25 L. Ed. 180.

"Congress has the power, says Justice Peters, to attach such condition to the grant of the bounty beyond all doubt; and the court held that the language of § 2, in the act of June 6, 1866, was comprehensive enough to exempt such money from any such attachment, levy, or seizure under state laws. *Eckert & Co. v. McKee*, etc., 9 Bush (Ky.) 355. It is undoubtedly competent for the United States, said Judge Hoar, to attach such conditions as they may see fit to the grant of



gress prescribed the fees to be charged by agents and attorneys for making out and causing to be executed the papers necessary to establish claims for pension bounty or other allowance and provided that if any agent or attorney in such a case demanded or received any greater compensation than that allowed by the act, he should be deemed guilty of a misdemeanor and be punished as therein provided. Stated fees were allowed the agents and attorneys by that act, but congress two years later passed a supplemental act allowing such agents or attorneys a fixed sum instead of fees, and allowed such agents or attorneys ten dollars in full for all services in procuring a pension.<sup>35</sup> By the act of congress, entitled "an act relating to claim agents and attorneys in pension cases," approved June 20, 1878, it was enacted that: "It shall be unlawful for any attorney, agent, or other person, to demand or receive for his services in a pension case a greater sum than ten dollars,"<sup>36</sup> and a similar provision was made by the act of June 27th, 1890.<sup>37</sup> Under § 4785 of the United States Revised Statutes, relating to fees for the prosecution of pension claims, it is provided that "no agent or attorney or other person shall demand or receive any other compensation for his services in prosecuting a claim for pension or bounty land than such as the commissioner of pensions shall direct to be paid to him, not exceeding twenty-five dollars; nor shall such agent, attorney or other person demand or receive such compensation, in whole or in part, until such pension or bounty land claimed shall be allowed. By § 4786 of the Revised Statutes provision is made for the filing by the agent or attorney of record with the commissioner of pensions in the case of certain claims, duplicate articles of agreement setting forth the fee agreed upon by the parties, and providing that in all cases where application is made for pension or bounty land, and no agreement is thus filed, the fee shall be ten dollars and no more. This section further provides that no greater fee than ten dollars shall be demanded, received, or allowed in any claim for pension or bounty land granted by special act of congress, nor in any claim for increase of pension on account of the increase of the disability for which the pension had been allowed.

**Punishment for Demanding or Receiving Excessive Fees.**—From the earlier down to the existing statutes prescribing the compensation of attorneys and agent for prosecuting pension claims, the demanding or receiving of compensation in excess of that prescribed by the statute is expressly made an offense and its punishment prescribed.<sup>38</sup>

## XII. Offenses against Pension Laws.

**A. Making or Procuring False Affidavits, etc., Concerning Claims for Pensions**—1. **STATUTORY PROVISIONS.**—Express provision is made in the United States Revised Statutes for the punishment of every person who knowingly or willfully in anywise procures the making or presentation of any false or fraudulent affidavit concerning any claim for pension, or payment thereof, or pertaining to any other matter within the jurisdiction of the commissioner of pensions.<sup>39</sup>

a pension, and to fix by law the time and manner in which the property shall finally pass to the pensioner." United States v. Hall, 98 U. S. 343, 25 L. Ed. 180.

35. Provisions of acts of 1862-64 as to fees of pension agents and attorneys.—United States v. Hall, 98 U. S. 343, 25 L. Ed. 180.

26. Provision of act of June 20, 1878, as to fees.—United States v. Reisinger, 128 U. S. 398, 32 L. Ed. 480.

37. Provision of June 27th, 1890.—Frisbie v. United States, 157 U. S. 160, 39 L. Ed. 657.

38. Offense of demanding or receiving excessive fees.—See post, "Offenses

against Pension Laws." XII.

39. Provision of United States Revised Statutes, § 4746, as to making or procuring false or fraudulent affidavits, etc.—Edgington v. United States, 164 U. S. 361, 41 L. Ed. 467. In this case it was held that this section was not to be deemed a repeal of § 5438 of the United States Revised Statutes making it penal to make or cause to be made, for the purpose of obtaining or aiding to obtain the payment or approval of any claim against the United States, any false deposition, knowing the same to contain any fraudulent or fictitious statement. Undoubtedly there is some ground that is common to both



2. **INDICTMENT.**—In an indictment for the transmission to the commissioner of pensions of an affidavit known to be false, it is sufficient for the indictment to charge the act to have been done "with intent to defraud the United States," without also charging that it was done feloniously or with "a felonious intent."<sup>40</sup>

3. **PUNISHMENT.**—The statute relating to false affidavits, as it was originally enacted, provided a penalty of a fine not exceeding five hundred dollars or for imprisonment for a term not exceeding three years;<sup>41</sup> but under the statute as amended, the penalty provided is a fine not exceeding five hundred dollars, or imprisonment for a term of not more than five years.<sup>42</sup>

**B. Demanding or Receiving Excessive Fees for Prosecution of Pension Claims.**—1. **STATUTORY PROVISIONS STATED AND CONSTRUED.**—Under the present as well as earlier federal statutes it is made a misdemeanor for any agent or attorney or other person instrumental in prosecuting any claim for pension or bounty land, to directly or indirectly contract for, demand, or receive, or retain any greater compensation for his services or instrumentality in prosecuting a claim for pension or bounty land than is provided, or for payment thereof at any other time or in any other manner than is provided by statute.<sup>43</sup>

**Statutory Provision Construed.**—The scope of the statute now under consideration and the evident purpose of congress are to prevent an applicant from being mulcted any sum beyond that provided by statute, by any one assisting in the matter.<sup>44</sup> The guilt or innocence of the defendant does not turn on the question whether he is or is not successful in obtaining the pension which he is applying for, nor whether he takes the sum in excess of that allowed out of the particular pension money received by the applicant;<sup>45</sup> nor does the question of his guilt depend on the amount of the excess.<sup>46</sup>

2. **EFFECT OF REPEAL OF STATUTE.**—The repeal of the act of congress of 1878,

sections. Thus the procuring or causing to be made a false deposition or affidavit in promoting a fraudulent pension claim is made an offense by both statutes. But the earlier statute is wider in its scope, because not restricted to fraudulent pension claims, nor to merely procuring a false affidavit to be made.

Generally, as to the punishment as perjury, of the making or causing to be made, false depositions for the purpose of obtaining or aiding to obtain payment or approval of any claim against the United States, see the title **PERJURY**. And see the title **UNITED STATES**.

**Transmission of affidavit known to be false.**—The transmission to the commissioner of pensions of an affidavit which was false in the facts which it professed to narrate, although sworn to by a person who really existed, and the person who transmitted it knew that it was false, is an offense within the meaning of the act of congress providing that if any person shall transmit to, or present at, or cause or procure to be transmitted to, or presented at, any office or officer of the government of the United States, any deed, power of attorney, order, certificate, receipt, or other writing, in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited, every such person shall be deemed and adjudged guilty of felony, etc. *United States v. Staats*, 8 How. 41, 12 L. Ed. 979.

**40. Sufficiency of indictment for transmission of false affidavit.**—*United States v. Staats*, 8 How. 41, 12 L. Ed. 979.

**41. Penalty for offenses.**—*Edgington v. United States*, 164 U. S. 361, 41 L. Ed. 467.

**42. United States Statutes**, § 4746.

**43. Statutory prohibition as to contracting for, demanding, or receiving, etc., excessive compensation.**—*United States Revised Statutes*, § 4786. *Ballew v. United States*, 160 U. S. 187, 40 L. Ed. 388; *United States v. Hall*, 98 U. S. 343, 25 L. Ed. 180; *United States v. Reisinger*, 128 U. S. 398, 32 L. Ed. 480; *Frisbie v. United States*, 157 U. S. 160, 39 L. Ed. 657; *United States v. Benecke*, 98 U. S. 447, 25 L. Ed. 192.

**44. Scope and purpose of provision.**—*Frisbie v. United States*, 157 U. S. 160, 39 L. Ed. 657.

**45. Guilt or innocence of defendant not dependent upon succession obtaining pension, etc.**—*Frisbie v. United States*, 157 U. S. 160, 39 L. Ed. 657.

**46. Guilt not dependent upon amount of excess.**—*Frisbie v. United States*, 157 U. S. 160, 39 L. Ed. 657.

"The rule de minimis non curat lex has no such application in criminal cases. The stealing of one cent is larceny as truly as the stealing of a thousand dollars. The amount may vary the degree, but it does not change the character of the crime." *Frisbie v. United States*, 157 U. S. 160, 39 L. Ed. 657. See, generally, the title **LARCENY**, vol. 7, p. 844.

prohibiting the demanding or receiving an excessive fee for prosecuting a pension claim, will not bar the prosecution and conviction of one who committed such offense prior to the repealing act.<sup>47</sup>

3. **INDICTMENT.**—An indictment for demanding, receiving, and retaining, by way of a fee for prosecuting a claim for pension, in excess of the sum permitted by statute, is not defective merely for the reason that it describes the defendant as a lawyer and not as an agent or attorney.<sup>48</sup> Nor is it a sufficient objection to an indictment that there is no averment that the person on whose behalf the claim was prosecuted was a pensioner of the United States, or that any money of any kind or character was ever paid to defendant for such person, or that any money was ever paid to any other person for her.<sup>49</sup> If the amount of the excess over the legal amount demanded, received, and retained by the defendant, is unknown, it is proper to allege that fact in the indictment, and, in the absence of any testimony to the contrary, it will be presumed that the amount of the excess was, in fact, unknown to the grand jury.<sup>50</sup> The charge of demanding, receiving, and retaining an excessive fee implies that there is wrong in the original exaction, and it is unnecessary to aver a demand upon the defendant to undo such wrong.<sup>51</sup> If he wrongfully demanded and received, and still retains the sum so demanded and received, the offense is complete.<sup>52</sup> In an indictment for demanding or receiving excessive fees, the allegation that the offense charged was "contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the United States," is one of a mere conclusion of law, is not of the substance of the charge, and its omission is of a matter of form which does not tend to the prejudice of the defendant, and is therefore, to be disregarded.<sup>53</sup>

4. **PUNISHMENT.**—A person guilty of the offense of demanding, receiving or retaining excessive compensation for the prosecution of a pension claim, is guilty of a misdemeanor, and, upon conviction thereof, may for every such offense be fined not exceeding five hundred dollars, or imprisoned at hard labor not exceeding two years, or both, in the discretion of the court.<sup>54</sup>

**C. Withholding of Pension**—1. **STATUTORY PROVISIONS STATED AND CONSTRUED.**—**Provision Stated.**—By statute it is expressly made a misdemeanor for an agent, attorney, or other person instrumental in prosecuting a pension

47. **Effect of repeal of statute.**—United States *v.* Reisinger, 128 U. S. 398, 32 L. Ed. 480.

48. **Description of defendant as "lawyer."**—Frisbie *v.* United States, 157 U. S. 160, 39 L. Ed. 657.

"It is claimed that the indictment is defective in that it describes the defendant as a lawyer and not as an agent or attorney. Of course the use of the word 'lawyer' is not significant; it is a mere descriptive term. The language of the statute is 'no agent, attorney, or other person engaged in preparing,' etc. The indictment charges that 'defendant then and there being a person engaged in preparing, presenting, and prosecuting a claim for pension upon the said United States \* \* \* by and on behalf of one Julia Johnson.' It is immaterial what was his original profession or avocation. It is sufficient that if even temporarily he engaged in the work of preparing, presenting, and prosecuting a claim for a pension. Doing that he brings himself within the requirements of the statute, and it is enough to charge that he was so engaged, and that whilst so engaged he did demand, receive, and retain more than

the sum which by the statute he was permitted to do." Frisbie *v.* United States, 157 U. S. 160, 39 L. Ed. 657.

49. **Indictment not defective for omission to aver receipt of money by claimant.**—Frisbie *v.* United States, 157 U. S. 160, 39 L. Ed. 657.

50. **Averment that amount of excess was unknown.**—Presumption in absence of averment.—Frisbie *v.* United States, 157 U. S. 160, 39 L. Ed. 657.

51. **Averment of demand or return of excess unnecessary.**—Frisbie *v.* United States, 157 U. S. 160, 39 L. Ed. 657.

52. Frisbie *v.* United States, 157 U. S. 160, 39 L. Ed. 657.

53. **Omission of allegation that offense was "contrary to the form of the statutes," etc.**—Frisbie *v.* United States, 157 U. S. 160, 39 L. Ed. 657. See, generally, the title **INDICTMENTS, INFORMATION, PRESENTMENTS AND COMPLAINTS**, vol. 6, p. 971.

54. **Punishment.**—United States Revised Statutes, § 4786. Ballew *v.* United States, 160 U. S. 187, 40 L. Ed. 388; United States *v.* Benecke, 98 U. S. 447, 25 L. Ed. 192; United States *v.* Irvine, 98 U. S. 450, 25 L. Ed. 193.



claim, etc., to withhold from a pensioner or claimant the whole or any part of the pension or claim allowed and due such pensioner or claimant, or the land warrant issued to any such claimant.<sup>55</sup>

**Provision Construed.**—While it is not easy to define for all purposes what constitutes under the statutes a withholding of a pension, yet it would clearly seem that there must be such unreasonable delay, some refusal to pay on demand, or some such intent to keep the money wrongfully from the pensioner, as would constitute an unlawful withholding in the meaning of the law.<sup>56</sup> It has been held that the word “withholding” has a definite signification, and as used in the statute under consideration, contemplates, not the fraudulent obtaining of money from a pensioner, but the withholding of the money before it reaches the hands of the pensioner and passes under his dominion and absolute control.<sup>57</sup>

**55. Statutory prohibition of wrongfully withholding pension, etc.**—United States Revised Statutes, § 4786. United States *v. Irvine*, 98 U. S. 450, 25 L. Ed. 193; United States *v. Benecke*, 98 U. S. 447, 25 L. Ed. 192; *Ballew v. United States*, 160 U. S. 187, 40 L. Ed. 388; *Frisbie v. United States*, 157 U. S. 160, 39 L. Ed. 657.

**56. What constitutes unlawful withholding within statute.**—United States *v. Irvine*, 98 U. S. 450, 25 L. Ed. 193.

“It cannot commence, of course, until the money is received by the party charged. Nor can it commence then, until there is a duty of immediate payment to the pensioner. A reasonable time must certainly be allowed for this. What that is must depend in each case on its own circumstances. A refusal to pay on demand without just excuse would constitute withholding at once. Such delay as would show an intention to evade payment would constitute a withholding. If there is nothing but careless delay, the party might hold the money for some time without incurring this severe penalty of two years imprisonment.” United States *v. Irvine*, 98 U. S. 450, 25 L. Ed. 193.

**57. Fraudulent obtaining of money from pensioner not within meaning of statute.**—*Ballew v. United States*, 160 U. S. 187, 40 L. Ed. 388.

“The context of the statute supports this view, for its penalty is imposed for the wrongful withholding of the whole or any part of the pension claim allowed and due such pensioner, and not for a wrongful obtaining of the same. The fact that the offense of withholding is limited to any agent or attorney or other person instrumental in prosecuting any claim for pension demonstrates that congress intended to legislate merely against the wrongful withholding by certain individuals, who, by reason of their relation to the pensioner and his claim, might lawfully obtain possession of the same from the government, and upon whom rested the duty of paying it over to the pensioner. If withholding had been considered as applicable to the retaining of pension money obtained from the pensioner by false pretenses, the limitation as to particular persons would

not have been enacted.” *Ballew v. United States*, 160 U. S. 187, 40 L. Ed. 388.

“These reasons make it clear that the purpose of the statute in punishing a withholding by certain persons standing in a fiduciary relation to the pensioner is consistent only with the theory that congress was legislating to prevent an embezzlement of pension money, not a larceny thereof from the pensioner or the obtaining of the same from him by false pretenses. This construction of the statute is further supported by reference to the act of March 3, 1873, c. 234, 17 Stat. 566, in § 31 (p. 575) of which is contained the original provision making it an offense to withhold pension money. In juxtaposition to that section, in § 32, was the following: ‘Any person acting as attorney to receive and receipt for money for and in behalf of any person entitled to a pension shall, before receiving said money, take and subscribe an oath, to be filed with the pension agent, and by him to be transmitted, with the vouchers now required by law, to the proper accounting officer of the treasury that he has no interest in said money by any pledge, mortgage, sale, assignment, or transfer, and that he does not know or believe that the same has been so disposed of to any person.’ The portion of § 32, above quoted, was subsequently embodied in § 4745 of the Revised Statutes.” *Ballew v. United States*, 160 U. S. 187, 40 L. Ed. 388.

**Withholding pay and bounty not an offense under § 13 of July 4th, 1864.**—An indictment against A., found Sept. 11, 1875, charged that in March, 1868, he, as agent and attorney of B. and C., did withhold, and continued thereafter to withhold from them, certain money which he as their agent and attorney had received from the United States by the collection of their respective claims for “pay and bounty” and “arrear of pay and bounty.” It was held that the acts charged are not an offense under § 13 of the act of July 4th, 1864 (13 Stat. 389). *United States v. Benecke*, 98 U. S. 447, 25 L. Ed. 192.

“Since the act in which this offense is described makes no provision for pay or for bounty, and the fees regulated and the acts forbidden are those done in regard to



2. **LIMITATION OF PROSECUTION.**—Whenever the act or series of acts necessary to constitute a criminal withholding of pension money have transpired, the crime is complete, and from that day the statute of limitations begins to run against the prosecution.<sup>58</sup>

3. **PUNISHMENT.**—The punishment provided by statute for the offense of wrongfully withholding pension money is the same as that provided for the offense of demanding, receiving or retaining an excessive fee for services in the prosecution of a pension claim, and is provided for in the same section of the statutes.<sup>59</sup>

**D. Embezzlement of Pension Money by Guardian.**—Express provision is made by statute for punishing the offense of the embezzlement of pension money by a guardian from his ward.<sup>60</sup>

### PEONAGE.—See note 1.

that act, it seems a reasonable construction of the penal part of the statute that withholding pay and bounty, which are not mentioned there, are not intended to be punished by the act. It is not in reference to pay that congress was legislating. The persons described who may be guilty are those prosecuting claims for pensions or bounty before the pension office. The offense described is 'withholding from a pensioner or other claimant the whole or any part of the claim allowed and due said pensioner or claimant,' and it is but a just limitation of the word 'claimant' that he should be a claimant under that act, a claimant before the pension bureau. This part of the section is to be taken in connection with the taking of illegal fees, which manifestly refers to cases before the pension office, and which are described and punished in the same sentence and by the same penalty. The word 'bounty' is not used in this sentence, nor the word 'pay,' but the argument is that the word 'claim' includes them. We think this would be an unjustifiable extension of a penal statute beyond its terms and against its purpose." *United States v. Benecke*, 98 U. S. 447, 25 L. Ed. 192. See CLAIMANT, vol. 3, p. 847, note.

**Provisions of statute inapplicable to money previously withheld.**—An act making it a misdemeanor to wrongfully withhold pension money cannot be held to apply to a case where the money had already been withheld five years when the statute was passed. "The party might very well be criminally wrong in failing to pay when he received it; but congress could hardly be supposed to intend to punish as a crime his failure to pay afterwards what was in law but a debt created five years before." *United States v. Benecke*, 98 U. S. 447, 25 L. Ed. 192.

**58. Limitation of prosecution.**—*United States v. Irvine*, 98 U. S. 450, 25 L. Ed. 193.

An indictment against A., found Sept. 15, 1875, charged that on Dec. 24, 1870, B. demanded of him the sum of \$525, which he as her agent and attorney had collected and received from the United States

on account of a pension awarded to her, and that he then, and continuously thereafter, wrongfully withheld it from her. Held: 1. That the indictment was barred by § 1044 of the Revised Statutes. 2. That the crime charged was not a continuous one to the time of finding the indictment. *United States v. Irvine*, 98 U. S. 450, 25 L. Ed. 193.

**59. Punishment.**—See ante, "Punishment," XII, C, 3.

**60. Punishment of embezzlement of pension moneys by guardian.**—By the act of March 3, 1873, following the designation of the offense of withholding pension money, it was provided that "every guardian having the charge and custody of the pension of his ward who embezzles the same in violation of his trust, or fraudulently converts the same to his own use, shall be punished by fine not exceeding two thousand dollars, or imprisonment at hard labor for a term not exceeding five years or both." *Ballew v. United States*, 160 U. S. 187, 40 L. Ed. 388.

Section 4783 of the present United States Revised Statutes is practically the same as the provision above set out, with the exception that it is made applicable to "every guardian, conservator, curator, committee, tutor, or other person having charge and custody in a fiduciary capacity of the pension of his ward who shall embezzle," etc. *Ballew v. United States*, 160 U. S. 187, 40 L. Ed. 388.

**Constitutionality of provision punishing embezzlement.**—Congress has, under the constitution, power to declare that the embezzlement or fraudulent conversion to his own use by a guardian of the money which he, on behalf of his wards, has received from the government as a pension due to them, is an offense against the United States, and to vest the proper circuit court with jurisdiction to try and punish him therefor. *United States v. Hall*, 98 U. S. 343, 25 L. Ed. 180.

**1. Peonage.**—In *Clyatt v. United States*, 197 U. S. 207, 215, 49 L. Ed. 726, it is said: "What is peonage? It may be defined as a status or condition of compulsory service, based upon the indebtedness of the

**PEOPLE.**—See the title *NEUTRALITY*, vol. 8, pp. 899, 901. See note 1.

**PER CAPITA.**—See, generally, the title *WILLS*. See note 2.

**PERCOLATING WATERS.**—See the title *WATERS AND WATERCOURSES*.

**PER DIEM.**—See references under *FEES*, vol. 6, p. 244.

**PEREMPTORY CHALLENGE.**—See the title *JURY*, vol. 7, p. 773.

**PEREMPTORY INSTRUCTIONS.**—See the title *INSTRUCTIONS*, vol. 7, p. 50.

**PEREMPTORY MANDAMUS.**—See the title *MANDAMUS*, vol. 8, p. 94.

**PEREMPTORY NONSUIT.**—See the title *DISMISSAL, DISCONTINUANCE AND NONSUIT*, vol. 5, p. 389.

**PERFECT.**—See note 3.

**PERFORM—PERFORMERS.**—See, generally, the titles *CONTRACTS*, vol. 4, p. 578; *FRAUDS, STATUTE OF*, vol. 6, p. 459.

**PERILS OF THE SEA.**—See the titles *CARRIERS*, vol. 3, p. 593; *EMBARGO AND NONINTERCOURSE LAWS*, vol. 5, p. 741; *MARINE INSURANCE*, vol. 8, pp. 168, 171, 172; *SHIPS AND SHIPPING*. See note 4.

peon to the master. The basal fact is indebtedness. As said by Judge Benedict, delivering the opinion in *Jaramillo v. Romero*, 1 N. Mex. 190, 194: 'One fact existed universally; all were indebted to their masters. This was the cord by which they seemed bound to their masters' service.' Upon this is based a condition of compulsory service. **Peonage** is sometimes classified as voluntary or involuntary, but this implies simply a difference in the mode of origin, but none in the character of the servitude. The one exists where the debtor voluntarily contracts to enter the service of his creditor. The other is forced upon the debtor by some provision of law. But **peonage**, however created, is compulsory service, involuntary servitude." See, also the title *SLAVERY AND INVOLUNTARY SERVITUDE*.

1. **People.**—In *Strother v. Lucas*, 12 Pet. 410, 446, 9 L. Ed. 1137, it is said: "Custom is introduced by the **people**, under which name we understand the union or assemblage of persons of all description, of that country where they are collected." See, also, the title *USAGES AND CUSTOMS*.

In *Walnut v. Wade*, 103 U. S. 683, 693, 26 L. Ed. 526, it is said: "The popular signification of the words '**people** of a town' and 'inhabitants of a town' is the same."

The terms subjects, **people**, and inhabitants used indiscriminately as synonymous, see *The Pizarro*, 2 Wheat. 227, 245, 4 L. Ed. 226.

In *Dred Scott v. Sandford*, 19 How. 393, 404, 15 L. Ed. 691, Mr. Chief Justice Taney, delivering the opinion of the court, said: "The words '**people** of the United States' and 'citizens' are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives. They are what we familiarly call the 'sovereign **people**' and every citizen is one of this **people**, and a constituent member of this

sovereignty." See, also, *Boyd v. Thayer*, 143 U. S. 135, 159, 36 L. Ed. 103; *Civil Rights Cases*, 109 U. S. 3, 31, 27 L. Ed. 836.

2. **Per capita.**—In *Eastern Band v. United States*, 117 U. S. 288, 310, 29 L. Ed. 880, it is said: "As designated by articles 12 and 15 of the treaty, these Cherokees were to receive 'their due portion of all the personal benefits accruing under the treaty, for their claims, improvements, and **per capita**.' The term 'claims' had reference to demands for spoliation of their property which existed prior to the treaty. The improvements were those made on the property ceded. By **per capita** was meant the proportionate amount, given to each Cherokee east not choosing to emigrate, of the money received on the cession of the lands east of the Mississippi, after deducting certain expenditures mentioned in article 15." See, also, the title *INDIANS*, vol. 6, p. 929.

3. **Perfect grant.**—See *Botiller v. Dominguez*, 130 U. S. 238, 32 L. Ed. 926. And see, generally, the title *PUBLIC LANDS*.

**Perfect right of self-defense.**—See the title *HOMICIDE*, vol. 6, p. 703.

**Perfect war.**—See the title *WAR*.

4. **Perils of the sea.**—In *The Maestic*, 166 U. S. 375, 386, 41 L. Ed. 1039, it is said: "The act of God, said Chancellor Kent (vol. 2, p. 597), means 'inevitable accident, without the intervention of man and public enemies,' and again (vol. 3, p. 216, that '**perils of the sea** denote natural accidents peculiar to that element, which do not happen by the intervention of man, nor are to be prevented by human prudence. A casus fortuitus was defined in the civil law to be, quod damno, fatali contingit, cuius diligentissimo possit contingere. It is a loss happening in spite of all human effort and sagacity.' The words **perils of the sea** may, indeed, have grown to have a broader signification than 'the act of God,' but that is unimportant here."

**Perils of the lake.**—In *Union Ins. Co. v. Smith*, 124 U. S. 405, 411, 31 L. Ed. 497, the following instructions were sustained:

**PERIOD.**—As to computation of time from “period of exportation” in tariff laws, see the title **REVENUE LAWS**.

**PERIODICAL.**—A periodical is defined by Webster as “a magazine or other publication which appears at stated or regular intervals,” and by the Century Dictionary as “a publication issued at regular intervals in successive numbers or parts, each of which (properly) contains matter on a variety of topics and no one of which is contemplated as forming a book of itself.”<sup>1</sup>

**PERIODICAL OVERFLOW.**—See note 2.

“The **perils of the lake**, river, etc., which the defendant took upon itself, by the terms of the policy, were such as should come to the damage of the vessel or any part thereof, excepting the incompetency of the master or insufficiency of the crew, or want of ordinary care and skill in the navigation of the vessel, rottenness, and defects of the vessel, and all other unseaworthiness.” “The **perils of the lake** described and referred to by this policy of insurance denote the natural accidents peculiar to that element, which do not happen by the intervention of man, nor are to be prevented by human prudence.”

**Perils of the river.**—See the title **MARINE INSURANCE**, vol. 8, p. 168.

1. **Periodical.**—*Houghton v. Payne*, 194 U. S. 89, 96, 48 L. Ed. 888. The court said: “A **periodical**, as ordinarily understood, is a publication appearing at stated intervals, each number of which contains a variety of original articles by different authors, devoted either to general literature of some special branch of learning or to a special class of subjects. Ordinarily each number is incomplete in itself, and indicates a relation with prior or subsequent numbers of the same series. It implies a continuity of literary character, a connection between the different numbers of the series in the nature of the articles

appearing in them, whether they be successive chapters of the same story or novel or essays upon subjects pertaining to general literature.” See, also, *Bates & Guild Co. v. Payne*, 194 U. S. 106, 48 L. Ed. 893.

2. **Periodical overflow.**—In *Heath v. Wallace*, 138 U. S. 573, 584, 34 L. Ed. 1063, it is said: The term ‘overflowed,’ as thus used, has reference to a permanent condition of the lands to which it is applied. It has reference to those lands which are overflowed, and will remain so without reclamation or drainage; while ‘subject to **periodical overflow**’ has reference to a condition which may or may not exist, and which, when it does exist, is of a temporary character. It was never intended that all the public lands which perchance might be temporarily overflowed at the time of freshets and high waters, but which, for the greater portion of the year, were dry lands, should be granted to the several states as ‘swamp and overflowed’ lands. At any rate, the question whether or not lands returned as ‘subject to **periodical overflow**’ are within the descriptive terms of those granted by the swamp land act—that is, whether they are ‘swamp and overflowed’—is a question of fact properly determinable by the land department.”



# PERJURY.

BY S. BLAIR FISHER.

- I. Statutory Provisions as to Perjury and False Swearing, 385.
- II. Essential Elements of Offense, 386.
- III. Prosecution and Punishment, 388.
  - A. Jurisdiction, 388.
  - B. The Indictment, 388.
  - C. Evidence, 390.
  - D. Punishment, 391.

## CROSS REFERENCES.

See the titles AFFIDAVITS, vol. 1, p. 200; AUTREFOIS, ACQUIT AND CONVICT, vol. 2, p. 757; BANKRUPTCY, vol. 2, p. 839; BOUNTIES, vol. 3, p. 512; CRIMINAL LAW, vol. 5, pp. 85, 121, 125; INDICTMENTS, INFORMATIONS, PRESENTMENTS AND COMPLAINTS, vol. 6, pp. 975, 1009; NOTARY PUBLIC, vol. 8, p. 926; OATH, vol. 8, p. 951; PENSIONS, ante, p. 371; REVENUE LAWS; WITNESSES.

As to the effect of false testimony as ground for relief against judgments, see the title JUDGMENTS AND DECREES, vol. 7, p. 632. As to charge of perjury as subjecting decisions of the land department to review, see the title PUBLIC LANDS.

### I. Statutory Provisions as to Perjury and False Swearing.

**Statutory Definition of Perjury.**—The definition of the offense of perjury, as also its punishment, has been the subject of express federal<sup>1</sup> as well as

1. It is provided by § 5392 of the United States Revised Statutes that "every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or other certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury." *Markham v. United States*, 160 U. S. 319, 40 L. Ed. 441; *Bucklin v. United States*, No. 2, 159 U. S. 682, 40 L. Ed. 305; *Caha v. United States*, 152 U. S. 211, 38 L. Ed. 415; *In re Loney*, 134 U. S. 372, 33 L. Ed. 949; *United States v. Ambrose*, 108 U. S. 336, 27 L. Ed. 746; *United States v. Curtis*, 107 U. S. 671, 27 L. Ed. 534. And see *In re Kollock*, 165 U. S. 526, 41 L. Ed. 813.

**Meaning of terms "declaration" and "certificate" as used in statute.**—In *United States v. Ambrose*, 108 U. S. 336, 27 L. Ed. 746, it was held that the words declaration and certificate, as used in § 5392 of the United States Revised Statutes, are not used as terms of art, or in any technical sense, but are used in the ordinary and popular sense to signify any statement of material matters of fact sworn to and subscribed by the party charged. "The paper or statement of the emol-

ument account, the falsity of which is the foundation of the charge, is set out, and if in the charging clause of the indictment it is described by a word equally applicable to other instruments, no harm can come to defendant, since he is precisely informed as to the identical writing which is alleged to be false, and which he swore to be true. Nor can he be misled in any way, because what he says in that writing is, in the correct use of language, his sworn declaration on that subject. But the perjury in all such cases consists in the oath by which the party indicted swears to the truth of some matter, and this oath may be said to be the false statement of the statute. Or, in another sense, it may be said that the written statement and the oath of the party that it is true, all constitute the declaration or certificate of the statute, for the falsity of which he is chargeable with perjury and liable to punishment. The previously prepared writing, his oath to its truth, or the whole taken together, is, in our opinion, a declaration of the party within the meaning of the statute, and may be so well described in the indictment." *United States v. Ambrose*, 108 U. S. 336, 27 L. Ed. 746.

"We are quite satisfied that, as set forth in this indictment, these are material matters under the statute, and if defendant did not believe them to be true when he swore to and subscribed the statement that they were true, that he is guilty of

state legislation.<sup>2</sup>

**False Oath in Support of Claims against United States.**—By the act of congress of March 1st, 1823, it was declared that "If any person shall swear or affirm falsely, touching the expenditure of public money, or in support of any claim against the United States, he or she shall, upon conviction thereof, suffer as for willful and corrupt perjury."<sup>3</sup> This act, it has been held, does not create or punish the crime of perjury, technically considered, but it creates a new and substantial offense of false swearing, and punishes it in the same manner as perjury.<sup>4</sup>

## II. Essential Elements of Offense.

In order that a false oath or affirmation may be punishable as perjury, it must have been taken in a proceeding in which the law authorizes an oath to be administered;<sup>5</sup> must have been taken before a competent tribunal, officer, or person;<sup>6</sup>

perjury, as declared in § 5392, and we think the word declaration correctly defines such statement. The same rule of construction is applicable to the word certificate used in the statute." *United States v. Ambrose*, 108 U. S. 336, 27 L. Ed. 746.

**2. By § 3741 of the Virginia Code, 1887,** it is provided that "if any person to whom an oath is lawfully administered on any occasion, willfully swears falsely on such an occasion touching any material matter or thing," he shall be guilty of perjury. *In re Loney*, 134 U. S. 372, 33 L. Ed. 949.

**3. False oath in support of claims against United States.**—*United States v. Bailey*, 9 Pet. 238, 9 L. Ed. 113. And see *United States v. Curtis*, 107 U. S. 671, 27 L. Ed. 534. See the title UNITED STATES.

**4. Effect of act of 1823.**—*United States v. Bailey*, 9 Pet. 238, 9 L. Ed. 113.

The act does no more than change a common-law offense into a statutory offense. *United States v. Bailey*, 9 Pet. 238, 9 L. Ed. 113.

**5. Oath must have been taken in proceeding where oath authorized by law.**—*Markham v. United States*, 160 U. S. 319, 40 L. Ed. 441; *Bucklin v. United States*, No. 2, 159 U. S. 682, 40 L. Ed. 305; *Caha v. United States*, 152 U. S. 211, 38 L. Ed. 415; *In re Loney*, 134 U. S. 372, 33 L. Ed. 949; *United States v. Ambrose*, 108 U. S. 336, 27 L. Ed. 746; *United States v. Curtis*, 107 U. S. 671, 27 L. Ed. 534; *United States v. Nickerson*, 17 How. 204, 15 L. Ed. 219.

**Act of 1823 includes all cases of swearing required by practice of treasury department in regard to expenditure of public moneys, etc.**—In *United States v. Bailey*, 9 Pet. 238, 9 L. Ed. 113, it is held that the language of the act of 1823 should be construed with reference to the usages of the treasury department; the false swearing and false affirmation referred to in the act ought to be construed to include all cases of swearing and affirmation required by the practice of the department, in regard to the expenditure of public money, or in support of any claims against the United States. The language of the act is sufficiently broad to include all such cases; and there is no reason for

excepting them from the words, as they are within the policy of the act, and the mischief to be remedied.

**False oath by person collecting pension as agent of pensioner.**—Under a statute requiring agents or attorneys employed to collect pension moneys to make oath or affirmation to the proper accounting officer of the treasury that he has no interest in said moneys by any pledge, mortgage, sale, assignment, or transfer and that he does not know or believe that the same has been so disposed of to any person, a false oath or affirmation is punishable as perjury. *United States v. Hall*, 98 U. S. 343, 25 L. Ed. 180; *Ballew v. United States*, 160 U. S. 187, 40 L. Ed. 388. See, generally, the title PENSIONS, ante, p. 371.

**Perjury in falsely taking and swearing "owner's oath" required by revenue collection laws.**—The falsely taking and swearing "the owner's oath, in cases where goods have been actually purchased," as prescribed by the 4th section of the supplementary collection law of the 1st of March, 1823, is punishable as perjury. *United States v. Wood*, 14 Pet. 430, 10 L. Ed. 527.

**False oath to obtain allowance of fishing bounty.**—A false oath taken in a proceeding to obtain an allowance or bounty for fishing vessels, under the act of congress of July 29, 1813, is punishable as perjury. *United States v. Nickerson*, 17 How. 204, 15 L. Ed. 219. See the titles AUTREFOIS, ACQUIT AND CONVICT, vol. 2, p. 757; BOUNTIES, vol. 3, p. 512.

**6. Must have been taken before competent tribunal, etc.**—*Markham v. United States*, 160 U. S. 319, 40 L. Ed. 441. And see cases cited to preceding text.

"It can hardly be supposed that a defendant indicted for perjury can be held to be guilty, unless the oath, in regard to which the perjury is charged, was taken before an officer of some kind having due authority to administer the oath." *United States v. Hall*, 131 U. S. 50, 33 L. Ed. 97.

"It is fundamental in the law of criminal procedure that an oath before one who has no legal authority to administer oaths

of a public nature, or before one who, although authorized to administer some kind of oaths, but not the one which is brought in question, cannot amount to perjury at common law, or subject the party taking it to prosecution for the statutory offense of willfully false swearing. 1 Hawk. P. C., b. 1, c. 27, § 4, p. 430, 8th ed. by Curwood; Roscoe's Cr. Evid. (7th Ed.), p. 817; 2 Whart. Crim. Law, § 2211; 2 Arch. Crim. Pr. & Pl. (8th Ed.), p. 1722." *United States v. Curtis*, 107 U. S. 671, 27 L. Ed. 534.

**Rule construed.**—The provision of § 5392 of the United States Revised Statutes to the effect that the oath must be taken before some "competent tribunal, officer, or person," does not necessarily mean that the tribunal by which the oath is administered shall have been created by the government which required it to be taken, nor that the officer who administers it shall be an officer of that government. But the statute does mean that the oath must be permitted or required, by at least the laws of the United States, and be administered by some tribunal, officer, or person authorized by such laws to administer oaths in respect of the particular matters to which it relates." *United States v. Curtis*, 107 U. S. 671, 27 L. Ed. 534.

**Generally as to the tribunals or officers before whom an affidavit or oath may be taken**, see the titles **AFFIDAVITS**, vol. 1, p. 200; **DEPOSITIONS**, vol. 5, p. 223; **OATH**, vol. 8, p. 951. And see the titles treating of particular officers, as, for instance, the title **NOTARY PUBLIC**, vol. 8, p. 926.

**The local land officers, in hearing and deciding upon a contest with respect to a homestead entry, constitute a competent tribunal**, within the scope of § 5392, and a contest so pending before them is a case in which the laws of the United States authorize an oath to be administered. *Caha v. United States*, 152 U. S. 211, 38 L. Ed. 415. And see *In re Kollock*, 165 U. S. 526, 41 L. Ed. 813.

**A special examiner of the pension bureau is a competent officer having lawful authority to administer an oath**, and the willfully and corruptly taking of a false oath before such examiner is punishable as perjury under the United States Revised Statutes, § 5392. *Markham v. United States*, 160 U. S. 319, 40 L. Ed. 441. See the title **PENSIONS**, ante, p. 371.

**If a state magistrate shall administer an oath, under an act of congress expressly giving him the power to do so**, it will be a lawful oath, by one having competent authority; and as much so as if he had been specially appointed a commissioner, under the law of the United States for that purpose; and such an oath, administered under such circumstances, will be within the purview of the act of 1823. *United States v. Bailey*, 9 Pet. 238, 9 L. Ed. 113. And see *United States v. Curtis*, 107 U. S. 671, 27 L. Ed. 534.

The act of 1823 does not create or punish the crime of perjury, technically considered; but it creates a new and substantial offense of false swearing, and punishes it in the same manner as perjury. The oath, therefore, need not be administered in a judicial proceeding, or in a case of which the state magistrate, under the state laws, had jurisdiction, so as to make the false swearing perjury; it would be sufficient, that it might be lawfully administered by the magistrate, and was not in violation of his official duty. *United States v. Bailey*, 9 Pet. 238, 9 L. Ed. 113.

There is no statute of the United States which expressly authorizes any justice of the peace of a state, or any officer of the national government, judicial or otherwise, to administer an oath in support of any claim against the United States, under the act of 1823. The secretary of the treasury, in order to carry into effect the authority given to him to liquidate and pay the claims referred to in the act of 1832, had established a regulation, authorizing affidavits made before any justice of the peace of a state, to be received and considered in proof of claims under the act. By implication, he possessed the power to make such a regulation; and to allow such affidavits in proof of claims under the act of 1832; it was incident to his duty and authority in settling claims under that act. When the oath is taken before a state or national magistrate, authorized to administer oaths, in pursuance of any regulations prescribed by the treasury department, or in conformity with the practice and usage of the treasury department, so that the affidavit would be admissible evidence at the department, in support of any claim against the United States, and the party swears falsely, the case is within the provision of the act of 1823, ch. 165. *United States v. Bailey*, 9 Pet. 238, 9 L. Ed. 113.

**The collector of the district in which a vessel was enrolled and licensed is expressly authorized to administer the oath required by the act of July 29, 1813**, in case of applications for the fishing bounty provided by that act. *United States v. Nickerson*, 17 How. 204, 15 L. Ed. 219.

**False oath before notary public not authorized to administer oath not punishable as perjury.**—In *United States v. Curtis*, 107 U. S. 671, 27 L. Ed. 534, it was held that prior to the act of Feb. 26, 1881, ch. 82, notaries public in the different states had no authority, by virtue of any act of congress, to administer the oath required by § 5211 of the United States Revised Statutes, in verification of reports by officers of national banks, and that a false oath to such a report, taken before a notary appointed by a state, was consequently not punishable as perjury. See, also, *United States v. Hall*, 131 U. S. 50, 33 L. Ed. 97. See generally, the title **BANKS AND BANKING**, vol. 3, pp. 17, 118.

"Our attention is called by counsel for



must have been in relation to a material matter or thing;<sup>7</sup> and the false statement must have been willfully made.<sup>8</sup>

### III. Prosecution and Punishment.

**A. Jurisdiction.—Federal Jurisdiction of Offense in Court or Other Judicial Tribunal of United States.**—A witness who gives his testimony, pursuant to the constitution and laws of the United States, in a case pending in a court or other judicial tribunal of the United States, whether he testifies in the presence of that tribunal, or before any magistrate or officer (either of the nation or of the state) designated by act of congress for the purpose, is accountable for the truth of his testimony to the United States only; and perjury committed in so testifying is an offense against the public justice of the United States and within the exclusive jurisdiction of the courts of the United States;<sup>9</sup> and cannot, therefore, be punished in the courts of a state under the general provisions of the statutes of such state relating to perjury.<sup>10</sup> Thus, for instance, it has been held that the courts of a state have no jurisdiction of the crime of perjury committed in an examination before a commissioner under the United States bankrupt act;<sup>11</sup> of perjury in testifying before a commissioner of the circuit court of the United States;<sup>12</sup> or of perjury in making an affidavit under the acts of congress relating to the sale of public lands.<sup>13</sup>

**Jurisdiction of Perjury Committed within Country Which Subsequently Became Territory of Oklahoma.**—See the title CRIMINAL LAW, vol. 5, p. 85.

**B. The Indictment.—General Rules as to Manner and Sufficiency of Charging Offense.**—In a prosecution for perjury, the indictment or presentment, in order to sustain a judgment upon a verdict of guilty, must set forth

the government to *United States v. Bailey*, 9 Pet. 238, 9 L. Ed. 113. That case, it is claimed, furnishes ample ground for an implication that the notary public who administered the oath in this case was fully empowered to do so. We do not so interpret that decision. That was an indictment for false swearing. It was based upon an act of congress which provided that if any person shall swear or affirm falsely touching the expenditure of public money, or in support of any claim against the United States, he should, upon conviction, suffer as for willful, corrupt perjury. The alleged false oath was administered before a justice of the peace for the commonwealth of Kentucky. It was admitted that there was no statute of the United States expressly empowering a justice of the peace to administer the oath taken by Bailey. But the authority of that officer was sustained upon the ground that the secretary of the treasury had previously, and as incident to his duty and authority under an act of congress, established a regulation permitting affidavits in support of claims against the United States to be made before justices of the peace. Except for that regulation the court, it is manifest, would not have sustained the indictment." *United States v. Curtis*, 107 U. S. 671, 27 L. Ed. 534.

**7. Must have been in relation to material matter.**—*Markham v. United States*, 160 U. S. 319, 40 L. Ed. 441; *United States v. Nickerson*, 17 How. 204, 15 L. Ed. 219. And see cases cited to first text under this section.

**8. False statement must have been willfully made.**—*Markham v. United States*, 160 U. S. 319, 40 L. Ed. 441; *United States v. Nickerson*, 17 How. 204, 15 L. Ed. 219. And see cases cited to first text under this section.

A defendant who did not believe certain material matters to be true, when he swore to and subscribed the statement that they were true, is guilty of perjury under § 5392 of the United States Revised Statutes. *United States v. Ambrose*, 108 U. S. 336, 27 L. Ed. 746.

**9. Exclusive federal jurisdiction where perjury committed in United States court or tribunal.**—In *re Loney*, 134 U. S. 372, 33 L. Ed. 949.

**10. State court without jurisdiction.**—In *re Loney*, 134 U. S. 372, 33 L. Ed. 949.

**11.** In *re Loney*, 134 U. S. 372, 33 L. Ed. 949.

**12.** In *re Loney*, 134 U. S. 372, 33 L. Ed. 949.

**13.** In *re Loney*, 134 U. S. 372, 33 L. Ed. 949.

"The decisions in the supreme courts of Pennsylvania and of New Hampshire, cited for the appellant, holding that the judiciary of a state has jurisdiction of perjury committed in a proceeding for naturalization before a court of the state, under authority of congress, tend rather to support than to oppose our conclusion; for they were put upon the ground that the proceeding for naturalization was a judicial proceeding in a court of the state, as it doubtless was." In *re Loney*, 134 U. S. 372, 33 L. Ed. 949.

the substance of the offense.<sup>14</sup> It is expressly provided by § 5396, of the United States Revised Statutes, that, in a presentment or indictment for perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant,<sup>15</sup> and by what court, and before whom the oath was taken, averring such court or person to have competent authority to administer the same,<sup>16</sup> together with the proper averment to falsify the matter wherein the perjury is assigned,<sup>17</sup> without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, or any affidavit, deposition, or certificate, other than as hereinbefore stated, and without setting forth the commission or authority of the court or person before whom the perjury was committed.<sup>18</sup>

**Averment as to Materiality of False Allegations.**—While it should appear on the face of the indictment that the false allegations were material to the matter in issue,<sup>19</sup> yet it is not requisite to set forth all the circumstances which render them material; the simple averment that they were so will suffice.<sup>20</sup>

**14. Necessity for setting out substance of offense.**—*Markham v. United States*, 160 U. S. 319, 40 L. Ed. 441, in which case the court said: "It is proper to add that § 1025 of the Revised Statutes, providing that 'no indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant,' is not to be interpreted as dispensing with the requirement in § 5296 that an indictment for perjury must set forth the substance of the offense charged. An indictment for perjury that does not set forth the substance of the offense will not authorize judgment upon a verdict of guilty."

**15. Sufficient to set forth substance of offense charged, etc.**—*Markham v. United States*, 160 U. S. 319, 40 L. Ed. 441; *Bucklin v. United States*, No. 2, 159 U. S. 682, 40 L. Ed. 305.

"The requirement that it shall be sufficient in an indictment for perjury to set forth the substance of the offense is not new in the statutes of the United States. It is so provided in the Crimes Act of April 30, 1790, 1 Stat. 112, 116, c. 9, § 18, and the latter act, in the particular mentioned, was the same as that of 23 Geo. II, c. 11. Referring to the English statute, and to the objects for which it was enacted, Mr. Chitty says that the substance of the charge is intended in opposition to its details. 2 Cr. Law, 307; *King v. Dowlin*, 5 T. R. 311, 317." *Markham v. United States*, 160 U. S. 319, 40 L. Ed. 441.

**For forms of indictment for perjury held to be sufficient,** see *Bucklin v. United States*, No. 2, 159 U. S. 682, 40 L. Ed. 305; *United States v. Ambrose*, 108 U. S. 336, 27 L. Ed. 746.

**16. Averment as to court or person before whom oath taken, etc.**—*Markham v. United States*, 160 U. S. 319, 40 L. Ed. 441. See, also, *United States v. Nicker-son*, 17 How. 204, 15 L. Ed. 219.

**Averment held sufficient to inform defendant of official character of person administering oath.**—In *Markham v. United States*, 160 U. S. 319, 40 L. Ed. 441, it was held that the averment that the oath charged to have been willfully and corruptly taken was taken "before G. C. Loomis, then and there a special examiner of the pension bureau of the United States, and then and there a competent officer, and having lawful authority to administer said oath," was sufficient, in connection with the statute, to inform the accused of the official character and authority of the officer before whom the oath was taken. See, generally, the title PENSIONS, ante, p. 371.

**17. Averments falsifying matter wherein perjury assigned.**—*Markham v. United States*, 160 U. S. 319, 40 L. Ed. 441.

As to the sufficiency of the word "declaration" in the charging part of the indictment, as describing the instrument alleged to be false, see ante, "Statutory Provisions as to Perjury and False Swearing," I, under catchline in note, "Meaning of terms 'declaration' and 'certificate,' as used in statute."

**18. Matters unnecessary to be set forth.**—*Markham v. United States*, 160 U. S. 319, 40 L. Ed. 441.

**19. Materiality of false allegations must be made to appear.**—*Markham v. United States*, 160 U. S. 319, 40 L. Ed. 441.

**20. Averment that allegations were material sufficient.**—*Markham v. United States*, 160 U. S. 319, 40 L. Ed. 441.

"It was not necessary that the indictment should set forth all the details or facts involved in the issue as to the materiality of such statement, and the authority of the commissioner of pensions to institute the inquiry in which the deposition of the accused was taken. \* \* \* In *King v. Dowlin*, above cited, Lord Kenyon said that it had always been adjudged to be sufficient, in an indictment for perjury, to allege generally that the particular question became a material question. So, in *Commonwealth v. Pollard*, 12 Met. 225, 229, which was a prosecution for perjury,

**C. Evidence.—Variance between Accusation and Proof.**—In an indictment for perjury, the sworn statement alleged to be false must be proved substantially as averred in the indictment;<sup>21</sup> but, as in the case of other criminal prosecutions, where time is not of the essence of the offense, variance between its allegation and proof is not material.<sup>22</sup>

**Sufficiency of Documentary or Written Testimony Alone to Establish Charge of Perjury.**—It has been held that circumstances, without any witness, when they exist in documentary or written testimony, may combine to establish the charge of perjury; as they may combine, altogether unaided by oral proof, except the proof of their authenticity, to prove any other fact connected with the declarations of persons, or business of human life.<sup>23</sup>

it was said that it must be alleged in the indictment that the matter sworn to was material, or the facts set forth as falsely and corruptly sworn to should be sufficient in themselves to show such materiality. In *State v. Hayward*, 1 Nott & McCord 546, 553, which was also a prosecution for perjury, the court, after observing that it should appear, on the face of the indictment, that the false allegations were material to the matter in issue, adjudged that it was not necessary 'to set forth all the circumstances which render them material; the simple averment that they became and were so will be sufficient.' Many other authorities are to the effect that the substance of the offense may be set forth without encumbering the indictment with a recital of its details and circumstances." *Markham v. United States*, 160 U. S. 319, 40 L. Ed. 441.

**Sufficient showing as to materiality and necessity of oath.**—In *United States v. Nickerson*, 17 How. 204, 15 L. Ed. 219, which was an indictment for perjury in an application for the allowance of a fishing bounty, under the act of 1813, the court held that it was not necessary to aver in the indictment what act or acts of congress required the oath to be taken. "The averment that it was taken by the owner or agent to obtain an allowance of bounty, and the description of the oath which was taken, and of its occasion, were the only matters of fact necessary to be alleged to show the materiality of the oath, and that it was an oath required by law. The court was bound to take judicial notice of the requirements of all acts of congress respecting it. It was competent for the government, under these averments of facts, to rely on any act of congress which required the oath to be taken, without referring to it. This was not a question respecting the authority of the collector to administer the oath. That, as has already been observed, was correctly averred in both indictments, pursuant to the act of 1790. And under that general averment of competent authority, any laws and any fact constituting that authority might have been shown."

**21. Sworn statement alleged to be false must be proved substantially as averred.**—*Hall v. United States*, 168 U. S. 632, 42 L. Ed. 607.

**22. When variance between allegation and proof of time immaterial.**—See the title INDICTMENTS, INFORMATION, PRESENTMENTS AND COMPLAINTS, vol. 6, p. 1010.

**23. Sufficiency of documentary or written testimony to establish charge of perjury.**—*United States v. Wood*, 14 Pet. 430, 10 L. Ed. 527.

The cases in which a living witness to the corpus delicti of the defendant, in a prosecution for perjury, may be dispensed with, are: All such where a person charged with a perjury by false swearing to a fact, directly disproved by documentary or written testimony springing from himself, with circumstances showing the corrupt intent; in cases where the perjury charged is contradicted by a public record, proved to have been well known to the defendant, when he took the oath, the oath only being proved to have been taken; in cases where the party is charged with taking an oath contrary to what he must necessarily have known to be the truth and the false swearing can be proved by his own letters relating to the fact shown to, or by other written testimony existing and being found in the possession of the defendant, and which has been treated by him as containing the evidence of the fact recited in it. *United States v. Wood*, 14 Pet. 430, 10 L. Ed. 527.

The defendant was indicted for perjury, in falsely taking and swearing "the owner's oath, in cases where goods have been actually purchased," as prescribed by the fourth section of the supplementary collection law of the first of March, 1823; the perjury was charged to have been committed in April, 1837, at the custom house in New York, on the importation of certain woolen goods, in the ship *Sheridan*. The indictment charged the defendant with having intentionally suppressed the true cost of the goods, with intent to defraud the United States, and charged the perjury in swearing to the truth of the invoice produced by him at the time of entry of the goods, the invoice being false, etc. It appeared by the evidence, that the goods mentioned in the entry had been bought by the defendant from John Wood, his father, of Saddleworth, England; no witness was produced by the United States to prove that the value or



**Admissibility of Evidence of Defendant's Reputation for Truth and Veracity.**—See the title *CRIMINAL LAW*, vol. 5, pp. 125, 126.

**D. Punishment.**—Section 5392 of the United States Revised Statutes, after defining the offense of perjury, provides that the person guilty of such offense, "shall be punished by fine of not more than two thousand dollars, and by imprisonment, at hard labor not more than five years, and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed."<sup>24</sup>

**PERMANENT—PERMANENTLY.**—See the title *COUNTIES*, vol. 4, p. 835. And see *ESTABLISH*, vol. 5, p. 902. See note 1.

**PERMANENT ALIMONY.**—See the title *DIVORCE AND ALIMONY*, vol. 5, p. 429.

**PERMANENT INJURY.**—As to measure of damages for, see the title *DAMAGES*, vol. 5, p. 188.

cost of the goods was greater than that for which they were entered at the custom house in New York. The evidence of this, offered by the prosecution, was the invoice book of John Wood, and thirty-five original letters from the defendant to John Wood, between 1834 and 1837, showing a combination between John Wood and the defendant, to defraud the United States, by invoicing and entering goods at less than their actual cost; that this combination comprehended the goods imported in the *Sheridan*; and that the goods received by that ship had been entered by the defendant, he knowing that they had cost more than the prices at which he had entered them. This evidence was objected to on the part of the defendant as not competent proof to convict the defendant of the crime of perjury; and that, if an inference of guilt could be derived from such proof, it was an inference from circumstances, not sufficient, as the best legal testimony, to warrant a conviction. Held, that in order to a conviction, it was not necessary on the part of the prosecution to produce a living witness, if the jury should believe, from the written testimony, that the defendant made a false and corrupt oath when he entered the goods. *United States v. Wood*, 14 Pet. 430, 10 L. Ed. 527.

**24. Provision of United States Revised Statutes, § 5392, as to punishment for perjury.**—*Markham v. United States*, 160 U. S. 319, 40 L. Ed. 441. And see cases cited to first text in this title.

**1. Permanent.**—In *Eckloff v. District of Columbia*, 135 U. S. 240, 243, 34 L. Ed. 120, it is said: "It is declared by its title to be an act to provide 'a permanent form of government for the district.' The word **permanent** is suggestive. It implies that prior systems had been temporary and provisional. As **permanent** it is complete in itself. It is the system of government. The powers which are conferred are organic powers. We look to the act itself for their extent and limitations."

**Does not mean forever.**—A grant of

land was upon condition that a certain institute of learning should be **permanently** located upon said land. It was held that such **permanent** location was made and the condition was thus fulfilled when the trustees passed a resolution locating the building on the land, with the intention that it should be the **permanent** place of conducting the business of the corporation. And this, notwithstanding that the building erected in pursuance of the resolution was afterwards destroyed by fire, and the institute subsequently erected on another piece of land. *Mead v. Ballard*, 7 Wall. 290, 19 L. Ed. 190.

So where a city granted aid to a railroad company upon condition that the railroad should **permanently** establish its eastern terminus and offices at the city, it was held that the condition was performed where the company established such terminus and offices and maintained them for eight years, although it afterwards removed some of its shops. The court said: "It appears to us, so far from this, that the contract on the part of the railroad company is satisfied and performed when it establishes and keeps a depot, and sets in operation car works and machine shops, and keeps them going for eight years, and until the interests of the railroad company and the public demand the removal of some or all of these subjects of the contract to some other place. This was the establishment at that point of the things contracted for in the agreement. It was the fair meaning of the words '**permanent** establishment,' as there was no intention at the time of removing or abandoning them. The word **permanent** does not mean forever, or lasting forever, or existing forever. The language used is to be considered according to its nature and its relation to the subject matter of the contract, and we think that these things were **permanently** established by the railway company at Marshall." *Texas, etc., R. Co. v. Marshall*, 136 U. S. 393, 403, 34 L. Ed. 385.

**PERMIT.**—As to permit to land goods, see the title **REVENUE LAWS**. See, also, the title **LICENSES**, vol. 7, p. 869.

**PERPETUAL INJUNCTION.**—See the title **INJUNCTIONS**, vol. 6, p. 1026.

**PERPETUAL LEASE.**—See the title **GROUND RENTS**, vol. 6, p. 579.

**PERPETUATION OF TESTIMONY.**—See the title **DEPOSITIONS**, vol. 5, p. 323.

## PERPETUITIES.

BY S. BLAIR FISHER.

### I. Statement of Rule, 392.

A. At Common Law, 392.

B. Under Statute, 393.

### II. Construction, Application and Effect of Rule, 393.

A. State of Facts Upon Which Validity Depends, 393.

B. Time of Vesting as Determining Validity, 393.

1. At Common Law, 393.

2. Under Statute, 394.

3. Effect of Devise to Class Some of Whom May Not Take within Prescribed Period, 394.

C. Application of Rule to Trust Estates, 395.

1. In General, 395.

2. Application of Rule to Gifts to Charities, 395.

### CROSS REFERENCES.

See the titles **ASSOCIATIONS**, vol. 2, p. 634; **CEMETERIES**, vol. 3, p. 648; **CHARITIES**, vol. 3, p. 692; **ESTATES**, vol. 5, p. 904; **HEIR, HEIRS AND THE LIKE**, vol. 6, p. 690; **POWERS**; **REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS**; **RESTRAINT ON ALIENATION**; **TRUSTS AND TRUSTEES**; **WILLS**.

### I. Statement of Rule.

**A. At Common Law.**—The common-law rule against perpetuities prohibits the tying up of property beyond a life or lives in being, and twenty-one years afterwards.<sup>1</sup> By this rule an estate, legal or equitable, granted or devised by one person to another which, by the terms of the instrument creating it, is not to vest until the happening of a contingency which may by possibility not occur within the period of a life or lives in being (treating a child in its mother's womb as in being) and twenty-one years afterward, is void for remoteness, and consequently a limitation over to a third person which may possibly not take effect within the period is void, and the estate remains in the first taker.<sup>2</sup> It has been

**1. Statement of common-law rule as to perpetuities.**—*Potter v. Couch*, 141 U. S. 296, 35 L. Ed. 721.

**2.** *Hopkins v. Grimshaw*, 165 U. S. 342, 41 L. Ed. 739; *McArthur v. Scott*, 113 U. S. 340, 28 L. Ed. 1015; *Jones v. Habersham*, 107 U. S. 174, 27 L. Ed. 401.

"A perpetuity is a limitation of property which renders it inalienable beyond the period allowed by law. That period is a life or lives in being and twenty-one years more, with a fraction of a year added for the term of gestation, in cases of posthumous birth." *Ould v. Washington Hospital*, 95 U. S. 303, 24 L. Ed. 450.

"Mr. Sander's definition in his *Essay upon Uses and Trusts*, 196: 'A perpetuity may be defined to be a future limitation,

restraining the owner of the estate from aliening the fee of the property, discharged of such future use of estate, before the event is determined or the period is arrived when such future use or estate is to arise. If that event or period be within the bounds prescribed by law, it is not a perpetuity.' It is then a limitation upon the *jus disponendi* of property, upon the common-law right of every man to dispose of his land 'to any other private man, at his own discretion.'" *Perin v. Carey*, 24 How. 465, 16 L. Ed. 701.

**Articles of association renouncing individual property do not constitute a perpetuity.**—See the title **ASSOCIATIONS**, vol. 2, p. 634.

held that this rule against perpetuities is altogether an act of judicial legislation, operating as a proviso to the statute of wills; a restriction upon the testamentary power.<sup>3</sup>

**B. Under Statute.**—In some of the states, the prohibition of perpetuities has been made the subject of express statutory provisions.<sup>4</sup>

## II. Construction, Application and Effect of Rule.

**A. State of Facts upon Which Validity Depends.**—Under the Ohio statute relating to perpetuities, it would seem that the words "the time of making such deed or will," which, as applied to a deed, designate the time both of its execution and of its taking effect, denote, as applied to a will, the time when it takes effect by the death of the testator, and not the date of its formal execution.<sup>5</sup> By the law of England, the question of remoteness depends upon the state of facts at the time of the testator's death, though differing from that existing at the date of the will.<sup>6</sup>

**B. Time of Vesting as Determining Validity**—1. **AT COMMON LAW.**—The rule of the common law, by which an estate devised must at all events vest within a life or lives in being and twenty-one years afterwards, has reference to time and not to persons.<sup>7</sup> Under this rule every devise or bequest is void which may by possibility not take effect within a life or lives in being and twenty-one years afterwards.<sup>8</sup> If the fatal period may elapse before what is to be done can be done, the consequence is the same as if such must inevitably be the result.

**3. Nature of rule.**—*Inglis v. Sailor's Snug Harbour*, 3 Pet. 99, 7 L. Ed. 617.

**4. "Section 1023 of the code of the District of Columbia** (subchapter 1 of chapter 24, relating to 'Estates') provides that except in the case of gifts or devises to charitable uses, every future estate, whether of freehold or leasehold, whether by way of remainder or without a precedent estate, and whether vested or contingent, shall be void in its creation, which suspends the absolute power of alienation of the property, so that there shall be no person or persons in being by whom an absolute fee in the same, in possession, can be conveyed, for a longer period than during the continuance of not more than one or more lives in being and twenty-one years thereafter. The provisions of the section are (at the end of the subchapter) made applicable to personal property generally, except where from the nature of the property they are inapplicable." *Iglehart v. Iglehart*, 204 U. S. 478, 51 L. E. 575.

**Under the Ohio Statute** (Act of Dec. 17, 1811, Revised Statutes, § 4200), it is provided that "no estate in fee simple, fee tail, or any lesser estate, in lands or tenements lying within this state, shall be given or granted by deed or will to any person or persons, but such as are in being, or to the immediate issue or descendants of such as are in being, at the time of making such deed or will." *McArthur v. Scott*, 113 U. S. 340, 28 L. Ed. 1015.

**Substitution of fidei commissa forbidden by Louisiana code.**—Article 1507 of the Louisiana code prohibits substitutions and fidei commissa, and annuls donations in which they are found. *McDonogh v. Murdoch*, 15 How. 367, 14 L. Ed. 732.

"These terms imply a distribution of property through a succession of donees. The substitution of the article 1507 of the code being an estate for life, to be followed by a continuing estate in another, by the appointment of the testator. The fidei commissa of the Louisiana code are estates of a similar nature, implying a limitation over from one to another. They are the fidei commissa of the Spanish and French laws, in so far as those estates are not tolerated by other articles of the code." *McDonogh v. Murdoch*, 15 How. 367, 14 L. Ed. 732. See the titles CHARITIES, vol. 3, pp. 689, 692; TRUSTS AND TRUSTEES; WILLS.

**5. Time when will takes effect intended under Ohio statute.**—*McArthur v. Scott*, 113 U. S. 340, 28 L. Ed. 1015.

**6. Rule under English law.**—*McArthur v. Scott*, 113 U. S. 340, 28 L. Ed. 1015.

**7. Common-law rule refers to time and not to persons.**—*McArthur v. Scott*, 113 U. S. 340, 28 L. Ed. 1015.

"Even the 'life or lives in being' have no reference to the persons who are to take, for the testator is allowed to select, as the measure of time, the lives of any persons now in existence; and the 'twenty-one years afterwards' are not regulated by the birth or the coming of age of any person, for they begin, not with a birth, but with a death, and are twenty-one years in gross, without regard to the life, or to the coming of age, of any person soever. *Cadell v. Palmer*, 1 Cl. & Fin. 372; *S. C. 7 Bligh N. R. 202.*" *McArthur v. Scott*, 113, U. S. 340, 28 L. Ed. 1015.

**8. Rule applies where possibility that limitation may not take effect within prescribed time.**—*Jones v. Habersham*, 107 U. S. 174, 27 L. Ed. 401; *Hopkins v. Grimshaw*, 165 U. S. 342, 41 L. Ed. 739.



Possibility and certainty have the same effect.<sup>9</sup> If, however, the event or period when the future use or estate is to arise, be within the bounds prescribed by law, then the future limitation is not a perpetuity.<sup>10</sup> A devise which must necessarily take effect as to every devisee within a life or lives in being, and twenty-one years afterwards, does not violate the rule of the common law against perpetuities.<sup>11</sup>

2. UNDER STATUTE.—In the case of at least one statute relating to perpetuities—that of Ohio—it has been held that such statute has no reference to time, and only avoids devises to persons who were not either in being themselves, or the immediate issue or immediate descendants of persons in being at the time of the making of the will.<sup>12</sup>

3. EFFECT OF DEVISE TO CLASS SOME OF WHOM MAY NOT TAKE WITHIN PRESCRIBED PERIOD.—Under the common-law rule against perpetuities, a devise to a class, some members of which may possibly not take within the prescribed period, is wholly void.<sup>13</sup>

McArthur v. Scott, 113 U. S. 340, 28 L. Ed. 1015.

9. Ould v. Washington Hospital, 95 U. S. 303, 24 L. Ed. 450.

"A lease containing a covenant to renew at its expiration with similar covenants, terms and conditions contained in the original lease is fully carried out by one renewal without the insertion of another covenant to renew. Otherwise a perpetuity is provided for. *Piggot v. Mason* (1829), 1 Paige's Ch. 412; *Carr v. Ellison* (1838), 20 Wend. 178; *Syms v. Mayor* (1887), 105 N. Y. 153; *Cunningham v. Pattee* (1868), 99 Massachusetts 248; *Taylor's Landlord & Tenant*, 8th Ed., §§ 333, 334. From the ordinary covenant to the new, a perpetuity will not be regarded as created. There must be some peculiar and plain language before it will be assumed that the parties intended to create it." *Winslow v. Baltimore, etc., R. Co.*, 188 U. S. 646, 47 L. Ed. 635. See the title LANDLORD AND TENANT, vol. 7, p. 833.

10. No perpetuity where limitation is within bounds prescribed by law.—*Perin v. Carey*, 24 How. 465, 16 L. Ed. 701.

11. *McArthur v. Scott*, 113 U. S. 340, 28 L. Ed. 1015; *Barnitz v. Casey*, 7 Cranch 456, 466, 3 L. Ed. 403.

"In the case at bar, as the youngest grandchild must be in being in the lifetime of his parent, and that parent was born in the testator's lifetime, the devise to the grandchildren, and even the devise over, upon the arrival of the youngest grandchild at twenty-one years of age, to the children of any grandchild deceased before that time, must necessarily take effect, as to every devisee, within a life or lives in being and twenty-one years afterwards, and therefore do not violate the rule of the common-law." *McArthur v. Scott*, 113 U. S. 340, 28 L. Ed. 1015.

A will does not violate the rule against perpetuities, where, under its provisions, after twenty years from the death of the testator, and after the death of his widow and daughter (if not before), the title, legal and equitable, in the whole estate will be vested in persons capable of con-

veying it. *Potter v. Couch*, 141 U. S. 296, 35 L. Ed. 721.

A devise to A., in fee, and if he shall die under the age of twenty-one years and without issue, then to B., in fee, is a good executory devise; and if B. die before the contingency happens, it devolves upon his heir, and so, from heir to heir, until the contingency happens, when it vests absolutely in him only who can then make himself heir to B., the executory devisee. *Barntiz v. Casey*, 7 Cranch 456, 3 L. Ed. 403.

"It has been argued by the defendant's counsel, that this executory devise is void, because the contingency is too remote. It is the acknowledged rule that an executory devise is not too remote, if the contingency may happen within a life or lives in being, or twenty-one years and a few months after. In the present case, the contingency must have happened within twenty-one years, at all events. For if John B. Hammond attained his full age, the estate vested absolutely. To have defeated the estate over, it was sufficient, either that he attained his full age, or died under age, leaving issue. The authorities are conclusive on this point. 1 Wils. 140, 270; 2 Burr. 873; 1 Taunt. 174; 5 Bos. & Pul. 38; 12 East 288; 2 Str. 1175. There is no validity, therefore, in this objection." *Barnitz v. Casey*, 7 Cranch 456, 3 L. Ed. 403. See the title REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS.

"A power to sell upon the expiration of an estate tail, and to divide the proceeds among persons then ascertainable, is not within the rule against perpetuities. *Creson v. Ferree*, 70 Penn. St. 446, 449; *Heasman v. Pearse*, L. R. 7 Ch. 275; *Gray on Perpetuities*, §§ 447, 490." *Barber v. Pittsburgh, etc., R. Co.*, 166, U. S. 83, 41 L. Ed. 925.

12. Ohio statute of perpetuities has no reference to time.—*McArthur v. Scott*, 113 U. S. 340, 28 L. Ed. 1015.

13. Effect of devise to class under the common-law rule.—*McArthur v. Scott*, 113 U. S. 340, 28 L. Ed. 1015.

Reason for rule.—"That is because. as

**Under Statute.**—It has been held doubtful, to say the least, whether the like effect can be attributed to a statute, such as that of Ohio, which, as has been seen, has no reference to time.<sup>14</sup> Even the "life or lives in being" have no reference to the persons who are to take; for the testator is allowed to select, as the measure of time, the lives of any persons now in existence; and the "twenty-one years afterwards" are not regulated by the birth or the coming of age of any person, for they begin, not with a birth, but with a death, and are twenty-one years in gross, without regard to the life or to the coming of age, of any person soever.<sup>15</sup>

**C. Application of Rule to Trust Estates**—1. **IN GENERAL.**—The rule of perpetuity applies as well to trust as to legal estates. The objection is as effectual in one case as in the other.<sup>16</sup>

2. **APPLICATION OF RULE TO GIFTS TO CHARITIES.**—The rule against perpetuities does not apply to a gift to a charity, with no intervening gift to or for the benefit of a private person or corporation, or to a contingent limitation over from one charity to another. But it does apply to a grant or devise to a charity after one to a private person; as well as to a grant or devise to a private person although limited over after an immediate gift to a charity. But when there is no limitation over in the grant or devise, and the grantor or deviser, or the heirs of either, claim the estate, not under the grant or devise, but because, by reason of the failure thereof, the estate legal or equitable, as the case may be, reverts or results to him or them, the rule against perpetuities is inapplicable.<sup>17</sup>

**PERSIST.**—"Persist" is the correlative of attempt or endeavor, and signifies "hold on," "persevere," etc.<sup>1</sup>

**PERSON.**—See note 2.

observed by Sir William Grant, 'it is the period of vesting, and not the description of the legatees, that produces the incapacity,' and the devise is not 'to some individuals who are, and to some who are not capable of taking.' 2 Meriv. 388, 390." *McArthur v. Scott*, 113 U. S. 340, 28 L. Ed. 1015.

14. **Common-law rule of doubtful application under statutes relating to perpetuities.**—*McArthur v. Scott*, 113 U. S. 340, 28 L. Ed. 1015.

15. *McArthur v. Scott*, 113 U. S. 340, 28 L. Ed. 1015.

"The devise of their parent's share to the children of any grandchild deceased before the time of division would seem to be valid as to those great-grandchildren whose parent, a grandchild of the testator, was living at the time of his death, because they would be 'immediate issue' of a person in being at that time; and valid also to any great-grandchildren, whose parent, though born after the testator's death, had died before their grandparent, a child of the testator, because they would be, if not 'immediate issue,' certainly 'immediate descendants,' of that child, who was in being at that time; and invalid as to those great-grandchildren only, whose parent (as in the case of Mrs. Madeira, daughter of the testator's child, Mary Trimble), born since the testator's death, died after their grandparent, and who, therefore, by reason of the interposition of the life of their parent, were neither 'immediate issue' nor 'immediate descendants' of a person in being when the testa-

tor died. See *Stevenson v. Evans*, 10 Ohio St. 307; *Turley v. Turley*, 11 Ohio St. 173." *McArthur v. Scott*, 113 U. S. 340, 28 L. Ed. 1015.

16. **Rule applies both to trust and to legal estates.**—*Ould v. Washington Hospital*, 95 U. S. 303, 24 L. Ed. 450.

17. **Application of rule to gifts to charities.**—See the titles **CEMETERIES**, vol. 3, p. 648; **CHARITIES**, vol. 3, pp. 692, 693.

1. *Commonwealth v. Cox*, 4 Dall. 170, 202, 1 L. Ed. 786.

2. **Alien.**—In *Wong Wing v. United States*, 163 U. S. 228, 242, 41 L. Ed. 140, it is said: "The term **person**, used in the fifth amendment, is broad enough to include any and every human being within the jurisdiction of the republic. A resident, alien born, is entitled to the same protection under the laws that a citizen is entitled to. He owes obedience to the laws of the country in which he is domiciled, and, as a consequence, he is entitled to the equal protection of those laws."

**Woman.**—A Virginia statute provided that: "Any **person** duly authorized and practising as counsel or attorney at law in any state or territory of the United States, or in the District of Columbia, may practice as such in the courts of this state." The supreme court said: "It was for the supreme court of appeals to construe the statute of Virginia in question, and to determine whether the word **person** as therein used is confined to males, and whether women are admitted to practice law in that commonwealth." The Virginia court had rejected the ap-

**PERSONAL ACTION DIES WITH PERSON.**—See the title **ABATEMENT, REVIVAL AND SURVIVAL**, vol. 1, p. 20.

**PERSONAL EFFECTS.**—See note 1.

**PERSONAL INJURIES.**—As to damages for, see the title **DAMAGES**, vol. 5, p. 157. As to the various actions for, see references given in title **NEGLIGENCE**, vol. 8, p. 873.

**PERSONAL JUDGMENT.**—See the title **JUDGMENTS AND DECREES**, vol. 7, p. 564.

**PERSONAL LIBERTY.**—See **LIBERTY**, vol. 7, p. 865, and the references there given.

**PERSONALLY KNOWN.**—See the title **ACKNOWLEDGMENTS**, vol. 1, p. 87.

**PERSONAL PROPERTY.**—As to sale of, see the title **SALES**. As to action to recover specific personal property, see the titles **DETINUE**, vol. 5, p. 345; **REPLEVIN**. As to gifts of, see the title **GIFTS**, vol. 6, p. 564. As to pledge of, see the title **PLEDGE AND COLLATERAL SECURITY**. As to mortgage of, see the title **CHATTEL MORTGAGES**, vol. 3, p. 699. As to title to by confusion, see the title **CONFUSION OF GOODS**, vol. 3, p. 1093. Postage stamps have been held to be personal property within the statute against robbery.<sup>2</sup>

**PERSONAL REPRESENTATIVES.**—See **LEGAL REPRESENTATIVES, PERSONAL REPRESENTATIVES, AND REPRESENTATIVES**, vol. 7, p. 852.

**PERSONAL SECURITY.**—Personal security means a security not on property.<sup>3</sup>

**PER STIRPES.**—See the title **WILLS**.

**PERSONAL TAX.**—See note 4.

**PERSONAL WARRANTY.**—See note 5.

**PERSUADE.**—See note 6.

plication of a woman who was an attorney in the District of Columbia. In *re Lockwood*, 154 U. S. 116, 118, 38 L. Ed. 929.

**Corporations as person.**—See the title **CORPORATIONS**, vol. 4, pp. 644, 646.

**A municipal corporation held a person.** Metropolitan R. Co. v. District of Columbia, 132 U. S. 1, 33 L. Ed. 231. See, also, *Chattanooga Foundry, etc., Works v. Atlanta*, 203 U. S. 390, 51 L. Ed. 241.

**State.**—The term **person** as used in an internal revenue act was held not to include a state. *United States v. Railroad Co.*, 17 Wall. 322, 21 L. Ed. 597. As to whether a state is a **person**, see *South Carolina v. United States*, 199 U. S. 437, 449, 50 L. Ed. 261.

**United States.**—See, generally, the title **UNITED STATES**.

A New York statute provided that a devise of lands might be made to any person capable by law of holding real property. In construing this provision, the court said: "The term **person** as here used applies to natural persons, and also to artificial persons,—bodies politic, deriving their existence and powers from legislation,—but cannot be so extended as to include within its meaning the federal government." *United States v. Fox*, 94 U. S. 315, 321, 24 L. Ed. 192.

But in *Stanley v. Schwalby*, 147 U. S. 508, 37 L. Ed. 259, it was held that although the United States were not bound by the laws of a state, yet the word **person** in a statute of limitations would include them as a body politic and corpo-

rate. See, generally, the title **LIMITATIONS OF ACTIONS AND ADVERSE POSSESSION**, vol. 7, p. 900.

**1. Personal effects.**—See *Arnold v. United States*, 147 U. S. 494, 496, 37 L. Ed. 253. And see, generally, the title **REVENUE LAWS**.

**2. Jolly v. United States**, 170 U. S. 402, 42 L. Ed. 1085.

**3. Merrill v. National Bank**, 173 U. S. 131, 158, 43 L. Ed. 640, dissenting opinion. See, generally, the title **PLEDGE AND COLLATERAL SECURITY**.

**4. Personal tax.**—In *United States v. Erie R. Co.*, 106 U. S. 327, 333, 27 L. Ed. 151, it is said: "'A personal tax,' says the supreme court of New Jersey, 'is the burden imposed by government on its own citizens for the benefits which that government affords by its protection and its laws, and any government which should attempt to impose such a tax on citizens of other states would justly incur the rebuke of the intelligent sentiment of the civilized world.'" *State v. Ross*, 23 N. J. L. 517, 521."

**5. Personal warranty.**—See *Flanders v. Seelye*, 105 U. S. 718, 726, 26 L. Ed. 1217. And see the title **GUARANTY**, vol. 6, p. 580.

**6. Persuade.**—Under the act of 1777, there must be an actual enlistment of the person **persuaded**, to constitute the offense of treason. The court said: "But we are of opinion, that the word **persuading**, used by the legislature, means to succeed; and that there must be an actual



**PERTAIN.**—See **BELONG**, vol. 3, p. 211.

**PERTENENCIA.**—See note 1.

**PETIT JURY.**—See the title **JURY**, vol. 7, p. 748.

**PETITION.**—As to petition for writ of error, see the title **APPEAL AND ERROR**, vol. 2, p. 122. As to petition for writ of mandamus, see the title **MANDAMUS**, vol. 8, p. 85. As to petitions in pleading, see the title **PLEADING**. As to petition for writ of habeas corpus, see the title **HABEAS CORPUS**, vol. 6, p. 659. As to petition for removal of causes, see the title **REMOVAL OF CAUSES**.

**PETITORY ACTIONS.**—See the title **EJECTMENT**, vol. 5, pp. 699, 700.

**PETIT OFFICER.**—See the title **ARMY AND NAVY**, vol. 2, p. 500.

**PETROLEUM.**—See the titles **INSPECTION LAWS**, vol. 7, p. 16; **INSURANCE**, vol. 7, p. 172; **MINES AND MINERALS**, vol. 8, p. 405.

**PEWS.**—See the title **RELIGIOUS SOCIETIES**.

**PHARMACISTS.**—See the title **NEGLIGENCE**, vol. 8, p. 888.

**PHILIPPINE ISLANDS.**—See the titles **APPEAL AND ERROR**, vol. 1, p. 797; **LIBEL AND SLANDER**, vol. 7, p. 862. As to duties on imports, see the title **REVENUE LAWS**. As to status of under constitution, see the title **CONSTITUTIONAL LAW**, vol. 4, p. 96, et seq. As to right of government to appeal in criminal cases, see the title **APPEAL AND ERROR**, vol. 2, p. 61. As to suspension of writ of habeas corpus, see the titles **APPEAL AND ERROR**, vol. 2, p. 298; **HABEAS CORPUS**, vol. 6, p. 671. As to courts-martial in Philippine waters, see the title **MILITARY LAW**, vol. 8, p. 347.

**PHILOSOPHICAL APPARATUS.**—See note 2.

**PHOSPHATE.**—See the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, p. 799.

**PHOTOGRAPHS.**—As to copyright in photographs, see the title **COPYRIGHT**, vol. 4, p. 606. As to admissibility of photographic copies of signatures for purposes of comparison when the question of forgery is in issue, see the title **DOCUMENTARY EVIDENCE**, vol. 5, p. 459. As to admissibility of the photograph of deceased upon a trial for homicide, see the titles **DOCUMENTARY EVIDENCE**, vol. 5, p. 459; **HOMICIDE**, vol. 6, p. 709.

**PHYSICAL EXAMINATION.**—See the title **INSPECTION AND PHYSICAL EXAMINATION**, vol. 7, p. 14.

enlistment of the person persuaded, in order to bring the defendant within the intention of the clause. 2 Lord Raym. 889." *Respublica v. Roberts*, 1 Dalk 39, 1 L. Ed. 27.

1. **Pertenencia.**—In *United States v. Castillero*, 2 Black 17, 168, 17 L. Ed. 360, the court said: "Writers do not exactly

agree as to what is a **pertenencia**, but the better opinion is that it is a square of two hundred varas, or five hundred and fifty feet."

2. **Philosophical apparatus.**—See *Robertson v. Oelschlaeger*, 137 U. S. 436, 34 L. Ed. 744. And see, generally, the title **REVENUE LAWS**.

## PHYSICIANS AND SURGEONS.

The power of a state to make reasonable provisions for determining the qualifications of those engaging in the practice of medicine and punishing those who attempt to engage therein in defiance of such statutory provisions is not open to question.<sup>1</sup>

**As to privileged character of communications between physician and patient,** see the titles COURTS, vol. 4, p. 1083; PRIVILEGED COMMUNICATIONS.

**Liability for Malpractice.**—It would seem that a surgeon will be liable to the injured party for unskillful treatment even if the father or friend of the patient contracted with the wrongdoer.<sup>2</sup>

**PIERS.**—See, generally, the title WHARVES AND WHARFINGERS, and references given.

**1. Power of state to provide as to qualifications of medical practitioner.**—Reetz v. Michigan, 188 U. S. 505, 47 L. Ed. 563; Dent v. West Virginia, 129 U. S. 114, 32 L. Ed. 623; Hawker v. New York, 170 U. S. 189, 42 L. Ed. 1002.

"No precise limits have been placed upon the police power of a state, and yet it is clear that legislation which simply defines the qualifications of one who at-

tempts to practice medicine is a proper exercise of that power." Hawker v. New York, 170 U. S. 189, 42 L. Ed. 1002. See the titles CONSTITUTIONAL LAW, vol. 4, pp. 372, 377, 430; POLICE POWER.

**2. Liability for malpractice.**—See Savings Bank v. Ward 100 U. S. 195, 25 L. Ed. 621.

# PILOTS.

BY HOMER RICHEY.

## I. Definitions, 400.

## II. Power of Congress to Prescribe Regulations Concerning Pilots, 400.

- A. Included in Power to Regulate Commerce, 400.
- B. Power of Congress Exercised by Adopting State Regulations, 400.

## III. State Regulation, 400.

- A. Generally, 400.
- B. Immaterial That Pilot Regulations Are Regulations of Commerce, 401.
- C. Congress May Restrict or Supersede State Laws, 401.
- D. Remedy against Unwise or Unjust Regulations Rests with Congress, 401.
- E. Law Prescribing Qualifications and Requiring License Not Opposed to Fourteenth Amendment, 401.
- F. Exemptions and Discriminations, 401.
  - 1. Generally as to Power of State to Make, 401.
  - 2. Federal Statutes Forbidding Discriminations, 401.
  - 3. Federal Statutes Exempting Certain Classes of Vessels from the Operation of State Laws, 402.
    - a. The Act of August 30, 1852, 402.
    - b. Coastwise Seagoing Steam Vessels, 402.

## IV. Rights, Duties and Liabilities of Pilot, 404.

- A. Generally as to Rights and Duties, 404.
- B. With Respect to General Average, 404.
- C. Negligence of Pilot, 404.
  - 1. Generally as to Degree of Care Required, 404.
  - 2. Duty of Pilot to Familiarize Himself with Channel, Banks, Natural Objects, Artificial Changes, etc., 405.
  - 3. Care and Skill to Prevent Collisions; Observance of Signals, Rules of Navigation, etc., 405.
  - 4. Collision with Piers, Bridges, etc., 405.
  - 5. Liability of Pilot for His Own Negligence, 405.
  - 6. Joint Liability of Members of Pilots Association, 405.
  - 7. Liability of Master, Owner, or Vessel for Negligence of Pilot, 406.
    - a. Generally, 406.
    - b. As Master and Employee, 406.
    - c. Under Statute Imposing Compulsory Pilotage, 406.
      - (1) Generally, 406.
      - (2) What Statutes Are Compulsory, 406.
  - 8. Contributory Negligence of Pilot, 406.
  - 9. Questions of Law and Fact, 406.

## V. Compensation of Pilots, 407.

- A. Half Pilotage, 407.
  - 1. Generally, 407.
  - 2. Constitutionality, 407.
    - a. As an Attempt to Evade Constitutional Restrictions, 407.
    - b. As a Revenue Law; Tonnage Duties, 407.
    - c. Under Provision Requiring Imposts and Excises to Be Uniform, 407.
    - d. Under Provision Forbidding Preference of One Port Over Another, 408.



- e. As a Regulation of Commerce, 408.
- f. As to Services Tendered without the Jurisdiction of the State, 408.
- 3. What Statutes Are Compulsory, 408.
- 4. Nature of Obligation, 408.
- B. Compensation as Salvors, 408.
- C. When Right to Compensation Becomes Vested, 409.
- D. Amount of Compensation, 409.
- E. Suits to Recover Pilotage, 410.
  - 1. Jurisdiction, 410.
  - 2. Appeal; Writ of Prohibition, etc., 410.

### CROSS REFERENCES.

See the titles ADMIRALTY, vol. 1, p. 119; COLLISION, vol. 3, p. 870; INTER-STATE AND FOREIGN COMMERCE, vol. 7, p. 269; MASTERS OF VESSEL, vol. 8, p. 300; SHIPS AND SHIPPING; TOWAGE, TUGS AND TOWS.

As to injunction against conspiracy to injure plaintiff's business as a pilot, see the title INJUNCTIONS, vol. 6, p. 1022. As to maritime liens for pilotage, see the title MARITIME LIENS, vol. 8, p. 218.

### I. Definitions.

**Pilot.**—Lord Tenterden, in his Treatise on Shipping, has defined a pilot to be "a person taken on board at a particular place for the purpose of conducting a ship through a river, road, or channel, or from or into a port."<sup>1</sup>

**Pilotage.**—Pilotage is compensation for services performed by a pilot.<sup>2</sup>

**Half Pilotage.**—Half pilotage is compensation for services which the pilot has put himself in readiness to perform by labor, risk and costs, and which he has actually offered to perform.<sup>3</sup>

### II. Power of Congress to Prescribe Regulations Concerning Pilots.

**A. Included in Power to Regulate Commerce.**—The power conferred upon congress to regulate commerce includes the whole subject of pilots and pilotage.<sup>4</sup>

**B. Power of Congress Exercised by Adopting State Regulations.**—Although congress cannot enable a state to legislate, congress may adopt the provisions of the state on any subject.<sup>5</sup>

### III. State Regulation.

**A. Generally.**—The act of August 7, 1789, adopting the existing state regulations and such as the states might thereafter enact upon the subject of pilotage, presupposes a right in the states to legislate on the subject.<sup>6</sup> In addition to this, it is well settled by judicial decision that the states have power to legislate upon the subject of pilots and pilotage until congress shall see fit to supersede

1. **Pilot defined.**—Treatise on Shipping, part 2, ch. 5, § 1, p. 148, cited in *The Hope*, 10 Pet. 108, 123, 9 L. Ed. 363.

2. **Pilotage.**—*Steamship Co. v. Portwardens*, 6 Wall. 31, 34, 18 L. Ed. 749; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. Ed. 158.

3. **Half pilotage.**—*Steamship Co. v. Portwardens*, 6 Wall. 31, 34, 18 L. Ed. 749; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. Ed. 158.

4. **Regulation; power of congress.**—See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 343, 401.

**Qualifications of pilots and engineers.**—Congress has prescribed the qualifications for pilots and engineers of steam vessels engaged in the coasting trade and navigat-

ing the inland waters of the United States while engaged in commerce among the states, Rev. Stat., Tit. 52, §§ 4399-4500, and such legislation undoubtedly is justified on the ground that it is incident to the power to regulate interstate commerce. *Smith v. Alabama*, 124 U. S. 465, 479, 31 L. Ed. 508.

5. **Power of congress exercised by adopting state regulations.**—*Huus v. New York*, etc., *Steamship Co.*, 182 U. S. 392, 393, 45 L. Ed. 1146. See, also, the title INTER-STATE AND FOREIGN COMMERCE, vol. 7, p. 402.

6. **State regulation.**—*Gibbons v. Ogden*, 9 Wheat. 1, 208, 6 L. Ed. 23; *Cooley v. Board of Wardens*, 12 How. 299, 320, 13 L. Ed. 996; *Ex parte McNiel*, 13 Wall. 236, 241, 20 L. Ed. 624; *Huus v. New York*, etc.,

such regulations by others of its own enactment, and that the statutes of the several states regulating the subject of pilotage are, in view of the numerous acts of congress recognizing and adopting them, to be regarded as constitutional until congress shall supersede them.<sup>7</sup>

**B. Immaterial That Pilot Regulations Are Regulations of Commerce.**—See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 402.

**C. Congress May Restrict or Supersede State Laws.**—It must not be forgotten that, as repeatedly stated, this power of the states is subject to such restrictions as congress may see fit to impose, and that congress may at any time limit the operation of state laws or supersede them altogether.<sup>8</sup>

**D. Remedy against Unwise or Unjust Regulations Rests with Congress.**—See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 405.

**E. Law Prescribing Qualifications and Requiring License Not Opposed to Fourteenth Amendment.**—Pilotage being a subject of governmental control, it is competent for the state to regulate it and to prescribe the qualifications of pilots and provide for their appointment, and to forbid all other persons to act as pilots. Such a law is not invalid under the fourteenth amendment, either as depriving unlicensed persons of an inherent right to perform pilotage services, or as conferring a monopoly of the business upon the commissioned pilots. If the state has the power to regulate, and in so doing to appoint and commission those who are to perform pilotage services, it follows that no monopoly can arise from the fact that the duly authorized agents of the state are alone allowed to perform the duty devolving upon them by law.<sup>9</sup>

**F. Exemptions and Discriminations**—1. **GENERALLY AS TO POWER OF STATE TO MAKE.**—See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 404.

2. **FEDERAL STATUTES FORBIDDING DISCRIMINATIONS.**—**Section 4237 of the Revised Statutes** declares: "No regulations or provisions shall be adopted by any state which shall make any discrimination in the rate of pilotage between vessels sailing between the ports of one state and vessels sailing between the ports of different states, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States; and all existing regulations or provisions making any such discrimination are annulled and abrogated." A state law which makes an exception in favor of the vessels of that state with respect to the rate of pilotage is discriminatory and is void because in conflict with Rev. Stat., § 4237.<sup>10</sup>

**Revokes Only the Discriminatory Clauses.**—It is obvious from the provisions of the Revised Statutes, § 4237, forbidding discrimination in state legislation concerning pilotage, that congress did not intend by that section to re-

Steamship Co., 182 U. S. 392, 45 L. Ed. 1146.

7. **Same.**—See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 402.

"Conceding it to be within the power of congress to assume control of and regulate the whole system of pilotage, as applied to vessels engaged in foreign or interstate commerce, it has for obvious reasons left to the several states the power to legislate upon this subject, and to prescribe rules for the licensing and government of pilots, the collection of their fees, and such other incidental matters as the nature of their services in the particular localities may require." *Huus v. New York, etc., Steamship Co.*, 182 U. S. 392, 393, 45 L. Ed. 1146.

8. **Congress may restrict or supersede state law.**—*Cooley v. Board of Wardens*,

12 How. 299, 316, 13 L. Ed. 996; *Steamship Co. v. Joliffe*, 2 Wall. 450, 17 L. Ed. 805; *Ex parte McNiel*, 13 Wall. 236, 241, 20 L. Ed. 624; *Sprague v. Thompson*, 118 U. S. 90, 30 L. Ed. 115; *Huus v. New York, etc., Steamship Co.*, 182 U. S. 392, 393, 45 L. Ed. 1146. See, also, ante, "Generally," III, A; "Immaterial That Pilot Regulations Are Regulations of Commerce," III, B.

**Pilots on boundaries between states.**—See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 404.

9. **Law prescribing qualifications not opposed to fourteenth amendment.**—*Olsen v. Smith*, 195 U. S. 332, 344, 345, 49 L. Ed. 224.

10. **Federal statutes forbidding discrimination;** Rev. Stats., § 4237. *Olsen v. Smith*, 195 U. S. 332, 334, 49 L. Ed. 224.

voke the power of the state on the subject or to abrogate existing pilotage laws of the several states containing discriminatory provisions, but only to abrogate the provisions making the discrimination. This results since the statute, after first generally prohibiting regulations by any state discriminating "in the rate of pilotage or half pilotage between vessels sailing between the ports of one state and vessels sailing between the ports of different states, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States," in careful language annuls and abrogates only "all existing regulations or provisions making any such discrimination."<sup>11</sup>

**Same; Separability of Statutes.**—Whether a provision of a state pilotage act which is void by reason of the fact that it contains a discriminatory exception in favor of the vessels of that state in the matter of pilotage, in violation of Rev. Stat., § 4237, is separable and cannot be eliminated from the statute without invalidating the whole law, is a question for the state courts whose interpretations will be accepted by the federal courts in determining the validity of the statute.<sup>12</sup> But whether the statute as construed by the state courts is valid or invalid as conflicting with the federal constitution and laws is, of course, a federal question.<sup>13</sup>

3. **FEDERAL STATUTES EXEMPTING CERTAIN CLASSES OF VESSELS FROM THE OPERATION OF STATE LAWS**—a. *The Act of August 30, 1852.*—The Act of August 30th, 1852, regulates the appointment of pilots upon certain steamboats, and is a complete system as to the class of vessels to which it applies.<sup>14</sup> It does not establish pilot regulations for ports; its object is to provide a system under which the masters and the owners of vessels, propelled in whole or in part by steam, may be required to employ competent pilots to navigate such vessels on their voyage. It does not modify or repeal the act of 1789 adopting state pilotage regulations.<sup>15</sup> The clauses respecting pilots in the act relate to pilots having charge of steamers on the voyage, and not to port pilots; and the provision that no person shall be employed or serve as a pilot who is not licensed by inspectors has reference to employment and service on the voyage generally, and not to employment and service in connection with ports and harbors.<sup>16</sup>

b. *Coastwise Seagoing Steam Vessels.*—By the Revised Statutes, § 4401, it is declared, in substance, that all coastwise seagoing vessels shall be subject to the navigation laws of the United States, and that every coastwise seagoing steam vessel subject to the navigation laws of the United States, and not sailing under register, shall, when under way, except in the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats. To further effectuate its control over coastwise seagoing vessels, it is provided by Revised Statutes, § 4444, that no state or municipal government shall impose upon pilots of steam vessels any obligation to procure a state or other license in addition to that issued by the United States, nor shall any pilot charges be levied by any such authority upon a steamer piloted as provided for in said title, provided that nothing in said title shall be construed to annul or affect any regulation established by state law requiring vessels entering or leaving any port in any such state, other than coastwise steam vessels, to take a pilot duly authorized by the laws of such state, or of a state situated upon the waters

See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 404.

11. **Same; revokes only the discriminatory clauses.**—*Olsen v. Smith*, 195 U. S. 332, 343, 49 L. Ed. 224.

12. **Same; separability of statute.**—*Olsen v. Smith*, 195 U. S. 332, 342, 49 L. Ed. 224.

13. **Same.**—*Olsen v. Smith*, 195 U. S. 332, 342, 49 L. Ed. 224.

14. **Statutes exempting certain vessels from operation of state law; act of Au-**

gust 30th, 1852.—Ex parte McNiel, 13 Wall. 236, 241, 20 L. Ed. 624.

15. **Same.**—*Steamship Co. v. Joliffe*, 2 Wall. 450, 17 L. Ed. 805.

16. **Same.**—*Steamship Co. v. Joliffe*, 2 Wall. 450, 461, 17 L. Ed. 805.

The act of the state of California of May 20th, 1861, entitled "An act to establish pilots and pilot regulations for the port of San Francisco," is not in conflict with it. *Steamship Co. v. Joliffe*, 2 Wall. 450, 17 L. Ed. 805.



of such state. The provisions of § 4444 clearly contemplated that by the existing state laws, coastwise steam vessels of the United States were subject to pilotage charges, and withdrew such vessels from liability to pilotage charges, but did not in other respects interfere with the state laws on the subject of pilotage.<sup>17</sup> The general object of these provisions and of Revised Statutes, §§ 4237, 4442, 4443, seems to be to license pilots upon steam vessels engaged in the coastwise or interior commerce of the country, and at the same time, to leave to the states the regulation of pilots upon all vessels engaged in foreign commerce.<sup>18</sup>

**No Application to Vessels Engaged in Foreign Trade.**—Neither the exemption of coastwise steam vessels from pilotage, resulting from the laws of the United States, nor any lawful exemption of coastwise vessels created by the state law, concerns vessels in the foreign trade, and, therefore, any such exemptions do not operate to produce a discrimination against British vessels engaged in foreign trade and in favor of vessels of the United States in such trade.<sup>19</sup>

**Applies to Vessels Engaged in the Porto Rican Trade.**—The words "coasting trade" are not intended to be strictly limited to trade between ports in adjoining districts. They were very clearly intended to include the domestic trade of the United States upon other than interior waters, including trade between Porto Rico and the continent.<sup>20</sup> By the Porto Rican or Foraker act, it was intended, not only to nationalize all Porto Rican vessels as vessels of the United States, and to admit them to the benefits of the coasting trade, but to place Porto Rico substantially upon the coast of the United States, and vessels engaged in trade between that island and the continent, as engaged in the coasting trade.<sup>21</sup>

**Captain and Mate Presumed to Be Licensed Pilots.**—On all sea going steamers the captain and the first mate are usually regularly licensed pilots, and

**17. Coastwise seagoing steam vessels.**—*Olsen v. Smith*, 195 U. S. 332, 343, 49 L. Ed. 224.

**18. Same; general object of statutes.**—*Huus v. New York, etc., Steamship Co.*, 182 U. S. 392, 394, 45 L. Ed. 1146.

A coastwise seagoing steam vessel which was not sailing under register, and which, at the time the defendant in error tendered his services, and subsequently when she passed up the river to Savannah, was under the control and direction of a pilot licensed by the United States inspectors of steam boats, was, at the time, piloted as provided by Revised Statutes, §§ 4401, 4442, 4443, and § 4444, and was therefore lawfully exempt from any pilot charges levied by any state or municipal government, since Rev. Stat., §§ 4401 and 4444 expressly except coastwise steam vessels from the regulations established by the laws of a state requiring vessels entering or leaving a port of any such state to take a pilot licensed under the laws of such state. *Sprague v. Thompson*, 118 U. S. 90, 96, 30 L. Ed. 115.

The owners of such a vessel were therefore at liberty to employ any pilot licensed under the authority of the United States for the particular services in which he was engaged without regard to the provisions of the state law requiring it to accept the services of the pilot first tend-

ered, or, in case of refusal, to pay pilotage therefor; and the employment of the services of the pilot actually taken by previous contract was equivalent to keeping him on board for that purpose during the whole voyage. *Sprague v. Thompson*, 118 U. S. 90, 96, 30 L. Ed. 115.

**19. No application to vessels engaged in foreign trade.**—*Olsen v. Smith*, 195 U. S. 332, 343, 49 L. Ed. 224. See, also, *Homer Ramsdell Transp. Co. v. La Compagnie Generale Transatlantique*, 182 U. S. 406, 414, 45 L. Ed. 1155.

**20. Vessels engaged in Porto Rican trade.**—*Huus v. New York, etc., Steamship Co.*, 182 U. S. 392, 396, 45 L. Ed. 1146.

**21. Same; Foraker act.**—*Huus v. New York, etc., Steamship Co.*, 182 U. S. 392, 396, 45 L. Ed. 1146.

Under this statute a steam vessel engaged in trade between Porto Rico and the port of New York is to be deemed a coastwise steam vessel both within the meaning of the New York pilotage laws and within the meaning of Rev. Stat., §§ 4401, 4444; such a vessel, therefore, whose master was himself a licensed pilot for the harbor of New York, under the laws of the United States was not liable for refusing to accept the services of a pilot licensed under the state law. *Huus v. New York, etc., Steamship Co.*, 182 U. S. 392, 45 L. Ed. 1146. See, also, *Gonzales v.*

in the absence of any allegation to the contrary, it will be presumed that they were so licensed.<sup>22</sup>

#### IV. Rights, Duties and Liabilities of Pilot.

**A. Generally as to Rights and Duties.**—The reason for requiring a vessel to take a pilot is his familiar acquaintance with particular waters. His duty, therefore, is properly the duty to navigate the ship over and through his pilotage limits, or, as it is commonly called, his pilotage ground.<sup>23</sup> To the pilot temporarily belongs the whole conduct of the navigation of the ship, including the duty of determining her course and speed, and the time, place and manner of anchoring her.<sup>24</sup> So far as respects the navigation of the vessel in that part of the voyage which is his pilotage ground, he is the temporary master charged with the safety of the vessel and the cargo, and of the lives of those on board, and intrusted with the command of the crew; he is not only one of the persons engaged in navigation, but he occupies a most important and responsible place among those thus engaged.<sup>25</sup>

**Vessel Must Be in Navigable Condition.**—The case, therefore, necessarily presupposes that the ship is in a condition capable of being navigated; distressed, perhaps, and laboring under difficulties, but still capable in point of crew, equipment and situation of being navigated.<sup>26</sup>

**Presence of Pilot as Absolving Master from His Duties.**—See the titles *COLLISION*, vol. 3, p. 877; *MASTERS OF VESSELS*, vol. 8, p. 300.

**B. With Respect to General Average.**—If a general average loss could be held to arise from an act of a pilot, without or against the order of the master of the vessel, it could only be because the pilot, by the maritime law, and by reason of his nautical skill and experience, temporarily took the place of the master, and was specially charged with the command and safety of the whole maritime adventure and of that adventure only.<sup>27</sup>

**C. Negligence of Pilot**—1. **GENERALLY AS TO DEGREE OF CARE REQUIRED.**—There is an obligation upon all persons, including pilots, to take the care which, under the special circumstances of the case, a reasonable and prudent man would take; and the omission of that care constitutes negligence.<sup>28</sup> Where a steamer is about to enter a harbor, great caution is required. There being no usage as to an open way, the vigilance is thrown upon the entering vessel. Ordinary care under such circumstances will not excuse a steamer for a wrong done.<sup>29</sup>

Williams, 192 U. S. 1, 14, 48 L. Ed. 317, citing this case.

**22. Captain and mate presumed to be licensed pilots.**—Butler v. Boston, etc., Steamship Co., 130 U. S. 527, 554, 32 L. Ed. 1017.

**23. Rights, powers and duties of pilot.**—The Hope, 10 Pet. 108, 123, 9 L. Ed. 363; Ralli v. Troop, 157 U. S. 386, 401, 39 L. Ed. 742.

**24. Same.**—Cooley v. Board of Wardens, 12 How. 299, 316, 13 L. Ed. 996; Ralli v. Troop, 157 U. S. 386, 402, 39 L. Ed. 742.

**25. Same; temporary master.**—Cooley v. Board of Wardens, 12 How. 299, 316, 13 L. Ed. 996; Ralli v. Troop, 157 U. S. 386, 402, 39 L. Ed. 742.

**26. Vessel must be in navigable condition.**—The Hope, 10 Pet. 108, 123, 9 L. Ed. 363.

**27. Powers with respect to general average sacrifice.**—Ralli v. Troop, 157 U. S. 386, 403, 39 L. Ed. 742.

"The authority of the pilot, as regards general average, was not touched by the decision of this court in *The China*, 7 Wall.

53, by which a vessel in charge of a pilot whom she had been compelled by law to take on board, and brought by his negligence into collision with another vessel, was held, upon a libel in rem, to be liable in damages to the owners of that vessel. That decision proceeded not upon any authority or agency of the pilot, derived from the civil law of master and servant, or from the common law, as the representative of the owners of the ship and cargo; nor upon the law of contribution in general average as between them; but upon a distinct principle of the maritime law, namely, that the vessel, in whosoever hands she lawfully is, is herself considered as the wrongdoer, liable for the tort, and subject to a maritime lien for the damages. 7 Wall. 68." Ralli v. Troop, 157 U. S. 386, 402, 39 L. Ed. 742.

**28. Negligence of pilot; degree of care required.**—Davidson Steamship Co. v. United States, 205 U. S. 187, 193, 51 L. Ed. 764.

**29. Same.**—Culbertson v. Shaw, 18 How. 584, 587, 15 L. Ed. 493; Davidson Steam-

2. DUTY OF PILOT TO FAMILIARIZE HIMSELF WITH CHANNEL, BANKS, NATURAL OBJECTS, ARTIFICIAL CHANGES, ETC.—A constant and familiar acquaintance with the towns, banks, trees, etc., and the relation of the channel to them, and of the snags, sandbars, sunken barges, and other dangers of the river as they may arise, is essential to the character of a pilot on the navigable rivers of the interior; this class of pilots being selected, examined and licensed for their knowledge of the topography of the streams on which they are employed, and not, like ocean pilots, chiefly for their knowledge of navigation and of charts, and for their capacity to understand and follow the compass, take reckonings, make observations, etc.<sup>30</sup> In the active life and changes made by the hand of man or the action of the elements in the path of his vessel, a year's absence from the scene impairs his capacity, his skilled knowledge, very seriously in the course of a long voyage. He should make a few of the first trips, as they are called, after his return, in company with other pilots more recently familiar with the river.<sup>31</sup> Likewise a captain who is also a pilot engaged in the navigation of the waters of the Great Lakes may be guilty of negligence in not keeping himself informed of changes going on from time to time in the different harbors which he is likely to be called upon to visit. His very want of knowledge, when he had the means of ascertaining the facts, could properly be regarded as negligence. Clearly it could not be held as matter of law not to do so.<sup>32</sup>

3. CARE AND SKILL TO PREVENT COLLISIONS; OBSERVANCE OF SIGNALS, RULES OF NAVIGATION, ETC.—See, generally, the title COLLISION, vol. 3, pp. 870, 880.

4. COLLISION WITH PIERS, BRIDGES, ETC.—See the titles COLLISION, vol. 3, p. 932; TOWAGE, TUGS AND TOWS.

5. LIABILITY OF PILOT FOR HIS OWN NEGLIGENCE.—See the title COLLISION, vol. 3, p. 878.

6. JOINT LIABILITY OF MEMBERS OF PILOTS ASSOCIATION.—Where the members of a voluntary unincorporated pilots' association, recognized by state law, have no power to select or discharge individual members or to control them in the performance of their duties, they are not liable to the owners of piloted vessels for damages occasioned by the negligence of one another. This is true regardless of whether such association be deemed a technical partnership or not; and it is immaterial that the fees for pilotage are paid, not to the individual pi-

ship Co. *v.* United States, 205 U. S. 187, 193, 51 L. Ed. 764.

30. Duty to familiarize himself with pilotage grounds and changes therein.—*Atlee v. Packet Co.*, 21 Wall. 389, 22 L. Ed. 619.

31. Same.—*Atlee v. Packet Co.*, 21 Wall. 389, 397, 22 L. Ed. 619.

Hence, a pilot who, though engaged for many years in navigating a part of the Mississippi, had not made a trip over that part for fifteen months previous, and who, from ignorance of its existence, ran his vessel against a pier which had been built in the river since he had last gone up or down it—was held to be in fault for want of knowledge of the pier. He was also held in fault for hugging, in a dark night, the shore near where he knew the mill and boom of a riparian owner to be, when the current of the river would have carried him into safe and deeper water further out. *Atlee v. Packet Co.*, 21 Wall. 389, 22 L. Ed. 619.

32. Same; pilots upon the Great Lakes.—*Davidson Steamship Co. v. United States*, 205 U. S. 187, 194, 51 L. Ed. 764.

Where the harbor was one of great

importance and the evidence showed that the captain, who was also a pilot upon the Great Lakes, had not been in it for more than a year, but that he knew that harbor improvements on the Great Lakes were being made by the government, that information of the condition of those improvements was given from time to time by circulars from the departments, and that such circulars and notices were mailed to him at his postoffice address, but that he made no effort to ascertain the new condition of the harbor, the only chart he had being an old one, it was held that a verdict of negligence upon the part of said captain and pilot, in running his vessel upon and injuring an uncompleted breakwater, was justified by the facts, notwithstanding he testified that he never received the circulars and notices mailed to him, and notwithstanding there was some evidence of contributory negligence upon the part of the government in placing the lights upon the breakwater in such a manner as to mislead vessels entering the port. *Davidson Steamship Co. v. United States*, 205 U. S. 187, 193, 195, 51 L. Ed. 764.



lots performing the service, but to the association, and by it distributed among the members in proportion to the number of days that they were on the active list.<sup>33</sup>

7. **LIABILITY OF MASTER, OWNER, OR VESSEL FOR NEGLIGENCE OF PILOT**—a. *Generally*.—See the title **COLLISION**, vol. 3, pp. 876, 877, 878.

b. *As Master and Employee*.—See the title **COLLISION**, vol. 3, p. 878.

c. *Under Statute Imposing Compulsory Pilotage*—(1) *Generally*.—A statute providing for compulsory pilotage and requiring vessels, under penalty, to take a licensed pilot, containing no clause exempting the vessels or owners from liability for the pilot's mismanagement, and the responsibility of a vessel for tort committed by it not being derived from the law of master and servant, or from the common law at all, but from the maritime law, which imposes a maritime lien upon the vessel in whosoever hands it may be for torts committed by it, the fact that the statute thus compelled the master to take the pilot does not exonerate the vessel from liability to respond for torts done by it, as, for example, a collision, even though such tort be the result wholly of the pilot's negligence.<sup>34</sup>

(2) *What Statutes Are Compulsory*.—Where the law is not enforced by any penalty, it is not regarded as compulsory;<sup>35</sup> but a law providing that vessels shall take a licensed pilot, and providing for the punishment of persons acting as pilots without a license, and prescribing a penalty against one employing an unlicensed pilot, is compulsory.<sup>36</sup>

8. **CONTRIBUTORY NEGLIGENCE OF PILOT**.—Contributory negligence upon the part of a pilot may defeat a recovery by the owners of the vessel in case of injuries resulting from a collision.<sup>37</sup>

9. **QUESTIONS OF LAW AND FACT**.—Where there is uncertainty as to the ex-

**33. Joint liability of members of pilots' association.**—*Guy v. Donald*, 203 U. S. 399, 406, 407, 51 L. Ed. 245.

**34. Where statute imposes compulsory pilotage.**—*Bussy v. Donaldson*, 4 Dall. 206, 1 L. Ed. 802; *The China*, 7 Wall. 53, 19 L. Ed. 67; *The Merrimac*, 14 Wall. 199, 20 L. Ed. 873. See, also, *Ralli v. Troop*, 157 U. S. 386, 402, 39 L. Ed. 742; *Guy v. Donald*, 203 U. S. 399, 406, 51 L. Ed. 245. See, generally, the title **COLLISION**, vol. 3, p. 878.

**35. What statutes are compulsory.**—*The Merrimac*, 14 Wall. 199, 203, 20 L. Ed. 873.

**36. Same.**—*The China*, 7 Wall. 53, 19 L. Ed. 67.

A state law which enacts that the master "shall take a licensed pilot," and that in case of refusal, pilotage shall be paid to the first pilot offering his services, and which forbids, under penalty, the employment of any but a licensed pilot, and imposes a penalty upon any person presuming to act as a pilot without having a license as such, is a compulsory pilotage law under which vessels are compelled to take a pilot. *The China*, 7 Wall. 53, 19 L. Ed. 67.

The statutes of New York impose compulsory pilotage on foreign vessels inward and outward bound to and from the port of New York by the way of Sandy Hook. *Homer Ramsdell Transp. Co. v. La Compagnie General Transatlantique*, 182 U. S. 406, 411, 45 L. Ed. 1155.

By the provisions of these statutes not

only is the master of a foreign vessel required to take a licensed pilot, or, in case of refusal to take such pilot, required to pay pilotage to the pilot first offering his services; but the subsequent provision as to "any person not holding a license under this act," construed in connection with the previous provision as to licensing the master of a coasting vessel as its pilot, evidently includes the master of a foreign vessel, and subjects him to fine or imprisonment if he pilots his own vessel. The requirement to take a licensed pilot or pay pilotage, together with the penalty imposed on a master who pilots his own foreign vessel, clearly imposes compulsory pilotage. *Homer Ramsdell Transp. Co. v. La Compagnie Generals Transatlantique*, 182 U. S. 406, 410, 45 L. Ed. 1155.

It was held in *The China*, 7 Wall. 53, 19 L. Ed. 67, that the New York statute of 1857 imposed such pilotage.

**37. Contributory negligence of pilot.**—*Atlee v. Packet Co.*, 21 Wall. 389, 398, 22 L. Ed. 619.

**Same; division of damages.**—Where the sinking of a barge was due as much to the want of knowledge and skill in the pilot and want of care in his management of the vessel, as to the obstructions placed by the defendant in the river, it was held that the damages should, upon a libel in admiralty, be divided between the defendant and the owners of the barge. *Atlee v. Packet Co.*, 21 Wall. 389, 398, 22 L. Ed. 619. See, also, the title **COLLISION**, vol. 3, pp. 879, 880, 932, 933, 935.

istence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be determined by a jury.<sup>38</sup>

## V. Compensation of Pilots.

**A. Half Pilotage**—1. **GENERALLY**.—The experience of all commercial states has shown the necessity, in order to create and maintain an efficient class of pilots, of providing compensation, not only when the services tendered are accepted by the master of the vessel, but also when they are declined, and half pilotage, as it is called, is a necessary and usual part of every system of regulation.<sup>39</sup>

2. **CONSTITUTIONALITY**—a. *As an Attempt to Evade Constitutional Restrictions*.—A law which provides that a vessel which neglects or refuses to take a pilot shall forfeit and pay to the master warden of the port, for the use of the society for the relief of distressed or decayed pilots, their widows and children, one-half the regular amount of pilotage, is an appropriate part of a general system of regulation on the subject of pilotage, and cannot be considered as a covert attempt to legislate upon another subject, under the appearance of legislating upon this one.<sup>40</sup>

b. *As a Revenue Law; Tonnage Duties*.—A state law imposing half-pilotage upon vessels entering the port of the state is not a revenue law, and is not, therefore, in conflict with the second and third clauses of the tenth section of the first article of the constitution, which prohibits a state, without the assent of congress, from laying any imposts or duties on imports or exports, or tonnage. This provision of the constitution was intended to operate on subjects actually existing and well understood when the constitution was formed. Imposts and duties on imports, exports and tonnage were then known to the commerce of a civilized world to be entirely distinct from fees and charges for pilotage and from the penalties by which commercial states enforced their pilot laws.<sup>41</sup>

**But Tonnage May Be Imposed under Guise of Pilotage**.—A tonnage duty or an impost upon imports or exports, may, however, be levied under the name of pilot dues or penalties; and in determining whether an exaction imposed by a pilot law is within the prohibition against laying imposts or duties on imports or exports or tonnage; it is the thing, and not the name, which is to be considered.<sup>42</sup>

c. *Under Provision Requiring Imposts and Excises to Be Uniform*.—A state pilot law which imposes half pilotage upon vessels entering the ports of the state is not repugnant to the first clause of the eighth section of the first article of the constitution, which declares that all duties, imposts and excises shall be uniform throughout the United States. Such a regulation cannot be deemed a law

38. Questions of law and fact.—*Davidson Steamship Co. v. United States*, 205 U. S. 187, 51 L. Ed. 764; *Smith v. Condry*, 1 How. 28, 11 L. Ed. 35. See, also, the title COLLISION, vol. 3, pp. 933, 947.

39. Compensation; half pilotage.—*Cooley v. Board of Wardens*, 12 How. 299, 13 L. Ed. 996; *Steamship Co. v. Joliffe*, 2 Wall. 450, 456, 17 L. Ed. 805; *Ex parte McNiell*, 13 Wall. 236, 238, 20 L. Ed. 624.

40. Half pilotage; as an attempt to evade constitutional restrictions.—*Cooley v. Board of Wardens*, 12 How. 299, 13 L. Ed. 996, followed and reaffirmed in *Ex parte McNiell*, 13 Wall. 236, 242, 20 L. Ed. 624. See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 403.

41. Half pilotage as a revenue law; tonnage duties.—*Cooley v. Board of Wardens*, 12 How. 299, 314, 13 L. Ed. 996, reaffirmed in *Ex parte McNiell*, 13 Wall. 236, 242, 20 L. Ed. 624.

42. Same; statute exacting tonnage under guise of pilotage.—*Cooley v. Board of Wardens*, 12 How. 299, 314, 13 L. Ed. 996.

In this connection it has been held that the appropriation of the sums received under the law imposing half pilotage to the use of a society for the relief of distressed and decayed pilots, their widows and children, has no legitimate tendency to impress upon it the character of a revenue law or to bring it within the inhibition of the constitutional provisions above mentioned. *Cooley v. Board of Wardens*, 12 How. 299, 314, 13 L. Ed. 996.

But a law which required every vessel entering the port to pay to the master and wardens, in addition to other fees, a sum of \$5.00 whether called upon to perform any service or not, was a regulation of commerce and a duty on tonnage, and was unconstitutional and void. *Steamship Co. v. Portwardens*, 6 Wall. 31, 34, 18 L. Ed. 749.

levying a duty, impost or excise; and therefore the want of uniformity throughout the United States is not objectionable.<sup>43</sup>

d. *Under Provision Forbidding Preference of One Port Over Another.*—A state law which imposes pilotage fees upon vessels entering a port of that state does not give a preference to that port in violation of the fifth clause of the ninth section of the first article of the constitution, which declares that no preference shall be given by a regulation of commerce or revenue to ports in one state over those of another; nor shall vessels to or from one state be obliged to enter, clear or pay duties in another, since it is an objection to, and not a ground of preference of a port, that a charge of this kind must be borne by the vessels entering it. Moreover, pilotage fees are not duties, and a pilotage law is not a revenue law within the meaning of the constitution.<sup>44</sup>

e. *As a Regulation of Commerce.*—See ante, "Immaterial That Pilot Regulations Are Regulations of Commerce," III, B. And see, generally, the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 403.

f. *As to Services Tendered without the Jurisdiction of the State.*—Where the statute so provides, the pilot may recover pilotage, although his services were tendered to and refused by the master of the vessel when she was without the jurisdiction of the state.<sup>45</sup>

3. WHAT STATUTES ARE COMPULSORY.—See ante, "What Statutes Are Compulsory," IV, C, 7, c, (2).

4. NATURE OF OBLIGATION.—The sum of money given by statute as half pilotage, to a pilot who first tenders his services to a vessel coming into port and is refused, is not a "penalty," but is a compensation under implied contract.<sup>46</sup> If the services are accepted, a contract is created between the master or owner of the vessel and the pilot, the terms of which, it is true, are fixed by the statute; but the transaction is not less a contract on that account.<sup>47</sup> If the services tendered are declined, the half fees allowed are by way of compensation for the exertions and labor made by the pilot, and the expenses and risks incurred by him in placing himself in a position to render the services, which, in the majority of cases, would be required. The transaction, in this latter case, between the pilot and the master or owners, cannot be strictly termed a contract but it is a transaction to which the law attaches similar consequences; it is a quasi contract.<sup>48</sup> In such case, the party makes no promise on the subject, but the law implies one; and the liability thus arising is said to be a liability upon an implied contract. The claim for half pilotage fees stands upon substantially similar grounds.<sup>49</sup>

**B. Compensation as Salvors.**—A pilot, while acting as such, in the strict line of his duty, however he may entitle himself to extraordinary pilotage compensation, for extraordinary services, as contradistinguished from ordinary services, cannot be entitled to claim salvage. In this respect, he is not distinguished from any other officer, public or private, acting within the appropriate sphere of

43. Half pilotage; effect of provision requiring imposts and excises to be uniform.—*Cooley v. Board of Wardens*, 12 How. 299, 314, 13 L. Ed. 996.

44. Half pilotage as a preference of one port over another.—*Cooley v. Board of Wardens*, 12 How. 299, 315, 13 L. Ed. 996, reaffirmed in *Ex parte McNeil*, 13 Wall. 236, 242, 20 L. Ed. 624; *Thompson v. Darden*, 198 U. S. 310, 315, 49 L. Ed. 1064. See, also, *Olsen v. Smith*, 195 U. S. 332, 49 L. Ed. 224.

**Weight of contemporaneous exposition.**—Upon this point the act of congress passed in 1789 (1 Stat. at L. 54), recognizing the pilot laws of the states, is entitled to great weight as showing that these laws

neither levied duties nor gave a preference to one port over another. *Cooley v. Board of Wardens*, 12 How. 299, 315, 13 L. Ed. 996; *Thompson v. Darden*, 198 U. S. 310, 315, 49 L. Ed. 1064.

45. Where services tendered without the jurisdiction of the state.—*Wilson v. McNamee*, 102 U. S. 572, 26 L. Ed. 234.

46. Half pilotage; nature of obligation.—*Ex parte McNeil*, 13 Wall. 236, 20 L. Ed. 624.

47. Same.—*Steamship Co. v. Joliffe*, 2 Wall. 450, 456, 17 L. Ed. 805.

48. Same.—*Steamship Co. v. Joliffe*, 2 Wall. 450, 457, 17 L. Ed. 805.

49. Same.—*Steamship Co. v. Joliffe*, 2 Wall. 450, 457, 17 L. Ed. 805.



his duty.<sup>50</sup> But a pilot, as such, is not disabled, in virtue of his office, from becoming a salvor. On the contrary, whenever he performs salvage services beyond the line of his appropriate duties, or under circumstances to which those duties do not justly attach, he stands in the same relation to the property as any other salvor; that is, with a title to compensation to the extent of the merit of his services, viewed in the light of a liberal public policy.<sup>51</sup> That services were performed and compensation received as pilotage necessarily presupposes that the ship was in a condition capable of being navigated, distressed perhaps, and laboring under difficulties, but still capable in point of crew, equipment and situation of being navigated.<sup>52</sup> It is not within the scope of the positive duties of a pilot to go to the rescue of a wrecked vessel, and employ himself in saving her or her cargo, when she was wholly unnavigable. That is a duty entirely distinct in its nature, and no more belonging to a pilot, than it would be to supply such a vessel with masts or sails, or to employ lighters to discharge her cargo in order to float her. It is properly a salvage service, involving duties and responsibilities for which his employment may peculiarly fit him; but yet in no sense included in the duty of navigating the ship.<sup>53</sup>

**C. When Right to Compensation Becomes Vested.**—When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right, which stands independent of the statute.<sup>54</sup> Therefore, where a pilot, licensed under a statute, had tendered his services to pilot a vessel out of port, and such services were refused, his claim to the half pilotage fees, allowed by the statute in such cases, became perfect; and the subsequent repeal of the statute did not affect a judgment rendered in an action brought to recover the claim, or the jurisdiction of the federal supreme court to view the judgment on writ of error.<sup>55</sup>

**D. Amount of Compensation.**—Where there was no special contract as to the amount of the compensation, the court awarded, upon a libel in personam, what was deemed to be just in the light of what was being paid for like services at that time and place.<sup>56</sup>

**50. Compensation as salvors.**—*The Hope*, 10 Pet. 108, 120, 9 L. Ed. 363.

**51. Same.**—*The Hope*, 10 Pet. 108, 121, 9 L. Ed. 363.

**52. Same; pilotage presupposes vessel to be in navigable condition.**—*The Hope*, 10 Pet. 108, 123, 9 L. Ed. 363.

**53. Same.**—*The Hope*, 10 Pet. 108, 123, 9 L. Ed. 363.

The brig *Hope*, with a valuable cargo, had been conducted, in the evening, by a pilot, inside of Mobile point, where pilots of the outer harbor usually leave vessels which they pilot inside of that bar; the pilot was discharged and the *Hope* proceeded up the bay of Mobile; the wind soon after changed, blew a violent gale from the northwest, both anchors parted, and the *Hope* was driven on a shoal, outside of the point, among the east breakers; the gale increased to a hurricane, and forced the vessel on her beam ends; and her masts and bowsprit were cut away; the master and crew deserted her, to save their lives. After various fruitless efforts to save her, the libelants, all pilots of the outer harbor of Mobile, two days after she was stranded, and while yet in great peril, succeeded; and she was brought up to the

city of Mobile by them, towed by their pilot boat, assisted by a steamboat employed by them. This was a case where the libelants acted as salvors, and not as pilots; they had, at the time, no particular relation to the distressed ship; they proffered useful services as volunteers, without any pre-existing covenant that connected them with the duty of employing themselves for her preservation; the duties they undertook were far beyond any belonging to pilots, and precisely those belonging to salvors. *The Hope*, 10 Pet. 108, 9 L. Ed. 363.

**54. Vested right to compensation; repeal of statute.**—*Steamship Co. v. Joliffe*, 2 Wall. 450, 17 L. Ed. 805.

**55. Same.**—*Steamship Co. v. Joliffe*, 2 Wall. 450, 17 L. Ed. 805.

**56. Amount of compensation.**—*Mephams v. Biessel*, 9 Wall. 370, 19 L. Ed. 677.

Compensation to a person who had acted for four months (from March 16th to July 26th), both as captain and as one of two pilots on a Missouri steamer, left at \$900 per month, at which sum the circuit court had fixed it; the evidence, which, though not so full as it ought to have been, showing that pilots' wages were at

**E. Suits to Recover Pilotage**—1. **JURISDICTION**.—Contracts relating to pilotage and suits to recover pilotage are within the sphere of the admiralty jurisdiction. The question is not an open one in the United States supreme court.<sup>57</sup>

**Half Pilotage Not a Penalty**.—It has been claimed that there is no jurisdiction in admiralty of a libel for half pilotage because admiralty has no jurisdiction of a libel to enforce a penalty, but, as we have seen, it is well settled that half pilotage is not a penalty, but compensation under an implied or quasi contract.<sup>58</sup>

**Where Claim Arose in Different District**.—It is not a prerequisite to the jurisdiction of the court that the claim should have arisen in the same district in which the vessel was libeled.<sup>59</sup>

2. **APPEAL; WRIT OF PROHIBITION, ETC.**—Prohibition will not lie to restrain admiralty from taking jurisdiction of a claim for pilotage fees.<sup>60</sup> A supposed error in a judgment of the admiralty court upon the merits of an action to recover pilotage fees cannot be corrected by means of a writ of prohibition. The remedy should have been by appeal, and if an appeal will not lie, then the parties are concluded by what has been done.<sup>61</sup>

**PIN**.—See note 1.

**PINES**.—As to status of Isle of Pines under the revenue laws, see the title **CONSTITUTIONAL LAW**, vol. 4, p. 98.

**PIONEER**.—See note 2.

**PIOUS GIFT**.—See the title **CHARITIES**, vol. 3, p. 675.

**PIOUS USES**.—See the title **LIMITATION OF ACTIONS AND ADVERSE POSSESSION**, vol. 7, p. 915.

**PIPE LINES**.—As to pipe lines on public lands, see the title **WATERS AND WATERCOURSES**.

the time very high; that the person had performed his duty in both capacities well, and that the owners had charged his services against the government (which had impressed the vessel during twenty-six days of the time), at the rate of \$1,000 per month. *Mephams v. Biessel*, 9 Wall. 370, 19 L. Ed. 677.

57. **Suit to recover pilotage; jurisdiction**.—*The Hope*, 10 Pet. 108, 120, 9 L. Ed. 363; *Ex parte McNiel*, 13 Wall. 236, 243, 20 L. Ed. 624. And see, generally, the title **ADMIRALTY**, vol. 1, p. 140.

"Suits for pilotage on the high seas, and on waters navigable from the sea, as far as the tide ebbs and flows, are within the admiralty and maritime jurisdiction of the United States. The service is strictly maritime, and falls within the principles already established by this court in the case of *The Steamboat Thomas Jefferson*, 10 Wheat. 428, 6 L. Ed. 359; and *Peyroux v. Howard*, 7 Pet. 324, 8 L. Ed. 700." *The Hope*, 10 Pet. 108, 119, 9 L. Ed. 363.

58. **Same; half pilotage not a penalty**.—See ante, "Nature of Obligation," V, A, 4.

59. **Where claim arose in one district and libel brought in another**.—*Ex parte Pennsylvania*, 109 U. S. 174, 27 L. Ed. 894.

Where a vessel was libelled within the jurisdiction of the district court for the eastern district for Pennsylvania, that court has jurisdiction, notwithstanding the claim arose beyond its jurisdiction under a statute of the state of Delaware. *Ex parte Pennsylvania*, 109 U. S. 174, 27 L. Ed. 894.

60. **Prohibition not lie to restrain jurisdiction**.—*Ex parte Hagar*, 104 U. S. 520, 26 L. Ed. 816; *Ex parte Pennsylvania*, 109 U. S. 174, 27 L. Ed. 894. See, also, the title **PROHIBITION**.

61. **Nor to review judgment**.—*Ex parte Pennsylvania*, 109 U. S. 174, 27 L. Ed. 894.

1. **Pin**.—See *Robertson v. Rosenthal*, 132 U. S. 460, 33 L. Ed. 392. And see, generally, the title **REVENUE LAWS**.

2. **Pioneer**.—See *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 561, 42 L. Ed. 1136; *Singer Mfg. Co. v. Cramer*, 192 U. S. 265, 276, 48 L. Ed. 437. And see the title **PATENTS**, ante, p. 166.

# PIRACY.

BY S. BLAIR FISHER.

- I. Definition, 411.
- II. Power of Congress to Define and Punish Piracies and Felonies on the High Seas, 412.
  - A. Constitutional Provision Conferring Power, 412.
  - B. Statutory Enactments in Exercise of Power, 412.
- III. Treaty Provisions as to Piracy, 414.
- IV. Pirates Not Entitled to Rights of War and Subject to Capture by Any Nation, 414.
- V. Effect of Commission as Protection from Punishment for Piratical Acts, 415.
- VI. Prosecution and Punishment, 415.
  - A. Jurisdiction, 415.
  - B. Statute of Limitations as Bar to Prosecution, 415.
  - C. Indictment, 415.
  - D. Evidence, 416.
  - E. Punishment, 416.
- VII. Misconduct of Piratical Captors as Affecting Property of Original Owners, 416.

## CROSS REFERENCES.

See the titles CRIMINAL LAW, vol. 5, pp. 81, 100; INDICTMENTS, INFORMATIONS, PRESENTMENTS AND COMPLAINTS, vol. 6, p. 961; PRIZE; WAR.

### I. Definition.

Robbery, or forcible depredation upon the sea, *animo furandi*, is piracy by the law of nations, and by the act of congress.<sup>1</sup>

1. Piracy defined.—United States *v.* Smith, 5 Wheat. 153, 5 L. Ed. 57; United States *v.* Furlong, 5 Wheat. 184, 5 L. Ed. 64.

"What is called robbery on the land, is piracy if committed at sea. 3 Inst. 113, 1 Com. Dig. 269. And as every robbery on land includes a trespass, so does every piracy at sea. 1 Com. Dig. 268. Consequently, if there be an unlawful taking, it may be piracy or trespass, according to the circumstances of the case, both being equally unlawful, though one a higher species of offense than the other, which cannot alter the intrinsic illegality of the fact common to both, but only occasion a greater or less degree of punishment, proportioned to the nature of the offense." Talbot *v.* Jansen, 3 Dall. 133, 1 L. Ed. 540.

"Sir Charles Hedges, in his charge at the admiralty sessions, in the case of Rex *v.* Dawson (5 State Trials 1), declared in emphatic terms, that 'piracy is only a sea term for robbery, piracy being a robbery committed within the jurisdiction of the admiralty.' Sir Leoline Jenkins, too, on a

like occasion, declared that 'a robbery, when committed upon the sea, is what we call piracy;' and he cited the civil law writers in proof. And it is manifest from the language of Sir William Blackstone (4 Bl. Com. 73), in his comments on piracy, that he considered the common-law definition as distinguishable in no essential respect from that of the law of nations. So that, whether we advert to writers on the common law, or the maritime law, or the law of nations, we shall find that they universally treat of piracy as an offense against the law of nations, and that its true definition by that law is robbery upon the sea." United States *v.* Smith, 5 Wheat. 153, 5 L. Ed. 57.

"Every illegal act or transgression, committed on the high seas, will not amount to piracy. A capture, although not piratical, may be illegal, and of such a nature as to induce the court to award restitution." Talbot *v.* Jansen, 3 Dall. 133, 1 L. Ed. 540.

The slave trade is not piracy, unless made so by the treaties or statutes of the nation to whom the party belongs. The



## II. Power of Congress to Define and Punish Piracies and Felonies on the High Seas.

**A. Constitutional Provision Conferring Power.—Provision Stated.**—The constitution of the United States expressly provides that congress shall have power "to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations."<sup>2</sup>

To define piracies, in the sense of the constitution, is merely to enumerate the crimes which shall constitute piracy; and this may be done, either by a reference to crimes having technical names, and determinate extent, or by enumerating the acts in detail, upon which the punishment is inflicted.<sup>3</sup>

**B. Statutory Enactments in Exercise of Power.**—In pursuance of the power thus conferred by the constitution, congress, by the act of April 30th, 1790, provided for the punishment, as a pirate and felon, of any person guilty of the offenses therein enumerated and described;<sup>4</sup> and by the act of March 3d, 1819 (continued in force by the act of May 15th, 1820), entitled "an act to protect the commerce of the United States, and to punish the crime of piracy," defined piracy by a reference to the law of nations,<sup>5</sup> and provided for its pun-

Antelope, 10 Wheat. 66, 6 L. Ed. 268. See the title **SLAVERY AND INVOLUNTARY SERVITUDE**.

"As no nation can prescribe a rule for others, none can make a law of nations; and this traffic remains lawful to those whose governments have not forbidden it. If it be consistent with the law of nations, it cannot in itself be piracy. It can be made so only by statute; and the obligation of the statute cannot transcend the legislative power of the state which may enact it." The Antelope, 10 Wheat. 66, 6 L. Ed. 268. See the title **SLAVERY AND INVOLUNTARY SERVITUDE**.

**2. Power of congress to define and punish.**—United States *v.* Smith, 5 Wheat. 153, 5 L. Ed. 57; *Crapo v. Kelly*, 16 Wall. 610, 21 L. Ed. 430.

**3. Manner and sufficiency of exercise of power.**—United States *v.* Smith, 5 Wheat. 153, 5 L. Ed. 57.

**4. The 8th section of the act of April 30th, 1790, for the punishment of certain crimes against the United States, is in these words:** "And be it enacted, that if any person or persons shall commit, upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state, murder or robbery, or any other offense, which, if committed within the body of a county, would, by the laws of the United States, be punishable with death; or if any captain or mariner of any ship or other vessel, shall, piratically and feloniously, run away with such ship or vessel, or any goods or merchandise, to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate; or if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defense of his ship, or goods committed to his trust, or shall make a revolt in the ship; every such offender shall be deemed, taken and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death; and the trial of crimes committed on the

high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought." United States *v.* Palmer, 3 Wheat. 610, 4 L. Ed. 471.

A robbery committed on the high seas, although such robbery, if committed on land, would not, by the laws of the United States, be punishable with death, is piracy, under the 8th section of the act of 1790, ch. 36, for the punishment for certain crimes against the United States; and the circuit courts have jurisdiction thereof. United States *v.* Palmer, 3 Wheat. 610, 4 L. Ed. 471.

The crime of robbery, committed by a person who is not a citizen of the United States, on the high seas, on board of a ship belonging exclusively to subjects of a foreign state, is not piracy under the act, and is not punishable in the courts of the United States. United States *v.* Palmer, 3 Wheat. 610, 4 L. Ed. 471.

The act of the 30th of April, 1790, § 8, extends to all persons on board all vessels which throw off their national character by cruising piratically and committing piracy on other vessels. United States *v.* Klinton, 5 Wheat. 144, 5 L. Ed. 55; United States *v.* Furlong, 5 Wheat. 184, 5 L. Ed. 64.

**Such act not repealed by act of March 3, 1819.**—The 8th section of the act of the 30th of April, 1790, for the punishment of certain crimes against the United States, is not repealed by the act of March 3d, 1819, to protect the commerce of the United States, and punish the crime of piracy. United States *v.* Furlong, 5 Wheat. 184, 5 L. Ed. 64.

**5. The act of the 3d of March, 1819, § 5, referring to the law of nations for a definition of the crime of piracy, is a constitutional exercise of the power of congress to define and punish that crime.** United States *v.* Smith, 5 Wheat. 153, 5 L. Ed. 57.

ishment,<sup>6</sup> and also for the capture and condemnation of vessels attempting or committing any piratical aggression, search, restraint, depredation, or seizure upon any vessel.<sup>7</sup> The innocence or ignorance on the part of the owner of a vessel committing the acts prohibited by this statute, will not exempt the vessel from condemnation.<sup>8</sup> Such act extends to foreign vessels committing a piratical aggression; and whatever responsibility the nation may incur towards

6. "The act of congress upon which this indictment is founded provides, 'that if any person or persons whatsoever, shall, upon the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders shall be brought into, or found in, the United States, every such offender or offenders, shall, upon conviction thereof, etc., be punished with death.' The first point made at the bar is, whether this enactment be a constitutional exercise of the authority delegated to congress upon the subject of piracies. The constitution declares that congress shall have power 'to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations.' The argument which has been urged in behalf of the prisoner is that congress is bound to define in terms the offense of piracy, and is not at liberty to leave it to be ascertained by judicial interpretation. If the argument be well founded, it seems admitted by the counsel that it equally applies to the 8th section of the act of congress of 1790, ch. 9, which declares that robbery and murder committed on the high seas shall be deemed piracy; and yet, notwithstanding a series of contested adjudications on this section, no doubt has hitherto been breathed of its conformity to the constitution." *United States v. Smith*, 5 Wheat. 153, 5 L. Ed. 57.

7. **Provision of act of 1819 as to capture and condemnation.**—Under the act of congress of March 3, 1819, ch. 75 (200), to protect the commerce of the United States and punish the crime of piracy, any armed vessel may be seized and brought in, or any vessel the crew whereof may be armed, and which shall have attempted or committed any piratical aggression, search, restraint, depredation, or seizure upon any vessel; and such offending vessel may be condemned and sold, the proceeds whereof to be distributed between the United States and the captors, at the discretion of the court. The word "piratical" in the act is not to be limited in its construction to such acts as by the laws of nations are denominated piracy, but includes such as pirates are in the habit of committing. A piratical aggression, search, restraint, or seizure is as much within the act as a piratical depredation. *Harmony v. United States*, 2 How. 210, 11 L. Ed. 239; *The Marianna Flora*, 11 Wheat. 1, 6 L. Ed. 405; *The Palmyra*, 12 Wheat. 1, 6 L. Ed. 531.

Under the act of March 3d, 1819, it is no matter whether the vessel be armed for

offense or defense, provided she commits the unlawful acts specified. *Harmony v. United States*, 2 How. 210, 11 L. Ed. 239.

To bring a vessel within the act of 1819 it is not necessary that there should be either actual plunder or an intent to plunder. If the act be committed from hatred, or an abuse of power, or a spirit of mischief, it is sufficient. *Harmony v. United States*, 2 How. 210, 11 L. Ed. 239.

**Condemnation of cargo not authorized.**—The condemnation of the cargo of a vessel is not authorized by the act of 1819, prohibiting piratical aggressions; neither does the law of nations require the condemnation of the cargo for petty offenses unless the owner thereof co-operates in and authorizes the unlawful act. An exception exists in the enforcement of beligerent rights. *Harmony v. United States*, 2 How. 210, 11 L. Ed. 239.

**Attack held not a piratical aggression under act.**—An attack made upon a vessel of the United States, by an armed vessel, with the avowed intention of repelling the approach of the former, or of crippling or destroying her, upon a mistaken supposition that she was a piratical cruiser, and without a piratical or felonious intent, or for the purpose of wanton plunder, or malicious destruction of property, is not a piratical aggression, under the act of the 3d of March, 1819, c. 75. Nor is an armed vessel, captured under such circumstances, liable to confiscation, as for a hostile aggression, under the general law of nations. *The Marianna Flora*, 11 Wheat. 1, 6 L. Ed. 405.

8. **Innocence or ignorance of owner of vessel immaterial.**—*Harmony v. United States*, 2 How. 210, 11 L. Ed. 239.

"So in *Harmony v. United States*, 2 How. 210, 11 L. Ed. 239, speaking of a forfeiture incurred by a piratical aggression, Mr. Justice Story remarked (p. 233): 'That the act makes no exception whatsoever, whether the aggression be with or without the co-operation of the owners. The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner.'" *The Barnstable*, 181 U. S. 461, 45 L. Ed. 954.

"The bare permission by the owners of the use of their vessel in hostile or piratical enterprises renders such vessel liable to capture and condemnation equally with her employment in similar offenses under the immediate command of such owners themselves. Vide the case of *Harmony*

foreign states, by executing its provisions, the tribunals of the United States are bound to carry them into effect.<sup>9</sup>

### III. Treaty Provisions as to Piracy.

In treaties with foreign nations—as, for instance, in one of the early treaties with Spain—provision is sometimes made that certain acts shall be punished as piracy. Where this is the case, whatever difficulty there may be, under our municipal institutions, in punishing as pirates, citizens of the United States, who take from a state at war with the power with whom such treaty is made, a commission to cruise against that power, contrary to the articles of the treaty, yet there is no doubt that such acts are to be considered as piratical acts, for all civil purposes, and the offending parties cannot appear and claim in our courts the property thus taken.<sup>10</sup> So, also, provision is sometimes made in treaties between nations, for the disposition, care and restoration of ships and merchandise, which shall be rescued from the hands of any pirates or robbers, on the high seas, and which shall be brought into some port of either nation between whom such treaty exists.<sup>11</sup>

### IV. Pirates Not Entitled to Rights of War and Subject to Capture by Any Nation.

Pirates have not the rights of war, since they act without authority and commission from their sovereign,<sup>12</sup> and may be lawfully captured by the public or

*v. United States*, 2 How. 210, 234, 11 L. Ed. 239; *The United States v. The Schooner Little Charles*, 1 Brok. Rep. 347; *The Palmyra*, 12 Wheat. 1, 14, 6 L. Ed. 531." *Jecker v. Montgomery*, 18 How. 110, 15 L. Ed. 311.

**9. Act extends to foreign vessels.**—*The Marianna Flora*, 11 Wheat. 1, 6 L. Ed. 405.

"A piratical aggression by an armed vessel, sailing under the regular flag of any nation, may be justly subjected to the penalty of confiscation for such a gross breach of the law of nations." *The Marianna Flora*, 11 Wheat. 1, 6 L. Ed. 405.

**10. Provisions in treaty with Spain as to piracy.**—"By the 2d section of the 14th article of the treaty with Spain, 'citizens, subjects or inhabitants' of the United States, are strictly prohibited from taking 'any commission or letter of marque, for arming any ship or vessel, to act as privateers against the subjects of his Catholic majesty, or the property of any of them, from any prince or state with which the said king shall be at war.' And it is further provided, 'that if any person of either nation shall take such commissions or letters of marque, he shall be punished as a pirate.' Whatever difficulties there may exist, under the free institutions of this country, in giving full efficacy to the provisions of this treaty, by punishing such aggressions, as acts of piracy, it is not to be questioned that they are prohibited acts, and intended to be stamped with the character of piracy: and to permit the persons engaged in the open prosecution of such a course of conduct to appear and claim of this court the prizes they have seized, would be to countenance a palpable infraction of a rule of conduct, declared to be the supreme law

of the land." *The Bello Corrunes*, 6 Wheat. 152, 5 L. Ed. 229.

**11. Treaty provisions as to disposition of property rescued from pirates.**—*The Amistad*, 15 Pet. 518, 10 L. Ed. 826. In this case a vessel having on board a number of negroes who were not slaves but kidnapped Africans, who, by the laws of Spain itself, were entitled to their freedom, was captured by such negroes, and by them brought to the coast of the United States, where the vessel and negroes were taken possession of by a United States vessel, and brought into port. It was held that such negroes were not pirates or robbers, and the case was not within the provision of the treaty with Spain providing for the restoration of property rescued from the hands of pirates or robbers.

"If then, these negroes are not slaves, but are kidnapped Africans, who, by the laws of Spain itself, are entitled to their freedom, and were kidnapped and illegally carried to Cuba, and illegally detained and restrained on board the *Amistad*, there is no pretense to say that they are pirates or robbers. We may lament the dreadful acts by which they asserted their liberty, and took possession of the *Amistad*, and endeavored to regain their native country; but they cannot be deemed pirates or robbers, in the sense of the law of nations, or the treaty with Spain, or the laws of Spain itself; at least, so far as those laws have been brought to our knowledge." *The Amistad*, 15 Pet. 518, 10 L. Ed. 826.

**12. Pirates not entitled to rights of war.**—*The Resolution*, 2 Dall. 1, 1 L. Ed. 263. See, generally, the title WAR.



private ships of any nation, in peace or war, for they are *hostes humani generis*.<sup>13</sup>

## V. Effect of Commission as Protection from Punishment for Piratical Acts.

It would seem that although the crew of a vessel may be protected by a commission bona fide received and acted under, from the consequences attaching to the offense of piracy by the general law of nations, though such commission was irregularly issued;<sup>14</sup> yet if the defects in the commission be such as, connected with the insubordination and predatory spirit of the crew, to excite a justly founded suspicion, it is sufficient, under the act of congress of March 3d, 1819, to justify the captors in bringing in the vessel for adjudication, and to exempt them from costs and damages.<sup>15</sup> Whether a person, acting with good faith under a commission from a government whose existence is unknown and unacknowledged, may or may not be guilty of piracy, such commission will not exempt from the charge of piracy, in the case of a seizure made, not *jure belli* but *animo furandi*.<sup>16</sup> A citizen of the United States, fitting out a vessel in a port of the United States, in order to cruise against a power in amity with the United States, is not protected by a commission from a belligerent from punishment for any offense committed against vessels of the United States.<sup>17</sup>

## VI. Prosecution and Punishment.

**A. Jurisdiction.**—The question of jurisdiction of piracies and other felonies committed on the high seas is treated elsewhere in this work.<sup>18</sup>

**B. Statute of Limitations as Bar to Prosecution.**—See the title CRIMINAL LAW, vol. 5, p. 100.

**C. Indictment.**—In an indictment for a piratical murder (under the act of the 30th of April 1790, § 8), it is not necessary that it should allege the prisoner to be a citizen of the United States, nor that the crime was committed on board a vessel belonging to citizens of the United States, but it is sufficient to charge it as committed from on board such a vessel, by a mariner sailing on board such a vessel.<sup>19</sup>

**13. Pirates may be lawfully captured by vessels of any nation.**—The *Marianna Flora*, 11 Wheat. 1, 6 L. Ed. 405.

**14. Effect of commission irregularly issued.**—The *Palmyra*, 12 Wheat. 1, 6 L. Ed. 531.

"Whatever may be the irregularities in the granting of such commissions, or the validity of them, so far as respects the King of Spain, to found an interest of prize in the captors, if the *Palmyra* bona fide received it, and her crew acted bona fide under it, it ought, at all events, in the courts of neutral nations, to be held a complete protection against the imputation of general piracy." The *Palmyra*, 12 Wheat. 1, 6 L. Ed. 531.

**15. The *Palmyra*,** 12 Wheat. 1, 6 L. Ed. 531.

**16. Commission no protection where seizure made *animo furandi*.**—United States *v.* *Klintock*, 5 Wheat. 144, 5 L. Ed. 55.

A commission issued by Aury, as "brigadier of the Mexican republic" (a republic whose existence is unknown and unacknowledged), or as "Generalissimo of the Floridas" (a province in the possession of Spain), will not authorize armed ves-

sels to make captures at sea. Quære, whether a person acting with good faith, under such a commission, may be guilty of piracy? However this may be, in general, under the particular circumstances of this case, showing that the seizure was made, not *jure belli*, but *animo furandi*, the commission was held not to exempt the prisoner from the charge of piracy. United States *v.* *Klintock*, 5 Wheat. 144, 5 L. Ed. 55.

**17. Citizen of United States not protected by foreign commission in case of offense against United States vessels.**—United States *v.* *Furlong*, 5 Wheat. 184, 5 L. Ed. 64.

**18. Jurisdiction of piracies and felonies on high seas.**—See the title CRIMINAL LAW, vol. 5, p. 81.

"Prima facie all piracies and trespassers committed against the general law of nations are inquirable, and may be proceeded against, in any nation where no special exemption can be maintained, either by the general law of nations, or by some treaty which forbids or restrains it." Talbot *v.* *Jansen*, 3 Dall. 133, 1 L. Ed. 540.

**19. Indictment for piratical murder.**—United States *v.* *Furlong*, 5 Wheat. 184, 5 L. Ed. 64.

**D. Evidence.**—On an indictment for piracy, the jury may find the national character of a vessel upon such evidence as will satisfy their minds, without the certificate of registry, or other documentary evidence, being produced, and without proof of their having been seen on board.<sup>20</sup> The same testimony which would be sufficient to prove that a vessel or person is in the service of an acknowledged state, is admissible to prove that they are in the service of a newly erected government. Its seal cannot be allowed to prove itself, but may be proved by such testimony as the nature of the case admits; and the fact that a vessel or person is in the service of such government may be established, otherwise should it be impracticable to prove the seal.<sup>21</sup>

**E. Punishment.**—The offense of piracy is punishable, under the United States statutes by death.<sup>22</sup> As to the condemnation and forfeiture of vessels for piratical aggressions, see ante, "Statutory Enactments in Exercise of Power," II, B.

## VII. Misconduct of Piratical Captors as Affecting Property of Original Owners.

Upon a piratical capture, the property of the original owners cannot be forfeited for the misconduct of the captors, in violating the municipal laws of the country where the vessel seized by them is carried.<sup>23</sup>

**PLACE.**—See the title CRIMINAL LAW, vol. 5, p. 76. See note 1.

**PLACE OF TRIAL.**—See the title VENUE.

**PLACERS.**—See the title MINES AND MINERALS, vol. 8, pp. 367, 396. See note 2.

**PLAIN WOOLEN GOODS.**—See note 3.

**PLANK ROADS.**—Plank roads are as much highways as railroads, and if authorized to be constructed by the legislature, they are public improvements.<sup>4</sup>

**PLANT CANE.**—See note 5.

20. Sufficiency of evidence as to national character of vessel.—United States v. Furlong, 5 Wheat. 184, 5 L. Ed. 64.

21. Sufficiency of evidence to prove that person is in service of newly erected government.—United States v. Palmer, 3 Wheat. 610, 4 L. Ed. 471.

22. Offense of piracy punishable by death.—United States v. Palmer, 3 Wheat. 610, 4 L. Ed. 471; United States v. Smith, 5 Wheat. 153, 5 L. Ed. 57.

23. Property of original owners not forfeited by misconduct of piratical captors.—The Josefa Segunda, 5 Wheat. 338, 5 L. Ed. 104.

As to the rule where the capture is made by a regularly commissioned captor, see the title PRIZE.

1. Place.—In *Cliquot's Champagne*, 3 Wall. 114, 142, 18 L. Ed. 116, it was held that the term place, as used in the tariff act of 1863, did not mean any locality more limited than the country where the goods are bought or manufactured. See, generally, the title REVENUE LAWS.

Place of business.—In *Bank v. Lawrence*, 1 Pet. 578, 582, 7 L. Ed. 269, it is said: "But the evidence does not show that the defendant had a place of business in the city of Washington, according to the usual commercial understanding of a place of business. There was no public

notoriety of any description given to it as such. No open or public business of any kind carried on, but merely occasional employment there, two or three times a week, in a house occupied by another person; and the defendant only engaged in settling up his old business."

2. Placers.—In *Clipper Mining Co. v. Eli Mining, etc., Co.*, 194 U. S. 220, 228, 48 L. Ed. 944, it is said: "A placer location is not a location of lodes or veins underneath the surface, but is simply a claim of a tract or parcel of ground for the sake of loose deposits of mineral upon or near the surface."

In *Northern Pacific R. Co. v. Soderberg*, 188 U. S. 526, 532, 47 L. Ed. 575, it is said: "Placers are merely superficial deposits, occupying the beds of ancient rivers or valleys, washed down from some vein or lode. *United States v. Iron Silver Mining Co.*, 128 U. S. 673, 32 L. Ed. 571."

3. Plain woolen goods.—See *Newman v. Arthur*, 109 U. S. 132, 27 L. Ed. 883. And see, generally, the title REVENUE LAWS.

4. *Mitchell v. Burlington*, 4 Wall. 270, 274, 18 L. Ed. 350. See, also, the title MUNICIPAL, COUNTY, STATE AND FEDERAL AID, vol. 8, p. 622.

5. Plant cane.—See *Viterbo v. Friedlander*, 120 U. S. 707, 734, 30 L. Ed. 776.

**PLANTING.**—"Planting means, in 'oysterman's phraseology,' as counsel say, 'depositing with the intent that the oysters shall remain until they are fattened.'"<sup>1</sup>

**PLATE GLASS INSURANCE.**—See the title *INSURANCE*, vol. 7, pp. 198, 199.

**PLATS.**—See the titles *BOUNDARIES*, vol. 3, pp. 468, 474, 491; *DEDICATION*, vol. 5, p. 242; *DOCUMENTARY EVIDENCE*, vol. 5, pp. 444, 469; *PUBLIC LANDS*.

1. *McCready v. Virginia*, 94 U. S. 391, 397, 24 L. Ed. 248. See, generally references under *OYSTERS*, vol. 8, p. 1018.



# PLEADING.

BY S. BLAIR FISHER.

- I. Scope of Title, 422.**
- II. Definition, Purpose and Necessity of Pleadings, 422.**
- III. Pleadings in Federal Courts, 422.**
- IV. Form, Requisites and Sufficiency of Pleadings Generally, 422.**
  - A. Necessity for Written Pleadings, 422.
  - B. Designation of Parties, 423.
  - C. Statement of Facts Constituting Cause of Action or Ground of Defense, 423.
    - 1. Necessity, 423.
      - a. General Rule Stated and Construed, 423.
        - (1) Rule Stated, 423.
        - (2) Facts and Not Evidence to Be Plead, 423.
        - (3) Facts and Not Conclusions of Law to Be Plead, 423.
        - (4) Allegations as to Time, Place, Quantity, Value, etc., 424.
        - (5) Necessity for Negating Exception in Granting or Enacting Clause of Conveyance or Statute, 424.
      - b. Matters Which Need Not Be Plead, 424.
      - c. Effect of Failure to Traverse Material Allegations in Adversary's Pleading, 425.
    - 2. Manner and Sufficiency, 425.
      - a. General Rules, 425.
        - (1) Must Be Direct and Positive, 425.
        - (2) Must Be Definite and Certain, 425.
        - (3) Pleading Facts According to Legal Effect, 425.
      - b. Under Codes and Practice Acts, 425.
    - 3. Departure, 426.
    - 4. Duplicity, 426.
    - 5. Misjoinder of Counts and Causes, 426.
    - 6. Multifariousness, 426.
    - 7. Surplusage, 426.
  - D. Prayer for Relief, 427.
  - E. Conclusion, 427.
  - F. Verification, 427.
    - 1. Necessity, 427.
    - 2. By Whom Verified, 428.
    - 3. Manner and Sufficiency, 428.
- V. Filing Pleadings, 428.**
  - A. Time and Maner, 428.
  - B. Filing New Pleadings When Original Lost, 428.
- VI. Interpretation and Construction of Pleadings, 429.**
- VII. Raising, Waiving and Curing Objections to Pleadings, 429.**
  - A. Manner of Raising, 429.
    - 1. Demurrer, 429.
    - 2. Motion to Strike Out, 429.
    - 3. Motion to Make More Definite and Certain, 431.
    - 4. Motion to Compel Election between Inconsistent Pleas, 431.
    - 5. Motion to Compel Separate Statement of Causes of Action, 431.

6. Defects as Grounds for Objection to Introduction of Evidence, 431.
7. Defects as Grounds for Arrest of Judgment, 431.
8. Defects as Grounds for Judgment Non Obstante Veredicto, 431.
9. Objections in Appellate Court, 431.

B. Waiver of Objections, 431.

C. Defects Cured by Verdict, 432.

# **VIII. Amendment of Pleadings, 432.**

## **IX. Supplemental Pleadings, 432.**

## **X. Repleader, 432.**

## **XI. Profert and Oyer, 432.**

## **XII. Particular Pleadings, 432.**

A. Declaration, Petition or Complaint, 432.

1. Declaration at Common Law, 432.

a. Definition and Purpose, 432.

b. Form, Requisites and Sufficiency, 432.

(1) Inducement, 432.

(2) Statement of Facts Constituting Cause of Action, 433.

(a) Necessity, 433.

(b) Manner and Sufficiency, 433.

(c) Necessity for Filing with Declaration Copy of Instrument Sued on, 434.

(3) Conclusion, 434.

c. Amendment, 434.

d. Filing, 434.

2. Declaration, Petition or Complaint under Codes and Practice Acts, 434.

a. In General, 434.

b. Form, Requisites and Sufficiency, 434.

(1) Designation of Court and County Where Action Brought, 434.

(2) Names and Capacity of Parties, 434.

(3) Statement of Facts Constituting Cause of Action, 435.

(a) Necessity, 435.

(b) Manner and Sufficiency, 435.

(c) Separate Statement and Numbering of Causes of Action, 435.

(4) Demand for Relief, 436.

(5) Verification, 436.

c. Amendment, 436.

B. Bill in Equity, 436.

C. Cross Bill, 436.

D. Demurrer, 436.

E. Plea, 436.

1. In Equity, 436.

2. At Common Law, 436.

a. Office of Plea, 436.

b. Classification of Pleas, 436.

c. Rules Applicable to Pleas Generally, 436.

(1) Filing and Withdrawing Pleas, 436.

(2) Right to Plead Several Matters, 437.

(a) In General, 437.

(b) Right to Plead and Demur at the Same Time, 437.

(c) Right to Plead in Abatement and Bar at Same Time, 438.

- (3) Requisites and Sufficiency of Pleas to the Action, 438.
    - (a) Must Be Complete Answer to Declaration, 438.
    - (b) Manner and Sufficiency of Alleging Matters Relied on by Way of Defense, 438.
    - (c) Conclusion, 439.
    - (4) Objections to Plea, 440.
    - (5) Effect of Plea as Aiding Defects in Declaration, 440.
  - d. Particular Pleas, 441.
    - (1) Pleas in Abatement, 441.
    - (2) Pleas in Bar, 441.
      - (a) General Issue, 441.
        - aa. Definition, Nature and Effect of Such Pleas Generally, 441.
          - (aa) Definition and Nature, 441.
          - (bb) Operation and Effect, 441.
        - bb. Evidence Admissible under Plea, 441.
        - cc. Forms of Plea in Particular Actions, 441.
          - (aa) Non Assumpsit, 441.
          - (bb) Non Cepit, 441.
          - (cc) Non Detinet, 442.
          - (dd) Nil Debet, 442.
          - (ee) Non Est Factum, 442.
          - (ff) Not Guilty, 442.
          - (gg) Nul Tiel Record, 442.
        - dd. General Issue with Notice of Special Defense, 442.
      - (b) Special Pleas, 443.
        - aa. General Rules as to Nature, Propriety and Sufficiency, 443.
        - bb. Defenses Properly Made by Special Plea, 444.
          - (aa) Accord and Satisfaction, 444.
          - (bb) Autrefois, Acquit and Convict, 444.
          - (cc) Former Recovery, 444.
          - (dd) Justification, 444.
          - (ee) Ne Unques Administrator, 444.
          - (ff) Non Damnificatus, 444.
          - (gg) Payment, 444.
          - (hh) Plene Administravit, 444.
          - (ii) Release, 445.
          - (jj) Set-Off, 445.
          - (kk) Statute of Limitations, 445.
          - (ll) Usage and Custom, 445.
          - (mm) Usury, 445.
  - e. Joint Pleas, 445.
- F. Answer, 445.
  - 1. In Equity, 445.
  - 2. Under Codes and Practice Acts, 445.
    - a. Nature and Effect, 445.
    - b. Form, Requisites and Sufficiency, 445.
      - (1) General or Specific Denial, 445.
        - (a) Necessity, 445.
        - (b) Form and Sufficiency of Denial, 445.
        - (c) Matters Admissible under General Denial, 447.
      - (2) Statement of New Matter Constituting Defense or Counterclaim, 447.
        - (a) Necessity, 447.
        - (b) Right to Plead Several Defenses, 448.



- (c) Form and Sufficiency of Statement, 448.
  - c. Verification, 448.
  - d. Objections to Answer, 448.
  - e. Amendment of Answers, 448.
- G. Replication, 448.
  - 1. Definition and Nature, 448.
  - 2. Necessity, 449.
    - a. At Common Law, 449.
    - b. Under Codes and Practice Acts, 449.
  - 3. Filing, Withdrawal and Substitution, 449.
    - a. Time and Leave to File, 449.
    - b. Withdrawal and Substitution, 450.
  - 4. Form, Requisites and Sufficiency, 450.
    - a. Must Contain Full and Complete Answer to Plea in Bar, 450.
    - b. Must Take Issue on Material Allegation of Plea, 450.
    - c. Can Traverse Only Matters of Fact, 450.
    - d. Must Be Direct and Positive, 451.
    - e. Must Plead Facts and Not Conclusions of Law, 451.
    - f. Must Not Depart from Declaration or Complaint, 451.
    - g. Must Not Be Double, 452.
  - 5. Operation and Effect, 452.
    - a. Operation as Abandonment of Demurrer, 452.
    - b. Effect as Aiding Defective Declaration, 452.
    - c. Effect as Aiding Defective Plea, 452.
  - 6. Raising, Waiving and Curing Objections to Replication, 452.
- H. Rejoinder and Subsequent Pleadings, 453.
  - 1. Nature and Propriety, 453.
  - 2. Requisites of Rejoinder, 453.
  - 3. Effect of Filing Amended Rejoinder, 454.

**XIII. Affidavit of Merits or Defense, 454.**

- A. Right of Court to Require, 454.
- B. Purpose of Requirement, 454.
- C. Requisites and Sufficiency of Affidavit, 455.
- D. Facts Stated in Affidavit Accepted as True, 455.

**XIV. Affidavits Attacking Validity of Instrument Sued on, or Introduced in Evidence, 455.**

**XV. Issues and Proof, 455.**

- A. Definition, Nature and Formation of Issues, 455.
  - 1. In General, 455.
  - 2. Similiter, 456.
- B. Burden of Proof, 456.
- C. Correspondence of Allegata and Probata, 456.

**XVI. Admissions in Pleadings, and Pleadings as Evidence, 456.**

**CROSS REFERENCES.**

See the titles ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 30; ACTIONS, vol. 1, p. 110; ADMIRALTY, vol. 1, p. 163; ALTERATION OF INSTRUMENTS, vol. 1, p. 272; AMENDMENTS, vol. 1, p. 290; APPEAL AND ERROR, vol. 2, pp. 113, 337, 378; APPEARANCES, vol. 2, p. 429; BILL OF PARTICULARS, vol. 3, p. 243; CONTRACTS, vol. 4, pp. 593, 594; COURTS, vol. 4, pp. 991, 1021, 1045, 1139; CRIMINAL LAW, vol. 5, pp. 105, 107; DAMAGES, vol. 5, p. 194; DEMURRERS, vol. 5, p. 293; DISMISSAL, DISCONTINUANCE AND NONSUIT, vol. 5, p. 356; EQUITY, vol. 5, p. 842; ESTOPPEL, vol. 5, p. 985; FRAUD AND DECEIT, vol. 6, p. 434; FRAUDS, STATUTE OF, vol. 6, p. 470; FRAUDULENT AND VOLUNTARY CONVEYANCES, vol. 6, p. 522; ILLEGAL CONTRACTS, vol. 6, p. 755; INDICTMENTS, INFORMATIONS, PRESENTMENTS AND

COMPLAINTS, vol. 6, p. 961; INJUNCTIONS, vol. 6, p. 1054; JUDGMENTS AND DECREES, vol. 7, pp. 611, 637, 663; LEGAL CONCLUSIONS, vol. 7, p. 849; MANDATE AND PROCEEDINGS THEREON, vol. 8, p. 97; MOTIONS AND SUMMARY PROCEEDINGS, vol. 8, p. 528; MULTIFARIOUSNESS, vol. 8, p. 532; PARTIES, ante, p. 34; PAYMENT, ante, p. 319; PRESUMPTIONS AND BURDEN OF PROOF; PRODUCTION OF DOCUMENTS; PROFERT AND OYER; RELEASE; SET-OFF, RECOURPMENT AND COUNTERCLAIM; STATUTES; TENDER; TRIAL; USAGES AND CUSTOMS; USURY; VARIANCE; VERDICT.

As to pleadings in particular actions or proceedings, by and against particular persons, etc., see the specific titles.

### I. Scope of Title.

The purpose of this title is merely to set out the general rules relating to pleadings at common law and under the codes and practice acts; the necessity for pleadings, time and place of filing, their form, requisites and sufficiency, and the raising, waiving and curing of objections to pleadings. While it is sought to apply these general rules to the declaration, petition or complaint, plea or answer, replication and subsequent pleadings, yet no attempt is made at an exhaustive application of these principles to the pleadings in specific actions. This will be left to the appropriate titles in this work. As to pleadings in equity, see the title *EQUITY*, vol. 5, p. 842, et seq.

### II. Definition, Purpose and Necessity of Pleadings.

**Definition and Purpose.**—Pleadings are the allegations made by the parties, to a civil or criminal case, for the purpose of definitely presenting the issue to be tried and determined between them.<sup>1</sup> The end proposed is to bring the matter of litigation to one or more points, simple and unambiguous.<sup>2</sup>

**Necessity.**—As to the general rule that a court can consider only what is put in issue by the pleadings, and that a judgment or decree must be responsive to the issues raised by the pleadings, see the titles *EQUITY*, vol. 5, p. 842; *JUDGMENTS AND DECREES*, vol. 7, p. 569. As to the right to take judgment or decree for want of, or insufficient pleas, see the title *JUDGMENTS AND DECREES*, vol. 7, pp. 559, 657, 663. As to the necessity for particular pleadings, see the specific sections in this title.

### III. Pleadings in Federal Courts.

As to rules and forms of pleading in the court of claims, see the titles *COURTS*, vol. 4, p. 1045; *UNITED STATES*.

As to the effect of the practice conformity act upon pleadings in federal courts, see the titles *AMENDMENTS*, vol. 1, p. 298; *COURTS*, vol. 4, p. 1139, et seq.; *EQUITY*, vol. 5, pp. 812, 842.

As to the form, requisites, and sufficiency of particular pleadings in the federal courts, see the appropriate sections in this title, and see, also, the specific titles throughout this work.

### IV. Form, Requisites and Sufficiency of Pleadings Generally.

**A. Necessity for Written Pleadings.**—Pleadings should be in writing, at law<sup>3</sup>

**1. Pleadings defined.**—*Tucker v. United States*, 151 U. S. 164, 38 L. Ed. 112. And see *McFaul v. Ramsey*, 20 How. 523, 15 L. Ed. 1010.

The office of pleading is to inform the court and the parties of the facts in issue; the court, that it may declare the law, and the parties, that they may know what to meet by their proof. *Hill v. Mendenhall*, 21 Wall. 453, 22 L. Ed. 616.

"The object of pleading is to concentrate the controversy upon the questions of fact and of law which should control

the result." *United States v. Gilmore*, 7 Wall. 491, 19 L. Ed. 282.

A motion, although reduced to writing, is not a pleading, and does not require a written answer. *Brownfield v. South Carolina*, 189 U. S. 426, 47 L. Ed. 882. See the title *MOTIONS AND SUMMARY PROCEEDINGS*, vol. 8, p. 528.

**2.** *McFaul v. Ramsey*, 20 How. 523, 15 L. Ed. 1010. See post, "Issues and Proof," XV.

**3. Necessity for written pleadings.**—"If the right of deciding absolutely and finally

as in equity.<sup>4</sup>

**B. Designation of Parties.**—It has been held to be a loose and improper method of impleading a party, to use only the initials of his Christian name, since initials are no legal part of a name.<sup>5</sup> Where, however, no advantage of this defect was taken in the court below, it will not be considered on appeal.<sup>6</sup>

**C. Statement of Facts Constituting Cause of Action or Ground of Defense**—1. **NECESSITY**—a. *General Rule Stated and Construed*—(1) *Rule Stated*.—In accordance with their purpose of bringing the matter in litigation to an issue, pleadings should clearly, distinctly, and succinctly state the nature of the wrong complained of, the remedy sought, and the defense set up;<sup>7</sup> and express provisions to this effect are found in most, if not all, of the various codes and practice acts.<sup>8</sup> Though the same strictness in pleading is not required in civil as in criminal actions, in neither can that which is essential to be proved be omitted to be averred.<sup>9</sup>

(2) *Facts and Not Evidence to Be Plead*ed.—Pleadings should state the ultimate facts to be proven, and not matters of evidence,<sup>10</sup> or what have been sometimes called probative facts, which go to establish the ultimate facts.<sup>11</sup>

(3) *Facts and Not Conclusions of Law to Be Plead*ed.—The office of pleading is to state facts, not conclusions of law.<sup>12</sup> It is the duty of the court to de-

all matters in controversy between suitors were committed to a single tribunal, it might be left to collect the nature of the wrong complained of, and the remedy sought, from the allegations of the party ore tenus, or in any other manner it might choose to adopt. But the common law, which wisely commits the decision of questions of law to a court supposed to be learned in the law, and the decision of the facts to a jury, necessarily requires that the controversy before it is submitted to the tribunal having jurisdiction of it, should be reduced to one or more integral propositions of law or fact; hence it is necessary that the parties should frame the allegations which they respectively make in support of their demand or defense into certain writings called pleadings." *McFaul v. Ramsey*, 20 How. 523, 15 L. Ed. 1010.

4. See the title **EQUITY**, vol. 5, p. 843.

5. **Description of party by initials of Christian name improper.**—*Monroe Cattle Co. v. Becker*, 147 U. S. 47, 37 L. Ed. 72. See, also, *Walton v. Marietta Chair Co.*, 157 U. S. 342, 39 L. Ed. 725. See the title, **NAMES**, vol. 8, p. 795.

6. **Objection not first available on appeal.**—*Monroe Cattle Co. v. Becker*, 147 U. S. 47, 37 L. Ed. 72. See the title **APPEAL AND ERROR**, vol. 2, p. 113.

7. **Statement as to nature of wrong, remedy sought, and defense set up.**—*McFaul v. Ramsey*, 20 How. 523, 15 L. Ed. 1010.

The cause of action comprises every fact a plaintiff is obliged to prove in order to obtain judgment, or, conversely, every fact the defendant would have the right to traverse. *Bradford v. Southern R. Co.*, 195 U. S. 243, 49 L. Ed. 178; *Chesapeake, etc., R. Co. v. Dixon*, 179 U. S. 131, 45 L. Ed. 121.

As to demurrers for failure to state

cause of action or defense, see the title **DEMURRERS**, vol. 5, p. 300.

8. **Requirements of codes as to such statement.**—See post, "Necessity," XII, A, 2, b, (3), (a); "Form, Requisites and Sufficiency," XII, F, 2, b.

9. **Averment of all matters essential to be proved.**—Per Field, J., dissenting, in *Friedenstien v. United States*, 125 U. S. 224, 31 L. Ed. 736. See post, "Necessity," XII, A, 1, b, (2), (a).

10. **Facts and not matters of evidence to be pleaded.—*Ely v. New Mexico, etc., R. Co.*, 129 U. S. 291, 32 L. Ed. 688; *McAllister v. Kuhn*, 96 U. S. 87, 24 L. Ed. 615; *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898; *Parley's Park Silver Min. Co. v. Kerr*, 130 U. S. 256, 32 L. Ed. 906.**

"It is a cardinal rule of pleading \* \* \* 'that evidence shall never be pleaded, for it only tends to prove matter of fact; and therefore the matter of fact shall be pleaded.' Or, as the rule is sometimes stated, pleadings must not be argumentative." Curtis, J., dissenting. *Scott v. Sandford*, 19 How. 393, 15 L. Ed. 691.

11. *Ely v. New Mexico, etc., R. Co.*, 129 U. S. 291, 32 L. Ed. 688.

12. **Facts and not conclusions of law to be stated.**—*Gold-Washing, etc., Co. v. Keyes*, 96 U. S. 199, 24 L. Ed. 656; *Alexander v. Bryan*, 110 U. S. 414, 28 L. Ed. 195; *Alabama v. Burr*, 115 U. S. 413, 29 L. Ed. 435; *Chicot County v. Sherwood*, 148 U. S. 529, 37 L. Ed. 546; *Ritchie v. McMullen*, 159 U. S. 235, 40 L. Ed. 133; *Aberdeen Bank v. Chehalis County*, 166 U. S. 440, 41 L. Ed. 1069; *Chapman v. Smith*, 16 How. 114, 14 L. Ed. 868; *Braun v. Sauerwein*, 10 Wall. 218, 19 L. Ed. 895; *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 20 L. Ed. 557. And see *Kennedy v. McKee*, 142 U. S. 606, 35 L. Ed. 1131; *Cragin v. Lovell*, 109 U. S. 194, 27 L. Ed. 903.



clare the conclusions, and of the parties to state the premises.<sup>13</sup>

(4) *Allegations as to Time, Place, Quantity, Value, etc.*—It is a general rule, in declaring as to time, that it must be laid after the cause of action accrues.<sup>14</sup>

**Allegations to time, quantity, value, etc., need not be proved with precision** but a large departure from the same is allowable.<sup>15</sup> The same rule also applies to allegations of place.<sup>16</sup>

**As to rejection of description of place as surplusage**, see post, "Surplusage," IV, C, 7.

(5) *Necessity for Negating Exception in Granting or Enacting Clause of Conveyance or Statute.*—There is a general rule, applicable both to conveyances and statutes, that where there is an exception in the general granting or enacting clause, the party relying upon such general clause must in pleading state the general clause, together with the exception, and must also show by the testimony that he is not within the exception.<sup>17</sup>

b. *Matters Which Need Not Be Plead.*—It is not necessary for pleadings to state matter which would come more properly from the other side.<sup>18</sup> Neither in criminal nor in civil pleading is it required to anticipate or negative a defense.<sup>19</sup> That which is patent to any one of average understanding need not

See the title **LEGAL CONCLUSIONS**, vol. 7, p. 849.

13. *Gold-Washing, etc., Co. v. Keyes*, 96 U. S. 199, 24 L. Ed. 656. And see *Hopper v. Covington*, 118 U. S. 148, 30 L. Ed. 190; *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 20 L. Ed. 557. For applications of this rule to particular pleadings, see the appropriate sections in this title.

14. **General rule in declaring as to time.**—*Renner v. Bank*, 9 Wheat. 581, 6 L. Ed. 166.

15. **Allegations as to time, quantity, value, etc.**—*United States v. Le Baron*, 4 Wall. 642, 18 L. Ed. 309; *Grayson v. Lynch*, 163 U. S. 468, 41 L. Ed. 230.

**Presumptions on appeal as to defective statements as to time.**—See the title **APPEAL AND ERROR**, vol. 2, p. 329.

16. **Allegations as to place.**—*Grayson v. Lynch*, 163 U. S. 468, 41 L. Ed. 230. See the title **VARIANCE**.

17. **Necessity for negating exception in conveyance and statutes.**—*Maxwell Land Grant Co. v. Dawson*, 151 U. S. 586, 38 L. Ed. 279. See the titles **DEEDS**, vol. 5, p. 275; **STATUTES**.

As to the necessity for indictments to aver that the defendant is not within any of the exceptions contained in the enacting clause of a statute, see the title **INDICTMENTS, INFORMATIONS, PRESENTMENTS AND COMPLAINTS**, vol. 6, pp. 993, 994.

18. **Matter coming more properly from other side.**—"Mr. Stephens, in his *Treatise on Pleading* 350, under the head that, 'it is not necessary to state matter which would come more properly from the other side,' says, 'this, which is the ordinary form of the rule, does not fully express its meaning. The meaning is, that it is not necessary to anticipate the answer of the adversary; which, according to Hale, C. J., 'is like leaping before one comes to the stile.' It is sufficient that each plead-

ing should in itself contain a good *prima facie* case, without reference to possible objections not yet urged.' 'Thus in pleading a devise of land by force of the statute of wills, 32 Hen. 8, c. 1, it is sufficient to allege that such an one was seized of the land in fee, and devised it by his last will, in writing, without alleging that such deviser was of full age. For though the statute provides that wills made by femes covert, or persons within age, etc., shall not be taken to be effectual, yet if the deviser were within age, it is for the other party to show this in his answer, and it need not be denied by anticipation.' 'So where an action of debt was brought upon the statute 21 Hen. 6, against the bailiff of a town for not returning a burgess of that town for the last parliament (the words of the statute being that the sheriff shall send his precept to the mayor, and if there be no mayor, then to the bailiff), the plaintiff declared that the sheriff had made his precept unto the bailiff, without averring that there was no mayor. And after verdict for the plaintiff, this was moved in arrest of judgment. But the court was of opinion clearly, that the declaration was good; for we shall not intend that there was a mayor, except it be showed; if there were one, it should come more properly on the other side.' 'Where the matter is such its affirmation or denial is essential to the apparent or *prima facie* right of the party pleading, there it ought to be affirmed or denied.'" Dissenting opinion of McLean, J., in *United States v. Linn*, 1 How. 104, 11 L. Ed. 64.

19. **Unnecessary to anticipate defense.**—*Evans v. United States*, 153 U. S. 584, 38 L. Ed. 830.

Where suit is brought on a contract made by a city, where the laws regulating it require the consent of two-thirds of its electors to validate debts for bor-

be particularly averred.<sup>20</sup> As to pleading matters of which the court will take judicial notice, see the title JUDICIAL NOTICE, vol. 7, pp. 674, 696, 700. As to the rule that a declaration need not contain any averments which it is not necessary to prove, see post, "Necessity," XII, A, 1, b, (2), (a).

c. *Effect of Failure to Traverse Material Allegations in Adversary's Pleading.*—It is a rule in pleading, that where, in the pleading of one party, there is a material averment which is traversable, but which is not traversed by the other party it is admitted;<sup>21</sup> and it is a usual provision of the various codes that every material allegation in a pleading not controverted by a subsequent pleading, shall, for the purposes of the action, be deemed true.<sup>22</sup>

2. MANNER AND SUFFICIENCY—*a. General Rules*—(1) *Must Be Direct and Positive.*—Pleadings should set out the facts relied on positively and in direct terms,<sup>23</sup> and should not leave them to be inferred, arguendo, or upon conjectures.<sup>24</sup>

As to answer held bad as amounting to negative pregnant, see post, "Form and Sufficiency of Denial," XII, F, 2, b, (1), (b).

(2) *Must Be Definite and Certain.*—*In General.*—Pleadings should be definite and not argumentative, vague or uncertain.<sup>25</sup>

As to raising, waiving and curing objections for indefiniteness or uncertainty, see post, "Raising, Waiving and Curing Objections to Pleadings," VII.

As to the degree of certainty requisite, it would seem to be sufficient if the pleading apprise the opposite party of what he may expect to meet thereunder.<sup>26</sup> In equity pleadings general certainty is usually deemed sufficient.<sup>27</sup>

(3) *Pleading Facts According to Legal Effect.*—By the elementary rules of pleading, facts may be pleaded according to their legal effects,<sup>28</sup> without setting forth particulars that led to it.<sup>29</sup>

b. *Under Codes and Practice Acts.*—The effect of the various codes is to do away with the different forms of action existing at common law, and to provide that there shall be but one form of civil action for the enforcement or protection of private rights and the redress or prevention of private

rowed money, such consent need not be averred on the plaintiff's part. If with such sanction the debt would be obligatory, the sanction will, primarily, be presumed. Its nonexistence, if it does not exist, is matter of defense, to be shown by the defendant. *Gelpcke v. Dubuque*, 1 Wall. 221, 17 L. Ed. 531.

20. *Matters patent to persons of average understanding.*—*Walla Walla City v. Walla Walla Water Co.*, 172 U. S. 1, 43 L. Ed. 341.

21. *Effect of failure to traverse material averment in adversary's pleading.*—*Toland v. Sprague*, 12 Pet. 300, 9 L. Ed. 1093.

22. *Halferty v. Wilmering*, 112 U. S. 713, 28 L. Ed. 858; *Robertson v. Perkins*, 129 U. S. 233, 32 L. Ed. 686.

23. *Pleadings should be direct and positive.*—*United States v. Braley*, 10 Pet. 343, 9 L. Ed. 448; *Ex parte Wall*, 107 U. S. 265, 27 L. Ed. 552.

24. *United States v. Bradley*, 10 Pet. 343, 9 L. Ed. 448. And see *Murphy v. Ramsey*, 114 U. S. 15, 29 L. Ed. 47.

25. *Pleadings must be definite and certain.*—*Randall v. Howard*, 2 Black 585, 17 L. Ed. 269; *Minor v. Mechanics' Bank*, 1 Pet. 46, 7 L. Ed. 47; *McCarty v. Roots*, 21 How. 432, 16 L. Ed. 162; *Burley v. German-American Bank*, 111 U. S. 216, 28

L. Ed. 406. And see *Aberdeen Bank v. Chehalis County*, 166 U. S. 440, 41 L. Ed. 1069; *Bank v. Seattle*, 166 U. S. 463, 41 L. Ed. 1079.

26. *Degree of certainty requisite.*—*Wise v. Allis*, 9 Wall. 737, 19 L. Ed. 784.

The strict doctrines relative to averments in pleading have been applied to special pleas in bar, of tender, and some others, of a peculiar character and depending upon their own particular reasons. *Carroll v. Peake*, 1 Pet. 18, 7 L. Ed. 34.

27. See the title EQUITY, vol. 5, p. 850.

28. *Pleading facts according to legal effect.*—*Sullivan v. Iron Silver Min. Co.*, 109 U. S. 550, 27 L. Ed. 1028; *Bank v. Gutschlick*, 14 Pet. 19, 10 L. Ed. 335; *Struthers v. Drexel*, 122 U. S. 487, 30 L. Ed. 1216.

"A party may in some cases declare according to the legal intentment of an instrument." *Dugan v. United States*, 3 Wheat. 172, 4 L. Ed. 362.

29. *Sullivan v. Iron Silver Min. Co.*, 109 U. S. 550, 27 L. Ed. 1028, citing *Bac. Ab. Pleas and Pleading*, I, 7; *Co. Lit.* 303b.

"We find nothing in the statutes of Colorado which changes the rules of the common law in this respect. See *Colorado Code of Civil Procedure of 1877*, §§ 48, 49, 52, 61." *Sullivan v. Iron Silver Min. Co.*, 109 U. S. 550, 27 L. Ed. 1028.



wrongs;<sup>30</sup> and under such codes it will be sufficient if the statement of facts constituting the cause of action or grounds of defense are expressed in plain, ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.<sup>31</sup>

3. **DEPARTURE.**—A departure in pleading is said to be when a party quits or departs from the case or defense which he has first made and has recourse to another;<sup>32</sup> it is when his replication<sup>33</sup> or rejoinder<sup>34</sup> contains matter not pursuant to the declaration or plea, and which does not support and fortify it.<sup>35</sup> A departure may be either in the substance of the action or defense or the law on which it is founded.<sup>36</sup> So also where the original petition is based upon a general law, and the amended petition asserts a right to recover in derogation of that law in consequence of a statute, this is a departure in pleading.<sup>37</sup>

4. **DUPPLICITY.**—Duplicity is the technical fault, in pleading, of uniting two or more causes of action in one count in a writ, or two or more grounds of defense in one plea, or two or more breaches in a replication.<sup>38</sup> As to duplicity in particular pleadings, see the appropriate section in this title.

5. **MISJOINDER OF COUNTS AND CAUSES.**—See the title **ACTIONS**, vol. 1, p. 111; **DEMURRERS**, vol. 5, p. 304.

6. **MULTIFARIOUSNESS.**—See the title **MULTIFARIOUSNESS**, vol. 8, p. 532.

7. **SURPLUSAGE.**—**Definition.**—Surplusage in pleading is the allegation of matter wholly foreign and impertinent to the cause. All matter beyond the circumstances necessary to constitute the action.<sup>39</sup>

30. **Common-law forms of action abolished by codes.**—*Ely v. New Mexico*, etc., R. Co., 129 U. S. 291, 32 L. Ed. 688; *Hardy v. Johnson*, 1 Wall. 371, 17 L. Ed. 502; *Christy v. Scott*, 14 How. 282, 14 L. Ed. 422.

In Texas, the technical forms of pleading, fixed by the common law, are dispensed with, but the principles which regulate the merits of a trial by ejectment and the substance of a plea of title to such an action, are preserved. *Christy v. Scott*, 14 How. 282, 14 L. Ed. 422.

"The common law has been adopted in Texas, but the forms and rules of pleading in common-law cases have been abolished, and the parties are at liberty to set out their respective claims and defenses in any form that will bring them before the court." *Bennett v. Butterworth*, 11 How. 669, 13 L. Ed. 859.

31. **Code provisions as to manner and sufficiency of stating facts.**—See post, "Manner and Sufficiency," XII, A, 2, b, (3), (b); "Form and Sufficiency of Statement," XII, F, 2, b, (2), (c).

32. **Departure defined.**—*Union Pac. R. Co. v. Wyler*, 158 U. S. 285, 39 L. Ed. 983, quoting *Saunders on Pleading and Evidence*, pp. 806, 807.

33. See post, "Replication," XII, G.

34. See post, "Rejoinder and Subsequent Pleadings," XII, H.

35. *Union Pac. R. Co. v. Wyler*, 158 U. S. 285, 39 L. Ed. 983; *Ankeny v. Clark*, 148 U. S. 345, 37 L. Ed. 475; *Warren v. Van Brunt*, 19 Wall. 646, 22 L. Ed. 219; *The Mabey and Cooper*, 14 Wall. 204, 20 L. Ed. 881. And see opinion of Johnson, J., in *United States v. Morris*, 10 Wheat. 246, 6 L. Ed. 314.

36. **Departure may be in substance of action or defense, or law on which**

**founded.**—*Union Pac. R. Co. v. Wyler*, 158 U. S. 285, 39 L. Ed. 983, quoting *Saunders on Pleading and Evidence*, pp. 806, 807.

"Gould on Pleadings, pp. 423, 424, says: 'When the matter, first alleged as the ground of action or defense is pleaded as at common law, any subsequent pleading by the same party, supporting it by a particular custom, is a departure.'" *Union Pac. R. Co. v. Wyler*, 158 U. S. 285, 39 L. Ed. 983.

"Stephen on Pleading, pp. 412, 413, thus elucidates the point, 'these, it will be observed, are cases in which the party deserts the ground, in point of fact, that he had first taken. But it is also [a] departure, if he puts the same facts on a new ground in point of law; as if he relies on the effect of the common law in his declaration, and on a custom in his replication; or on the effect of the common law in his plea, and a statute in his rejoinder.'" *Union Pac. R. Co. v. Wyler*, 158 U. S. 285, 39 L. Ed. 983.

37. **Departure from original in amended petition.**—*Union Pac. R. Co. v. Wyler*, 158 U. S. 285, 39 L. Ed. 983.

"As the first petition proceeded under the general law of master and servant, and the second petition asserted a right to recover in derogation of that law, in consequence of the Kansas statute, it was a departure from law to law." *Union Pac. R. Co. v. Wyler*, 158 U. S. 285, 39 L. Ed. 983.

Generally, as to the rule that an amendment should not change the case made by the original bill or petition, see the title **AMENDMENTS**, vol. 1, pp. 296, 300.

38. **Duplicity defined.**—*Black's Law Dict.*, title Duplicity.

39. **Surplusage defined.**—*Black's Law Dict.*, title Surplusage. And see *Wilson v.*



**Effect.**—Surplusage in pleadings does not, in any case, vitiate after verdict.<sup>40</sup>

**D. Prayer for Relief.**—As to prayer for relief in admiralty proceedings, see the title *ADMIRALTY*, vol. 1, p. 164.

**As to prayer for relief in bills in equity**, see the title *EQUITY*, vol. 5, p. 852.

**As to the requirements of the codes as to demand of relief in a petition or complaint**, see post, "Demand for Relief," XII, A, 2, b, (4).

**E. Conclusion.**—Though there is no little confusion and diversity of opinion appearing in the books with respect to the question when the pleading ought to conclude to the country and when with a verification, yet it would seem to be the established rule, that whenever new matter is introduced on either side, the pleading should conclude with a verification,<sup>41</sup> in order that the other party may have an opportunity of answering it.<sup>42</sup> As to the proper conclusion of particular pleadings, see the appropriate sections in this title.

**F. Verification**—I. **NECESSITY.**—In **General.**—Under some of the codes and practice acts it is expressly provided that all complaints, answers and replications shall be verified in a prescribed manner.<sup>43</sup> Under others, such verification is

Codman, 3 Cranch 193, 2 L. Ed. 408; Carroll v. Peake, 1 Pet. 18, 7 L. Ed. 34; United States Bank v. Donnally, 8 Pet. 361, 8 L. Ed. 974.

**Averments held to be mere surplusage.**—The averments in a declaration set forth that the plaintiff had been turned out of possession of a lot of ground, but did not state that the eviction was by due course of law; the breach alleged in the count was, that the defendant had refused, on demand, to convey the lot. The court held the averment of eviction to be mere surplusage. Bank v. Guttschlick, 14 Pet. 19, 10 L. Ed. 335.

It is said by Chitty (Pleading 410) that "where the place of doing an act is precisely alleged, if the description be wholly immaterial, the ground of charge or of complaint not being local, the description may perhaps be rejected as surplusage; as if in trespass for taking goods, the declaration were to allege that they were taken 'in a house' it would seem to be sufficient to prove that they were taken elsewhere, unless indeed a local trespass as to the house be laid in the same count." Grayson v. Lynch, 163 U. S. 468, 41 L. Ed. 230.

The averment, in a declaration, that the assignment of a promissory note was for value received, is an immaterial averment. The assignee, without value, can as well maintain his action as the assignee on a valuable consideration. It is, therefore, mere surplusage, and does not require to be proved; nor does it affect the substantial part of the declaration. Wilson v. Codman, 3 Cranch 193, 2 L. Ed. 408.

In United States Bank v. Donnally, 8 Pet. 361, 8 L. Ed. 974, which was an action of debt upon a promissory note, the court was of opinion that the fourth and fifth counts of the declaration were, upon general demurrer, good; and that the judgment of the court below, as to them, was erroneous, they set out a good and suffi-

cient cause of action, in due form of law; and the averment that the contract was made in Kentucky, and that, by the laws of that state, it has the force and effect of a sealed instrument, does not vitiate the general structure of those counts, founding a right of action on the note set forth thereon; at most, they are surplusage; and if they do not add to, they do not impair, the legal liability of the defendant, as asserted in the other parts of those counts.

In an action upon a judgment recovered in favor of an administrator, the plaintiff need not name himself as administrator, and if he does so, it may be rejected as surplusage. Biddle v. Wilkins, 1 Pet. 686, 7 L. Ed. 315.

**As to the rejection, as surplusage, of the preamble or inducement to a declaration**, see post, "Inducement," XII, A, 1, b, (1).

**40. Surplusage does not vitiate after verdict.**—Carroll v. Peake, 1 Pet. 18, 7 L. Ed. 34.

"It is objected that the declaration shows no cause of action; and it is insisted the judgment shall be reversed for that cause. The declaration is very loosely drawn and a great deal of matter is crowded into it which is impertinent or, at most, only in aggravation of damages. But surplusage in pleadings does not vitiate, in any case, after verdict; and wholly disregarding the impertinent and irrelevant matter, the declaration contains enough to support the action." Carroll v. Peake, 1 Pet. 18, 7 L. Ed. 34.

**41. When pleadings should conclude with verification.**—United States v. Linn, 1 How. 104, 11 L. Ed. 64, citing 1 Chitty Pleading 590.

**42. Reason for rule.**—United States v. Linn, 1 How. 104, 11 L. Ed. 64.

**43. Provision of codes and practice acts as to verification of all pleadings.**—By § 63, of the Montana Practice Act, it is provided that "all complaints, answers, and

required only under certain circumstances, as, for instance, where it is sought to deny the execution of the written instrument upon which any pleading is founded,<sup>44</sup> to deny the existence of a corporation,<sup>45</sup> or of a partnership.<sup>46</sup> In yet other jurisdictions, the requirement of a sworn denial of such allegations would seem to depend on whether or not the allegations themselves were duly verified by affidavit.<sup>47</sup>

**As to demurrer for want of affidavit of verification,** see the title *DEMURRERS*, vol. 5, p. 305.

2. **BY WHOM VERIFIED.**—According to the provisions of some of the codes and practice act, a pleading may be verified by the party, his agent, or attorney.<sup>48</sup> According to others, the verification is to be made "by the party, or, if there are several parties united in interest or pleadings, by one at least of such parties acquainted with the facts, if such party is in the county and capable of making the affidavit."<sup>49</sup>

3. **MANNER AND SUFFICIENCY.**—**Manner of Verification.**—The usual method of verifying the pleadings is by affidavit.<sup>50</sup>

**Sufficiency.**—The affidavit of verification should state that the facts stated in the pleading are true to the knowledge of the person making it, except as to those matters which are therein stated on his information and belief, and as to those matters, that he believes it to be true.<sup>51</sup>

### V. Filing Pleadings.

**A. Time and Manner.**—As to the time of filing declarations, see post, "Filing," XII, A, 1, d. As to time and manner of filing pleas, see post, "Filing and Withdrawing Pleas," XII, E, 2, c, (1).

**As to striking out pleas filed irregularly,** see post, "Motion to Strike Out," VII, A, 2.

**As to filing replications,** see post, "Time and Leave to File," XII, G, 3, a.

**B. Filing New Pleadings When Original Lost.**—The trial court may properly allow a plaintiff to file a new petition, not differing in any substantial particular from the original, which was lost without his fault.<sup>52</sup>

replications shall be verified as provided in this section." *Maclay v. Sands*, 94 U. S. 586, 24 L. Ed. 211.

44. **Denial of execution of instrument, etc.**—*Apache County v. Barth*, 177 U. S. 538, 44 L. Ed. 878; *Harper County Comm'rs v. Rose*, 140 U. S. 71, 35 L. Ed. 344; *Bradford v. Williams*, 4 How. 576, 11 L. Ed. 1109; *Chambers County v. Clews*, 21 Wall. 317, 22 L. Ed. 517. See the titles *BILLS, NOTES AND CHECKS*, vol. 3, p. 361; *BONDS*, vol. 3, p. 437; *MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES*, vol. 8, p. 650.

45. **Denial of corporate existence of plaintiff or defendant in actions by or against corporations,** see the title *CORPORATIONS*, vol. 4, p. 770.

46. **Denial of existence of partnership.**—*Forsyth v. Doolittle*, 120 U. S. 73, 30 L. Ed. 586. See the title *PARTNERSHIP*, ante, p. 73. And see note to succeeding text.

47. **Necessity of sworn denial dependent on whether facts were originally alleged under oath.**—See *Harper County Comm'rs v. Rose*, 140 U. S. 71, 35 L. Ed. 344.

48. **Affidavit by party, agent or attorney.**—*Harper County Comm'rs v. Rose*, 140 U. S. 71, 35 L. Ed. 344, citing § 108 of the Kansas Code of Civil Procedure.

49. **By party or one of several parties united in interest or pleading.**—*Maclay v. Sands*, 94 U. S. 586, 589, 24 L. Ed. 211, quoting from § 63 of the Montana Practice Act.

50. **Verification by affidavit.**—*Apache County v. Barth*, 177 U. S. 538, 44 L. Ed. 878; *Harper County Comm'rs v. Rose*, 140 U. S. 71, 35 L. Ed. 344; *Maclay v. Sands*, 94 U. S. 586, 24 L. Ed. 211; *Chambers County v. Clews*, 21 Wall. 317, 22 L. Ed. 517.

51. **Sufficiency—Verification on belief.**—*Maclay v. Sands*, 94 U. S. 586, 24 L. Ed. 211.

Where an instrument in writing is charged to have been executed by a person then deceased, the affidavit will be sufficient if it state that the affiant has reason to believe and does believe that such instrument was not executed by the decedent or by his authority. *Apache County v. Barth*, 177 U. S. 538, 44 L. Ed. 878.

As to sufficiency of denial, upon information and belief, that the plaintiff is a corporation, see the title *CORPORATIONS*, vol. 4, p. 769.

52. **Filing new petition where original lost.**—"It remains to consider the objections urged to the order of the court, allowing a new petition to be filed in place



## VI. Interpretation and Construction of Pleadings.

According to the common-law rule, all pleadings are to be construed most strongly against the pleader.<sup>53</sup>

Under the various codes and practice acts, the strictness of the common-law rule as to the construction of pleadings has been relaxed, and, instead of construing pleadings strictly against the party, they are to be construed liberally, with a view to substantial justice between the parties.<sup>54</sup>

Pleas in bar are not to receive a narrow and merely technical construction, but are to be construed according to their entire subject matter.<sup>55</sup>

**Law of Forum as Determining Sufficiency of Pleading.**—Whether a cause of action is stated in a pleading, is generally to be decided with reference to the law of the state where the action is pending.<sup>56</sup>

## VII. Raising, Waiving and Curing Objections to Pleadings.

**A. Manner of Raising**—1. **DEMURRER.**—See the title **DEMURRERS**, vol. 5, p. 293.

2. **MOTION TO STRIKE OUT.**—**When Proper.**—A motion to strike out a plea is properly made when it has been filed irregularly,<sup>57</sup> is not sworn to, if that

of the original, which was lost, and to the trial of the case by the court, without the intervention of a jury. We do not consider either of these objections to be well taken. It was not only proper to allow the filing of a new petition, when the original was lost, and no copy was to be had, but it would have been the subject of just complaint had this allowance been refused. The affidavit states that the loss was without the fault of the plaintiff, and there is no pretense that the fact was otherwise. The original petition was in the ordinary form in use in actions of trespass to try the title to land, and was for the recovery of one-fourth of a league; and there is no suggestion that the new petition differs from it in any substantial particular." *Phillips v. Moore*, 100 U. S. 208, 25 L. Ed. 603.

**53. Common-law rule as to construction of pleading.**—*Gillette v. Bullard*, 20 Wall. 571, 22 L. Ed. 387; *United States v. Parker*, 120 U. S. 89, 30 L. Ed. 601; *United States v. Linn*, 1 How. 104, 11 L. Ed. 64.

"This is the rule laid down by Chitty, 1 Chit. Pl., 578, and in which he is supported by numerous authorities. And the reason assigned for this rule of construction is that it is a natural presumption that the party pleading will state his case as favorably as he can for himself. And if he do not state it with all its legal circumstances, the case is not in fact favorable to him; and the rule of construction in such case is, that if a plea has on the face of it two intendments, it shall be taken most strongly against the defendant; that is, says he, the most unfavorable meaning shall be put upon the plea; a rule which obtains also in other pleadings; and a number of cases are put, illustrating this rule." *United States v. Linn*, 1 How. 104, 11 L. Ed. 64.

**54. Pleadings liberally construed under codes and practice acts.**—*United States v. Parker*, 120 U. S. 89, 30 L. Ed. 601; *Burley v. German-American Bank*, 111 U. S. 216,

28 L. Ed. 406; *Gillette v. Bullard*, 20 Wall. 571, 22 L. Ed. 387.

"Section 70 of the Civil Procedure Act of the state of Nevada, approved March 8, 1869 (Laws of 1869, p. 206), being § 3092 of the general statutes of Nevada of 1885, is as follows: 'In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice between the parties.' In commenting on this section, the supreme court of Nevada, in *Ferguson v. Virginia & Truckee Railroad*, 13 Nevada 184, 191, uses the following language: 'But the rule of construing pleadings most strongly against a pleader has been replaced in this state by the more liberal rule prescribed in § 70 of the practice act. This section is the same as § 159 of the New York code. The result of the decisions in that state seems to be, that, on a general demurrer, the allegations of a complaint will be construed as liberally in favor of the pleader as, before the code, they would have been construed after the verdict for the plaintiff. That is, they will be construed in such a sense as to support the cause of action or the defense. Moak's *Van Santvoord's Pl.*, 3d ed., side page 771, et seq., and cases cited. In this state a similar doctrine has been declared in *State v. Central Pacific Co.*, 7 Nevada 99, 103.' " *United States v. Parker*, 120 U. S. 89, 30 L. Ed. 601.

**55. Pleas in bar are always construed according to their entire subject matter,** and will be sustained accordingly, as taken altogether, and will not be determined by a disjoining of their members, or by laying stress on what may be immaterial. *Withers v. Greene*, 9 How. 213, 13 L. Ed. 109.

**56. Law of forum as determining sufficiency of pleading.**—*Finney v. Guy*, 189 U. S. 335, 47 L. Ed. 839. And see the title **CONFLICT OF LAWS**, vol. 3, p. 1086.

**57. Plea irregularly filed.**—*Bates v. Clark*, 95 U. S. 204, 24 L. Ed. 471.



is required,<sup>58</sup> or wants signature of counsel.<sup>59</sup> So, also, it has been held proper to strike out a plea in bar, which is, in substance, the same as a plea in abatement, already passed on by a jury against the party setting it up,<sup>60</sup> or to strike out special defenses open to the defendant under the general denial or general issue pleaded.<sup>61</sup> Sham or inconsistent pleas,<sup>62</sup> or pleas which are clearly frivolous and constitute no defense to the action, may properly be stricken out

**58. Pleas not sworn to.**—*Bates v. Clark*, 95 U. S. 204, 24 L. Ed. 471.

As to necessity for sworn pleas, see ante, "Necessity," IV, F, 1.

**59. Omission of counsel's signature.**—*Bates v. Clark*, 95 U. S. 204, 24 L. Ed. 471.

**60. Plea in bar same in substance as plea in abatement, etc.**—*Grand Chute v. Winegar*, 15 Wall. 355, 21 L. Ed. 170.

"A party having his plea in abatement passed upon by a jury, and found against him, is not permitted to set up the same matter in bar and again to go to the jury upon it." *Grand Chute v. Winegar*, 15 Wall. 355, 21 L. Ed. 170.

**61. Special defenses open to defendant under general denial or general issue.**—*Nemaha County v. Frank*, 120 U. S. 41, 30 L. Ed. 584; *Pendleton County v. Amy*, 13 Wall. 297, 20 L. Ed. 579.

**Special defenses open under general denial.**—"The averments in that portion of the answer stricken out are in substance, 1st, that the bonds were illegal and void because not issued to a company authorized by the statute to receive them; and, 2d, that they were illegal and void because issued in excess of the amount of ten per centum of the assessed valuation of the taxable property in said precinct. The answer of the defendant, in addition to the matter stricken out, contains the following: 'Defendant has no knowledge as to whether the plaintiff is a bona fide holder of said bonds, or any part thereof, or whether he purchased them before due or paid any value therefor, or purchased them at all, and, therefore, for the purpose of raising the issue and procuring the proof thereon by compulsory process, defendant denies the allegations of the petition on that subject, and also denies each and every allegation contained in said petition, except such as it has herein expressly admitted in this answer.' This clause in the answer remained and formed the issue which was tried. It is a general denial of each and every allegation of the petition, as no allegation of the petition was otherwise admitted in the answer. It therefore put the plaintiff upon proof of every fact necessary to constitute the cause of action set out in his petition, and embraced a denial of the legality and validity of the bonds, and the lawfulness of their issue and delivery. It required the plaintiff to show by competent proof that he was the owner of the coupons sued on, taken from bonds in accordance with law, and delivered to a fact executed by the defendant, issued in

party competent to receive the title. It permitted proof on the part of the defendant of every fact which tended to establish that the bonds were illegal and void. It follows, therefore, that every defense which was open to the defendant under that portion of the answer stricken out was equally open to it under the answer as it stood at the trial. The plaintiff obtained no advantage, and the defendant suffered no detriment, by the ruling of the court requiring that portion of the answer to be stricken out. The action of the court in granting the motion did not, therefore, prejudice the defendant." *Nemaha County v. Frank*, 120 U. S. 41, 30 L. Ed. 584.

**Pleas setting up nothing not available under general issue.**—"It must be admitted that the pleas interposed by the defendant in the court below were inartistically framed; that they were argumentative, and that they set up nothing which could not have been taken advantage of, for what it was worth, under the general issue. They might have been stricken from the record on motion, or if special demurrers were allowable in that circuit, they would have been condemned, had the plaintiff so demurred." *Pendleton County v. Amy*, 13 Wall. 297, 20 L. Ed. 579.

**Striking notice of special matter to be given in evidence under general issue.**—In *United States v. Stone*, 106 U. S. 525, 27 L. Ed. 163, in which the striking out the notice of the special matter to be given in evidence under the plea of nil debet, was alleged as error, the court said: "It was proper to strike it out, because it was matter which denied the plaintiff's whole cause of action which, consequently, it was bound to meet with its own evidence in the first instance, and which, therefore, the defendants traversed by the plea of nil debet, and the plea denying the alleged breach of the condition of the bond. Any evidence which would have been competent under the notice would have been equally so without it; and, in point of fact, all the evidence offered on the part of the defendants, which was competent under the notice, was admitted under the pleas."

**62. Sham or inconsistent pleas.**—*Grand Chute v. Winegar*, 15 Wall. 355, 356, 21 L. Ed. 170.

"The allowance of double pleas and defenses is not a matter of absolute right, but of discretion in the court, and \* \* \* the courts constantly exercise their discretion in controlling this privilege by disallowing sham or inconsistent pleas."

on motion.<sup>63</sup> Where a defense is by way of traverse, it is not error to strike out so much thereof as is not responsive to the allegations of the petition.<sup>64</sup> It has been held by the United States supreme court that a motion to strike out a plea is an unscientific and unprofessional mode of raising and deciding a pure issue of law, notwithstanding the practice in some of the territorial courts, and that this should always be done, when it can, by a demurrer, which is the recognized and appropriate mode in the common law, or by exception, which amounts to the same thing in the civil law, as it is applied to answers in chancery practice.<sup>65</sup>

**As to reviewability of orders on motion to strike out pleadings,** see the title *APPEAL AND ERROR*, vol. 1, pp. 958, 1001.

**Striking Out Pleadings as Reversible Error.**—See the title *APPEAL AND ERROR*, vol. 2, p. 338.

3. **MOTION TO MAKE MORE DEFINITE AND CERTAIN.**—**In General.**—In the codes of some of the states, it is expressly provided that where one or more denials or allegations, contained in a pleading, are so indefinite or uncertain that the precise meaning or application thereof is not apparent, the court may require the pleading to be made definite and certain by amendment.<sup>66</sup> The objection that a denial is indefinite or uncertain, must be taken by a motion, made before trial,<sup>67</sup> and cannot be availed of by excluding evidence at the trial.<sup>68</sup>

**Reviewability of Order on Motion.**—See the title *APPEAL AND ERROR*, vol. 1, p. 1001.

4. **MOTION TO COMPEL ELECTION BETWEEN INCONSISTENT PLEAS.**—Where two pleas in bar are inconsistent in their averments with each other, the plaintiff may by motion, compel the defendant to elect by which he will abide.<sup>69</sup>

5. **MOTION TO COMPEL SEPARATE STATEMENT OF CAUSES OF ACTION.**—See post, "Separate Statement and Numbering of Causes of Action," XII, A, 2, b, (3), (c).

6. **DEFECTS AS GROUNDS FOR OBJECTION TO INTRODUCTION OF EVIDENCE.**—As to the rule that objections for indefiniteness and uncertainty must be taken by motion, and cannot be availed of by excluding evidence at trial, see ante, "Motion to Make More Definite and Certain," VII, A, 3.

7. **DEFECTS AS GROUNDS FOR ARREST OF JUDGMENT.**—See the title *JUDGMENTS AND DECREES*, vol. 7, p. 595.

8. **DEFECTS AS GROUNDS FOR JUDGMENT NON OBSTANTE VEREDICTO.**—See the title *JUDGMENTS AND DECREES*, vol. 7, p. 571.

9. **OBJECTIONS IN APPELLATE COURT.**—See the title *APPEAL AND ERROR*, vol. 2, pp. 113, 337, 378.

**B. Waiver of Objections.—Right to Waive.**—The rule as to certainty in

*Grand Chute v. Winegar*, 15 Wall. 355, 21 L. Ed. 170.

One plea in bar is not waived by the existence of another plea in bar, though the two may be inconsistent in their averments with each other. The remedy of the plaintiff in such case is not by demurrer, but by motion to strike out one of the pleas, or to compel the defendant to elect by which he will abide. *Noonan v. Bradley*, 9 Wall. 394, 19 L. Ed. 757.

63. **Frivolous pleas.**—*United States v. Dashiell*, 4 Wall. 182, 18 L. Ed. 319.

Where a plea is clearly frivolous on the face of it, that is a good ground for setting it aside. See *Eberly v. Moore*, 24 How. 147, 16 L. Ed. 612.

64. **Matter not responsive to allegations of petition.**—*Hart v. United States*, 95 U. S. 316, 24 L. Ed. 479.

65. **Motion to strike not proper method of raising pure issue of law.**—*Bates v. Clark*, 95 U. S. 204, 24 L. Ed. 471. See the title *DEMURRERS*, vol. 5, p. 293.

66. **Right of court to require pleading to be made definite and certain.**—*Burley v. German-American Bank*, 111 U. S. 216, 28 L. Ed. 406. And see *Fuller v. Claflin*, 93 U. S. 14, 23 L. Ed. 785.

67. **Objection by motion before trial.**—*Burley v. German-American Bank*, 111 U. S. 216, 28 L. Ed. 406. And see *Fuller v. Claflin*, 93 U. S. 14, 23 L. Ed. 785.

68. **Objection not available by excluding evidence at trial.**—*Burley v. German-American Bank*, 111 U. S. 216, 28 L. Ed. 406.

69. **Motion to compel election between inconsistent pleas in bar.**—*Noonan v. Bradley*, 9 Wall. 394, 19 L. Ed. 757.

pleadings is framed for the benefit of the parties, and may be waived by them.<sup>70</sup>

**Waiver by Pleading to Merits.**—It is well settled that defects of substance only are open to a party who has pleaded to the merits, or to one who has replied to an antecedent pleading.<sup>71</sup>

**C. Defects Cured by Verdict.**—See the titles AMENDMENTS, vol. 1, p. 308; APPEAL AND ERROR, vol. 2, p. 378.

### VIII. Amendment of Pleadings.

See the title AMENDMENTS, vol. 1, p. 290, et seq.

### IX. Supplemental Pleadings.

As to supplemental bills, see the title EQUITY, vol. 5, p. 856, and cross references there found. As to supplemental answers, see the titles EJECTMENT, vol. 5, p. 709; EQUITY, vol. 5, p. 863.

### X. Repleader.

**In General.**—Judgment of repleader is allowed by the court to do justice between the parties where the defect is in the form or manner of stating the right, and the issue joined is on an immaterial point, so that it cannot tell for whom to give judgment.<sup>72</sup> A repleader is little more in substance than permitting an amendment.<sup>73</sup>

**Discretion of Court as to Awarding Repleader.**—When to a declaration two special pleas are interposed, each setting up substantially the same defense, and by the replication to one issue is joined on the merits, and by the replication to the other an immaterial issue is formed, and upon the trial all the issues are found for the plaintiff, it is a matter of discretion in the court whether to arrest the judgment for the verdict on the immaterial issue and award a repleader, with which the supreme court will not interfere.<sup>74</sup>

**Reversal and Remand as Substitute for Directing Repleader.**—As to the practice of the supreme court of the United States to reverse the judgment and remand the cause for further proceedings instead of directing amendments or repladers, see the title MANDATE AND PROCEEDINGS THEREON, vol. 8, p. 97.

### XI. Profert and Oyer.

See the title PROFERT AND OYER.

### XII. Particular Pleadings.

**A. Declaration, Petition or Complaint**—1. **DECLARATION AT COMMON LAW**—a. *Definition and Purpose.*—**Definition.**—The word declaration, as a word of art in the law, is generally used to signify the plea by which a plaintiff in a suit at law sets out his cause of action, as the word complaint is in the same sense, the technical name of a bill in chancery.<sup>75</sup>

**The office of a declaration** is to state the essential facts on which the liability of the defendant in the action depends.<sup>76</sup>

b. *Form, Requisites and Sufficiency*—(1) *Inducement.*—The inducement is

70. Waiver of requirement of certainty in pleadings.—*Minor v. Mechanics' Bank*, 1 Pet. 46, 7 L. Ed. 47.

71. Waiver of formal defects by pleading to merits, etc.—*Hudson Canal Co. v. Pennsylvania Coal Co.*, 8 Wall. 276, 19 L. Ed. 349.

As to effect of pleading the general issue, see post, "General Issue," XII, E, 2, d, (2), (a).

72. When repleader proper.—*Bouv. L. Dict.*, title Repleader. *Garland v. Davis*, 4 How. 131, 11 L. Ed. 907; *Erskine v. Hohnbach*, 14 Wall. 613, 20 L. Ed. 745.

73. *Garland v. Davis*, 4 How. 131, 11 L.

Ed. 907, in which case will be found a discussion of the common-law practice as to awarding repleader.

74. Discretion of court as to awarding repleader.—*Erskine v. Hohnbach*, 14 Wall. 613, 20 L. Ed. 745.

75. Declaration defined.—*Per Miller, J.*, in *United States v. Ambrose*, 108 U. S. 336, 27 L. Ed. 746.

As to the necessity for filing a new declaration on the transfer of the case from a state court to a federal court, see the title REMOVAL OF CAUSES.

76. Office of declaration.—*Alabama v. Burr*, 115 U. S. 413, 29 L. Ed. 435.



that portion of the declaration which is brought forward by way of explanatory introduction to the main allegations.<sup>77</sup> The office of an inducement being explanatory, does not, in general, require exact certainty.<sup>78</sup> Matter which is unnecessarily stated by way of inducement may well be rejected as surplusage.<sup>79</sup>

(2) *Statement of Facts Constituting Cause of Action*—(a) *Necessity*.—It is a general rule in pleading, that where any fact is necessary to be proved at the trial, in order to sustain the plaintiff's right of recovery, the declaration must contain an averment substantially of such fact, in order to let in the proof.<sup>80</sup> The declaration need not, however, contain any averment which it is not necessary to prove.<sup>81</sup>

(b) *Manner and Sufficiency*.—In accordance with the rules as to the necessity, manner and sufficiency of stating facts in pleadings generally,<sup>82</sup> a declaration should state the ultimate facts to be proven, and not matters of evidence,<sup>83</sup> and should state facts and not conclusions of law merely.<sup>84</sup> So, also, in ac-

**77. Inducement defined.**—Black's Law Dict., title Inducement. And see *The City v. Lamson*, 9 Wall. 477, 19 L. Ed. 725.

**78. Exact certainty not essential in inducement.**—*The City v. Lamson*, 9 Wall. 477, 19 L. Ed. 725.

"Thus, says Mr. Chitty, when an agreement with a third person is stated only as an inducement to the defendant's promise, which is the principal cause of action, it is considered, in general, sufficient to state such agreement without certainty of name, place, or person." *The City v. Lamson*, 9 Wall. 477, 19 L. Ed. 725.

A holder of coupons which have been cut off from the bond to which they were originally attached, may bring suit on them, if they represent interest already due, notwithstanding he be no longer holder of the bond to which they belonged. He need not, if he declares properly, produce the bond. In suing on the coupons in such case it is proper enough to recite the bonds in such general way as explains and brings into view the relation which the coupons originally held to the bonds, and in some respects still hold. The suit does not by such recital—that is to say, by one in the nature of inducement and by way of preamble only—become a suit upon the bond. It is still a suit on the coupons. *The City v. Lamson*, 9 Wall. 477, 19 L. Ed. 725.

**79. Rejection, as surplusage, of matter unnecessarily stated.**—*The City v. Lamson*, 9 Wall. 477, 19 L. Ed. 725. See ante, "Surplusage," IV, C, 7.

**80. General rule as to facts necessary to be proved.**—*United States Bank v. Smith*, 11 Wheat. 171, 6 L. Ed. 443. And see ante, "Definition and Purpose," XII, A, 1, a.

**81. Facts unnecessary to be proven need not be averred.**—*United States Bank v. Smith*, 11 Wheat. 171, 6 L. Ed. 443.

**82. See ante, "Statement of Facts Constituting Cause of Action or Ground of Defense," IV, C.**

**83. Ultimate facts and not matters of evidence to be stated.**—*McAllister v. Kuhn*, 96 U. S. 87, 24 L. Ed. 615.

A declaration in an action for the wrongful conversion of the shares of the capital stock of a corporation is sufficient for the purposes of pleading, if it states the ultimate fact to be proven. The circumstances which tend to prove that fact can be used for the purposes of evidence; but they have no place in the pleadings. *McAllister v. Kuhn*, 96 U. S. 87, 24 L. Ed. 615.

An averment in a declaration that the defendants had made and delivered to the plaintiffs their promissory notes, implies that the instruments were at the time in the form and condition required by law. *Campbell v. Wilcox*, 10 Wall. 421, 19 L. Ed. 973.

"If a stamp were essential to the validity of paper of this kind, the averment in the declaration that the defendants had made and delivered to the plaintiff their promissory notes, would imply that the instruments were at the time in the form and condition required by law. It has been held that in a declaration upon a contract, some memorandum of which, under the statute of frauds, must be in writing, a compliance with the requisition of the statute is implied in the averment that the contract was made, and that such compliance need not be specifically stated, although it must be proved if denied by the defendant. So in this case the existence of a stamp upon the notes, as in the case stated, the existence of a writing, is a matter of evidence and not of pleading." *Campbell v. Wilcox*, 10 Wall. 421, 19 L. Ed. 973.

**84. Should state facts and not conclusions of law.**—An averment, in a declaration, that certain bonds held by the plaintiff were executed pursuant to the laws of the state, is but a statement of a conclusion of law, which is not admitted by demurrer. Such declaration is fatally defective for not stating the facts necessary to enable the court to judge for itself whether that conclusion of law has any foundation in fact. *Hopper v. Covington*, 118 U. S. 148, 30 L. Ed. 190.

In *Alabama v. Burr*, 115 U. S. 413, 29 L. Ed. 435, it was held that the allegation

cordance with the general rule, a declaration will be held sufficient which pleads facts according to their legal effect.<sup>85</sup>

**Effect of Averment in Replication as Curing Defective Declaration.**

—See post, "Effect as Aiding Defective Declaration," XII, G, 5, b.

(c) *Necessity for Filing with Declaration Copy of Instrument Sued on.*—In some jurisdictions it is required by statute that a copy of the written instrument on which the action is founded shall be filed with the declaration, and it constitutes part of the pleadings in the case.<sup>86</sup>

(3) *Conclusion.*—As to the effect of the statute of jeofails as curing the omission of formal conclusions to the counts in a declaration, see the title AMENDMENTS, vol. 1, p. 310.

c. *Amendment.*—See the title AMENDMENTS, vol. 1, p. 298, et seq.

d. *Filing.*—The declaration must certainly be filed before trial. When the plaintiff accepts a plea, it is an engagement that this shall be done; and a waiver by the defendant of any advantage from the omission.<sup>87</sup> In some jurisdictions it is provided by law that the plaintiff must file his declaration at the next succeeding rule day, after the defendant shall have entered his appearance,<sup>88</sup> or that the defendant may rule him to do so, which if he fails to do, he shall be nonsuit.<sup>89</sup> It has been held however, that such law applies to a single defendant, or, if there be more, to the appearance of all the defendants, and that the plaintiff is not bound to declare, until all the defendants have appeared, or the suit be abated as to such as have not appeared.<sup>90</sup>

**2. DECLARATION, PETITION OR COMPLAINT UNDER CODES AND PRACTICE ACTS**

—a. *In General.*—It is a usual provision of the codes and practice acts of the various states that every civil action shall be commenced by filing a petition or complaint.<sup>91</sup>

b. *Form, Requisites and Sufficiency.*—(1) *Designation of Court and County Where Action Brought.*—A complaint or petition under codes and practice acts should contain the name of the court and county in which the action is brought.<sup>92</sup>

(2) *Names and Capacity of Parties.*—**Should Contain Names of Parties.**—The complaint or petition should contain the names of the parties, plaintiff

in the declaration that the loss arose from the fraud was only a conclusion of law. If the facts from which the conclusion is drawn are not sufficient to show that in law the loss was attributable to the fraud, the declaration is bad.

85. **Sufficient to plead facts according to legal effect.**—*Struthers v. Drexel*, 122 U. S. 487, 30 L. Ed. 1216, in which a declaration was held sufficient which set forth the contract according to its legal effect. See, also, the title CONTRACTS, vol. 4, p. 594.

An allegation that a party made, accepted, indorsed or delivered a bill of exchange, is sufficient, although the defendant did not do either of those acts himself; provided he authorized the doing of them. *Bank v. Guttschlick*, 14 Pet. 19, 10 L. Ed. 335.

86. **Necessity for filing copy of instrument sued on.**—*Nauvoo v. Ritter*, 97 U. S. 389, 24 L. Ed. 1050. See the title COUPONS, vol. 4, p. 857.

87. **Declaration must be filed before trial.**—*Wenn v. Adams*, 2 Dall. 156, 1 L. Ed. 329.

88. **Filing at next succeeding rule day.**—*Barton v. Petit*, 7 Cranch 194, 3 L. Ed. 313, stating this to be the law in Virginia.

89. **Procedure where declaration not so**

filed.—*Barton v. Petit*, 7 Cranch 194, 3 L. Ed. 313.

90. **Necessity for appearance of all defendants, etc.**—*Barton v. Petit*, 7 Cranch 194, 3 L. Ed. 313.

91. **Petition or complaint as institution of action.**—*Fly v. New Mexico*, etc., R. Co., 129 U. S. 291, 32 L. Ed. 688; *Robertson v. Perkins*, 129 U. S. 233, 32 L. Ed. 686; *Parley's Park Silver Min. Co. v. Kerr*, 130 U. S. 256, 32 L. Ed. 906; *Glenn v. Sumner*, 132 U. S. 152, 33 L. Ed. 301; *Brown v. Rank*, 132 U. S. 216, 33 L. Ed. 340; *Roberts v. Lewis*, 144 U. S. 653, 36 L. Ed. 579; *In re Connaway*, 178 U. S. 421, 44 L. Ed. 1134; *Hardy v. Johnson*, 1 Wall. 371, 17 L. Ed. 502; *Rey v. Simpson*, 22 How. 341, 16 L. Ed. 260. See, generally, the title ACTIONS, vol. 1, p. 111.

92. **Name of court and county in which action brought.**—*Roberts v. Lewis*, 144 U. S. 653, 36 L. Ed. 579.

**Manner of addressing complaint seeking equitable relief.**—By subdivision 4 of § 76 of the Code of Washington Territory, it was provided that "when the relief sought is of an equitable nature, the complaint shall be addressed to the judge of the district in which the action is brought." *Brown v. Rank*, 132 U. S. 216, 33 L. Ed. 340.



and defendant.<sup>93</sup>

**Allegations as to Capacity of Parties.**—In some jurisdictions it is expressly provided that where the plaintiff sues or the defendant is held in any other than an individual capacity, the plaintiff need not state the facts constituting such capacity or relation, but may aver generally, or as a conclusion of law, such capacity or relation.<sup>94</sup>

(3) *Statement of Facts Constituting Cause of Action*—(a) *Necessity*.—The declaration, petition or complaint must contain a statement of the facts constituting the cause of action.<sup>95</sup>

(b) *Manner and Sufficiency*.—**In General.**—Many, if not all, of the codes and practice acts, contain provisions to the effect that the statement of facts constituting the cause of action shall be expressed in plain, ordinary and concise language,<sup>96</sup> without repetition,<sup>97</sup> and in such a manner as to enable a person of common understanding to know what is intended.<sup>98</sup>

**Statement of Ultimate Facts.**—As in the case of pleadings generally, it will be sufficient for the petition or complaint to set out the ultimate facts.<sup>99</sup>

(c) *Separate Statement and Numbering of Causes of Action*.—**Separate Statement.**—In the codes of some states it is expressly provided that when the petition or complaint contains more than one cause of action, they shall be separately stated.<sup>1</sup> Such separate statement can be compelled by motion to that end in the court below,<sup>2</sup> but if the objection is not thus raised, it will be held to have been waived.<sup>3</sup>

**93. Names of parties.**—*Roberts v. Lewis*, 144 U. S. 653, 36 L. Ed. 579.

**94. Sufficiency of general averment of capacity or relation.**—By § 2716 of the Iowa Code, it is provided that "a plaintiff suing as a corporation, partnership, executor, guardian, or in any other way implying corporate, partnership, representative, or other than individual capacity, need not state the facts constituting such capacity or relation, but may aver generally, or as a legal conclusion, such capacity or relation; and where a defendant is held in such capacity or relation, a plaintiff may aver such capacity or relation in the same general way." *Halferty v. Wilmering*, 112 U. S. 713, 28 L. Ed. 858.

**95. Statement of facts constituting cause of action.**—*Ely v. New Mexico, etc.*, R. Co., 129 U. S. 291, 32 L. Ed. 688; *Robertson v. Perkins*, 129 U. S. 233, 32 L. Ed. 686; *Parley's Park Silver Min. Co. v. Kerr*, 130 U. S. 256, 32 L. Ed. 906; *Glenn v. Sumner*, 132 U. S. 152, 33 L. Ed. 301; *Roberts v. Lewis*, 144 U. S. 653, 36 L. Ed. 579; *Ankeny v. Clark*, 148 U. S. 345, 37 L. Ed. 475; *Rey v. Simpson*, 22 How. 341, 16 L. Ed. 260; *Hardy v. Johnson*, 1 Wall. 371, 17 L. Ed. 502; *Basey v. Gallagher*, 20 Wall. 670, 22 L. Ed. 452.

**96. Statement in plain, ordinary and concise language.**—*Rey v. Simpson*, 22 How. 341, 16 L. Ed. 260; *Hardy v. Johnson*, 1 Wall. 371, 17 L. Ed. 502; *Basey v. Gallagher*, 20 Wall. 670, 22 L. Ed. 452; *Ely v. New Mexico, etc.*, R. Co., 129 U. S. 291, 32 L. Ed. 688; *Robertson v. Perkins*, 129 U. S. 233, 32 L. Ed. 686; *Glenn v. Sumner*, 132 U. S. 152, 33 L. Ed. 301. And see *Parley's Park Silver Min. Co. v. Kerr*, 130 U. S. 256, 32 L. Ed. 906.

**97. Rey v. Simpson, 22 How. 341, 16 L. Ed. 260.**

**98. Rey v. Simpson, 22 How. 341, 16 L. Ed. 260.**

**99. Statement of ultimate facts.**—*Ely v. New Mexico, etc.*, R. Co., 129 U. S. 291, 32 L. Ed. 688; *Parley's Park Silver Min. Co. v. Kerr*, 130 U. S. 256, 32 L. Ed. 906. See ante, "Facts and Not Evidence to Be Pleaded," IV, C, 1, a, (2).

"The complaint in the present case, in compliance with the requirements of the practice act of Utah Territory, states in concise language the two ultimate facts, upon which the claim for relief depends, that the plaintiff is in possession of the property, and that the defendant claims an interest or an estate therein adverse to him. These are sufficient to require the nature and character of the adverse claim on the part of the defendant to be set up, inquired into, and judicially determined, and the question of title finally settled." *Parley's Park Silver Min. Co. v. Kerr*, 130 U. S. 256, 32 L. Ed. 906.

**Manner of pleading performance of condition precedent.**—By § 2715 of the Iowa code, it is provided that, "in pleading the performance of conditions precedent in a contract, it is not necessary to state the facts constituting such performance, but the party may state, generally, that he duly performed all the conditions on his part." *Halferty v. Wilmering*, 112 U. S. 713, 28 L. Ed. 858.

**1. Separate statement of causes of action.**—*Shepherd v. Baltimore, etc.*, R. Co., 130 U. S. 426, 32 L. Ed. 970, citing Civil Code of Ohio, §§ 80, 81, 86.

**2. Motion to compel separate statement.**—*Shepherd v. Baltimore, etc.*, R. Co., 130 U. S. 426, 32 L. Ed. 970.

**3. Waiver of objection.**—*Shepherd v. Baltimore, etc.*, R. Co., 130 U. S. 426, 32 L. Ed. 970.



**Numbering Material Allegations.**—The codes of some states contain a further requirement that each material allegation in the complaint or petition shall be distinctly numbered.<sup>4</sup>

(4) *Demand for Relief.*—The declaration, petition or complaint, must, in addition to stating the facts constituting the cause of action, contain a demand of the relief to which the party supposes himself entitled.<sup>5</sup>

(5) *Verification.*—**In General.**—As to the requirement that petitions and complaints shall be verified, the manner and sufficiency of verification, etc., see ante, "Verification," IV, F.

**Verification as Essential to Operation of Pleading as an Admission.**—See post, "Admissions in Pleadings, and Pleadings as Evidence," XVI.

**C. Amendment.**—See the title AMENDMENTS, vol. 1, p. 298, et seq.

**B. Bill in Equity.**—See the title EQUITY, vol. 5, p. 843.

**C. Cross Bills.**—See the title CROSS BILLS, vol. 5, p. 133.

**D. Demurrer.**—See the title DEMURRERS, vol. 5, p. 293.

**E. Plea.**—1. **IN EQUITY.**—See the title EQUITY, vol. 5, p. 858, et seq.

2. **AT COMMON LAW**—**a. Office of Plea.**—The office of a plea is to state on the record the answer of the defendant to the allegations of the plaintiff.<sup>6</sup> A plea, as will be seen, is intended to set out facts,<sup>7</sup> differing therein from a demurrer which is intended to raise questions of law.<sup>8</sup>

**b. Classification of Pleas.**—**Dilatory and Peremptory.**—Pleas are classified, according to their purpose, into dilatory pleas or pleas in abatement, which go to abate the plaintiff's action; that is, to suspend or put it off for the present,<sup>9</sup> but do not necessarily dispute the validity of the rights which are made the subject of the suit,<sup>10</sup> and pleas in bar, which go to bar the plaintiff's action, that is, to defeat it absolutely and entirely.<sup>11</sup>

**Traverses and Special Pleas.**—Pleas in bar are, in turn, divided into traverses or denials, and pleas in confession and avoidance, or special pleas.<sup>12</sup>

**Pleas Puis Darrein Continuance.**—See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 38.

**c. Rules Applicable to Pleas Generally.**—(1) *Filing and Withdrawing Pleas.*

—**Power of Court to Regulate Time and Manner of Filing.**—The right of a court to prescribe rules to regulate the time and manner of filing pleas is beyond question, if they are reasonable, and such rules are indispensable to the dispatch of business and the orderly administration of justice.<sup>13</sup>

**Effect of Failure to Plead at Proper Time.**—It is a rule at common law that if a party can plead a fact, material to his defense, and omits to do it, at

4. Numbering of material allegations.—Glenn v. Sumner, 132 U. S. 152, 33 L. Ed. 301, citing North Carolina Code of Civil Procedure, § 93.

5. Demand for relief.—Roberts v. Lewis, 144 U. S. 653, 36 L. Ed. 579; Ely v. New Mexico, etc., R. Co., 129 U. S. 291, 32 L. Ed. 688; Hardy v. Johnson, 1 Wall. 371, 17 L. Ed. 502.

6. Office of plea.—Christy v. Scott, 14 How. 282, 14 L. Ed. 422; United States v. Girault, 11 How. 22, 13 L. Ed. 587. See post, "Must Be Complete Answer to Declaration," XII, E, 2, c, (3), (a).

7. See post, "Manner and Sufficiency of Alleging Matters Relied on by Way of Defense," XII, E, 2, c, (3), (b).

8. See the title DEMURRERS, vol. 5, p. 297.

9. Dilatory pleas or pleas in abatement.—Black's Law Dict., title Pleas in Abatement.

10. For a full treatment of dilatory pleas, embracing pleas in abatement, and

pleas to the jurisdiction, see the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 30, et seq.

11. Pleas in bar.—Black's Law Dict., title Plea in Bar; United States v. Linn, 1 How. 104, 11 L. Ed. 64; Insurance Co. v. Lewis, 97 U. S. 682, 24 L. Ed. 1114. And see Noonan v. Bradley, 9 Wall. 394, 19 L. Ed. 757.

12. Division into traverses and special pleas.—See post, "General Issue," XII, E, 2, d, (2), (a); "Special Pleas," XII, E, 2, d, (2), (b).

13. Court may prescribe time and manner of filing.—Packet Co. v. Sickles, 19 Wall. 611, 22 L. Ed. 203. See, generally, the title RULES OF COURT.

It is within the judicial discretion of every court, on good cause shown, to set aside a default in filing pleadings on a statutory rule day, and allow the omission to be supplied. Railroad Co. v. Koontz, 104 U. S. 5, 26 L. Ed. 643.

the proper time, he can never avail himself of it afterwards.<sup>14</sup>

**Discretion of Court as to Allowing Filing of Additional Pleas.**—The granting or refusal of leave to file an additional plea, or to amend one already filed, is discretionary with the court below,<sup>15</sup> and is not reviewable by the appellate court, except in a case of gross abuse of discretion.<sup>16</sup>

**Order of Filing Pleas in Abatement and Pleas in Bar.**—As to the rule that pleas in abatement must be filed at an early stage of the proceedings, and not in connection with or after pleas in bar, see the title **ABATEMENT, REVIVAL AND SURVIVAL**, vol. 1, p. 33.

**As to withdrawing pleas in bar, and pleading in abatement**, see the title **ABATEMENT, REVIVAL AND SURVIVAL**, vol. 1, p. 33.

**Withdrawal of Plea as Withdrawing Appearance.**—See the title **APPEARANCES**, vol. 2, p. 458.

(2) *Right to Plead Several Matters*—(a) *In General.*—Under the modern practice, it would seem that, in general, a defendant may, in different pleas, state as many separate and independent grounds of defense as he may be advised is material.<sup>17</sup> In some jurisdictions, however, it seems that the allowance of double pleas and defenses is not a matter of absolute right, but of discretion in the court, and that the courts constantly exercise their discretion in controlling this privilege by disallowing inconsistent pleas,<sup>18</sup> and in others, inconsistent or contradictory pleas are forbidden.<sup>19</sup> Where the law authorizes a defendant to plead several pleas, he may use each plea in his defense, and the

**14. Waiver by failure to plead at proper time.**—*Penhallow v. Doane*, 3 Dall. 54, 1 L. Ed. 507.

As to the rule that no relief will be granted in equity against a judgment at law, see the title **JUDGMENTS AND DECREES**, vol. 7, pp. 629, 633.

As to the rule that a judgment is conclusive in a suit on the same cause of action, as to all matters which might have been properly put in issue in the former action, see the title **RES ADJUDICATA**.

**15. Discretionary with court to allow filing of additional pleas, etc.**—*Gormley v. Bunyan*, 138 U. S. 623, 34 L. Ed. 1086; *Chapman v. Barney*, 129 U. S. 677, 32 L. Ed. 800; *Mandeville v. Wilson*, 5 Cranch 15, 3 L. Ed. 23; *Marine Ins. Co. v. Hodgson*, 6 Cranch 206, 3 L. Ed. 200.

**16. Exercise of discretion not reviewable in appellate court.**—See the title **APPEAL AND ERROR**, vol. 1, p. 1001.

**17. Right to plead several matters.**—*Haldeman v. United States*, 91 U. S. 584, 23 L. Ed. 433; *Glenn v. Sumner*, 132 U. S. 152, 33 L. Ed. 301.

"If a defendant pleads several pleas in bar, either of which is defense to the whole action, and one be found in his favor, he is entitled to judgment." *Harris v. Wall*, 7 How. 693, 12 L. Ed. 875.

According to the laws of Virginia, the defendant has the right to plead as many several matters, whether of law or fact, as he may deem necessary for his defense. *United States Bank v. Donnelly*, 8 Pet. 361, 8 L. Ed. 974.

In *United States Bank v. Donnelly*, 8 Pet. 361, 8 L. Ed. 974, the defendant, in accordance with his rights under the laws of Virginia, pleaded nil debet to the first three counts of the declaration (on which issue was joined), and the statute of limi-

tations of Virginia to the same count.

**18. Discretion of court to disallow inconsistent pleas.**—*Grand Chute v. Winegar*, 15 Wall. 355, 21 L. Ed. 170.

**Effect of inconsistent pleas in bar.**—One plea in bar is not waived by the existence of another plea in bar, though the two may be inconsistent in their averments with each other. The remedy of the plaintiff in such cases, is, as has been seen, to strike out one of the pleas, or to compel the defendant to elect by which he will abide. See ante, "Motion to Strike Out," VII, A, 2.

**19. The rule which prevails in Louisiana on the subject of general and special pleas, as declared in the decisions of her courts, is that they may be presented together, if consistent with each other. Inconsistent or contradictory pleas alone are forbidden.** *Andrews v. Hensler*, 6 Wall. 254, 18 L. Ed. 737.

Under the code of Louisiana, which allows general and special pleas to be pleaded together, if consistent with each other, an amended answer or plea on a redhibitory action for diseased and useless slaves bought at auction, that the auctioneer, who sold the slaves for the defendant, declared at his request at the time, that they must be examined by the physician of the purchaser previous to their delivery, but that the plaintiff was in such haste to obtain possession of the slaves purchased, that he removed them without examination, before the act of sale was passed, is not contradictory of or inconsistent with a general denial of an allegation that the slaves were at the time of sale afflicted with various maladies that were known to the defendant, from which some of them had since died, and the others had been rendered useless.



admissions unavoidably contained in one cannot be used against him in another.<sup>20</sup>

(b) *Right to Plead and Demur at the Same Time.*—See the title DEMURRERS, vol. 5, p. 306.

(c) *Right to Plead in Abatement and Bar at Same Time.*—See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, pp. 33, 39.

(3) *Requisites and Sufficiency of Pleas to the Action.*—(a) *Must Be Complete Answer to Declaration.*—**In General.**—The plea must be an answer to any case which may be legally established under the declaration.<sup>21</sup> A plea which contains neither a denial of the facts alleged in the declaration nor matter in confession and avoidance, is bad.<sup>22</sup> The plea must not only be adapted to the nature and form of the action, but must also be conformable to the count.<sup>23</sup>

**As to the method of taking advantage of failure to answer entire declaration or count,** see post, "Objections to Plea," XII, E, 2, c, (4).

(b) *Manner and Sufficiency of Alleging Matters Relied on by Way of Defense.*—**Application of General Rules as to Distinct, Positive, Definite and Certain Allegations.**—In accordance with the general rules of pleading already laid down,<sup>24</sup> the allegations in a plea, of the facts relied on by way of defense must be distinct,<sup>25</sup> direct and positive,<sup>26</sup> and not argumentative,<sup>27</sup> and must be definite and certain.<sup>28</sup> With regard to the degree of certainty required in pleas in bar, it would seem that if, by rational intendment, they meet the cause of action, or, in the phrase of the old writers, they are certain to a general intent, they are sufficient.<sup>29</sup>

Such amended answer only specified a particular fact in aid of the general denial. *Andrews v. Hensler*, 6 Wall. 254, 18 L. Ed. 737.

20. **Admissions in one plea not available against defendant in another.**—*Glenn v. Sumner*, 132 U. S. 152, 33 L. Ed. 301.

21. **Plea must be complete answer to declaration.**—*Lyon v. Bertram*, 20 How. 149, 15 L. Ed. 847. And see *United States v. Dashiell*, 4 Wall. 182, 18 L. Ed. 319; *Simonton v. Winter*, 5 Pet. 141, 8 L. Ed. 75.

Where a plea in answer is but notice of special matter by way of abatement of the amount claimed and so goes to but part of the cause of action, it cannot be relied on as a plea in bar. *United States v. Dashiell*, 4 Wall. 182, 18 L. Ed. 319.

**As to striking out from traverse matters not responsive to allegations,** see ante, "Motion to Strike Out," VII, A, 2.

22. **Plea must deny or confess and avoid.**—*Pumpelly v. Green Bay Co.*, 13 Wall. 166, 20 L. Ed. 557.

Where a declaration charges a defendant with overflowing the plaintiff's land by raising the water in the lake, a plea containing neither a denial of what is alleged nor authority for doing it is bad. *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 20 L. Ed. 557.

23. **Plea must be adapted to action and conform to count.**—*Simonton v. Winter*, 5 Pet. 141, 8 L. Ed. 75.

24. See ante, "Manner and Sufficiency," IV, C, 2.

25. **Facts must be alleged with distinctness.**—*McGuire v. Gerstley*, 204 U. S. 489, 51 L. Ed. 581.

26. **Must be direct and positive.**—*United States v. Bradley*, 10 Pet. 343, 9 L. Ed. 448.

27. **Must not be argumentative.**—*United States v. Bradley*, 10 Pet. 343, 9 L. Ed. 448; *Minor v. Mechanics' Bank*, 1 Pet. 46, 7 L. Ed. 47; *Gelston v. Hoyt*, 3 Wheat. 246, 4 L. Ed. 381. And see *Pendleton County v. Amy*, 13 Wall. 297, 20 L. Ed. 579.

**Argumentative traverse held good on general demurrer.**—On suit upon the coupons of railroad bonds payable, both bonds and coupons, by their terms, to the bearer—the declaration alleging the plaintiff to be owner, holder, and bearer of the coupons—a plea that the plaintiff was not, either at the time when the declaration or when the plea was filed, the owner, holder, or bearer, is a traverse of a material allegation of the declaration, and though faulty as argumentative, must, on general demurrer, be held good. *Pendleton County v. Amy*, 13 Wall. 297, 20 L. Ed. 579. See the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES, vol. 8, p. 650.

28. **Must be definite and certain.**—*Wise v. Allis*, 9 Wall. 737, 19 L. Ed. 784; *Minor v. Mechanics' Bank*, 1 Pet. 46, 7 L. Ed. 47.

"The object of the rule in regard to particularity or certainty necessary in pleas and notices) is undoubtedly to enable the other party to make such answer or response to the matter set up in the plea or notice, either by way of pleading or of evidence, or such cross-examination of the witness of the party setting up the plea or notice as the facts of his case may enable him to do." *Wise v. Allis*, 9 Wall. 737, 739, 19 L. Ed. 784.

29. **Degree of certainty requisite.**—*Withers v. Greene*, 9 How. 213, 13 L. Ed. 109.

"The degree of particularity or certainty necessary in pleas and notices is an



**Must Allege Facts and Not Conclusions of Law.**—A plea must allege facts and not conclusions of law.<sup>30</sup>

**Must Not Anticipate Evidence in Support of Plaintiff's Allegation.**—The office of a plea is, as has been seen, to state in the record the answer of the defendant to the allegations of the plaintiff,<sup>31</sup> but not to the evidence by which the defendant conjectures the plaintiff will endeavor to support those allegations.<sup>32</sup>

**Sufficiency of Pleading Facts According to Legal Effect.**—As has already been seen, it is a general rule that facts may be pleaded according to their legal effect, without setting forth the particulars that led to it,<sup>33</sup> and necessary circumstances implied by law need not be expressed in the plea.<sup>34</sup>

**As to construction of pleas in bar,** see ante, "Interpretation and Construction of Pleadings," VI.

(c) *Conclusion.*—**Test as to Proper Conclusion.**—A plea in bar should conclude to the country where it takes issue,<sup>35</sup> as in the case of a general traverse.<sup>36</sup> When, however, the plea sets up new matter in avoidance, it should conclude with a verification.<sup>37</sup> A defective conclusion of a plea in bar, being matter of form, must be pointed out by a special demurrer.<sup>38</sup> Such irregularity is cured by trial and verdict, and is not available for the first time in the appellate court.<sup>39</sup>

**Prayer for Judgment Not Essential to Validity.**—It would seem that the

ever-recurring question in judicial proceedings, and can never be effectually disposed of so long as new and varying circumstances may present the question in new aspects. The object of the rule is undoubtedly to enable the other party to make such answer or response to the matter set up in the plea or notice, either by way of pleading or of evidence, or such cross-examination of the witness of the party setting up the plea or notice as the facts of his case may enable him to do. In other words, to apprise him fairly of what he may expect to meet under the plea or notice." *Wise v. Allis*, 9 Wall. 737, 19 L. Ed. 784.

**30. Facts and not conclusions of law to be alleged.**—*Alexander v. Bryan*, 110 U. S. 414, 28 L. Ed. 195; *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 20 L. Ed. 557.

Where a plea relies on a statute authority, as a defense, it must allege the facts which it asserts to be so authorized, and cannot plead generally that it complied with the statute. Hence a plea is bad which states that defendant raised the water in a lake no higher than the statute authorized, when the statute forbade the water being raised above its ordinary level. *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 20 L. Ed. 557.

**31.** See ante, "Office of Plea," XII, E, 2, a.

**32. Must not anticipate evidence in support of plaintiff's allegations.**—*Christy v. Scott*, 4 How. 282, 14 Ed. 422.

"The defendants answer, that the evidence which the receiver has furnished the plaintiffs of this indebtedness is false and fabricated; and that no part of the sum in question was ever collected or received by him; thereby placing the defense upon the assumption of a fact or facts which may or may not be material in the case,

and upon which the plaintiffs may or may not rely in making out the indebtedness. A defendant has no right to anticipate or undertake to control by his pleadings the nature or character of the proof upon which his adversary may think proper to rely in support of his cause of action, nor to ground his defense upon any such proof. He must deal with the facts as they are set forth in the declaration; and not with the supposed or presumed evidence of them." *United States v. Girault*, 11 How. 22, 13 L. Ed. 587.

A plea cannot be sustained, which rests for its validity upon a supposed state of facts which may not exist. *Lyon v. Bertram*, 20 How. 149, 15 L. Ed. 847.

**33. Sufficiency of pleading facts according to legal effect.**—See ante, "Pleading Facts According to Legal Effect," IV, C, 2, a, (3).

**34. Circumstances implied by law need not be expressed.**—*Sullivan v. Iron Silver Min. Co.*, 109 U. S. 550, 27 L. Ed. 1028.

**35. When conclusion to country proper.**—*United States v. Girault*, 11 How. 22, 13 L. Ed. 587; *Laber v. Cooper*, 7 Wall. 565, 19 L. Ed. 151.

**36.** See dissenting opinion of Curtis, J., in *Scott v. Sandford*, 19 How. 393, 568, 15 L. Ed. 691.

**37. When plea should conclude with verification.**—*United States v. Linn*, 1 How. 104, 11 L. Ed. 64.

**38. Defect available only by special demurrer.**—*United States v. Girault*, 11 How. 22, 13 L. Ed. 587; *Laber v. Cooper*, 7 Wall. 565, 19 L. Ed. 151. See the title DEMURRERS, vol. 5, p. 296.

**39. Objection not available for first time in appellate court.**—*Laber v. Cooper*, 7 Wall. 565, 19 L. Ed. 151. See the titles AMENDMENTS, vol. 1, p. 310; APPEAL AND ERROR, vol. 2, p. 378.

prayer for judgment or conclusion of pleas in bar, is not considered as essential to their validity;<sup>40</sup> and that the court will give that judgment which, upon the whole record, appears to be the proper judgment, though not prayed for by the party.<sup>41</sup>

(4) *Objections to Plea.*—Generally, as to the manner of raising, waiving and curing objections to pleading, see ante, "Raising, Waiving and Curing Objections to Pleadings," VII.

**Where Plea Answers Only Part of Declaration or Count.**—It is a settled rule in pleading, that wherever a plea in its commencement professes to respond to the entire declaration or count, and is in substance and reality an answer to part only of such declaration or count, the plea is bad, and the defect may be availed of upon demurrer.<sup>41a</sup> If a plea professes in the commencement to answer only part of the declaration or count, and is in truth and substance a response to such part alone, the plaintiff should not demur, because the residue of the count or declaration is unanswered, but should take judgment for that residue by nil dicit, as by demurring he would operate a discontinuance of the entire cause.<sup>42</sup>

**Defects of form in pleas** are to be taken advantage of by special demurrer.<sup>43</sup>

(5) *Effect of Plea as Aiding Defects in Declaration.*—A defective declaration may be aided at common law by the plea.<sup>44</sup> Thus, in an action of trespass for taking goods, not stating them to be the property of the plaintiff, this defect will be aided, if the defendant, by his plea admits the plaintiff's property.<sup>45</sup> So, where several acts are to be performed by the plaintiff, as a condition precedent, and he does not aver performance of all, if it appear by the plea that the act omitted to be stated was, in fact, performed, the defect is cured.<sup>46</sup>

**40. Prayer for judgment not essential to validity of plea.**—Withers v. Greene, 9 How. 213, 13 L. Ed. 109.

**41. Court will give proper judgment upon whole record.**—Withers v. Greene, 9 How. 213, 13 L. Ed. 109.

"Thus it is stated by Chitty, vol. 1, p. 558, speaking of pleas in bar, 'that this prayer, before the recent rule' (alluding to the rules of pleading adopted in England in the 4th of William IV), 'ought properly to have corresponded with, and been founded upon, the commencement of the plea, and the effect of the matter contained in the body of it;' but, continues this author, 'as the court would ex officio give judgment in favor of the defendant according to the substance of the plea, without reference to the conclusion, an error with regard to the prayer of judgment in the concluding part of the plea was not material, except in the case of a plea in abatement.' In the case of *The King v. Shakespeare*, 10 East 87, upon a demurrer to a plea in abatement, Lord Ellenborough said: 'Praying judgment of the indictment means no more than praying judgment on the indictment; and if this were the case of a plea in bar, the court would give that judgment which, upon the whole record, appeared to be the proper judgment, though not prayed for by the party. But in abatement the court will give no other than the proper judgment prayed for by the party, and without the defendant prays a particular and proper judgment in abatement, the court are not bound to give the proper judgment upon the whole record, as they

would be in the case of pleas in bar.' In *Attwood v. Davis*, 1 Barn. & Ald., 173, it is said by Bayley, Justice, that 'there is a distinction between a plea in bar and a plea in abatement; in the former, the party may have a right judgment upon a wrong prayer, but not in the latter.' In the case of *Rowles v. Lusty*, 4 Bingh. 428, upon a writ of entry, it was ruled, that the prayer for judgment for the messuages and land in the count did not vitiate the plea, notwithstanding the commencement of the plea applied only to the messuages and parcel of the land. And in this last case, *The King v. Shakespeare* and *Attwood v. Davis* are cited as authority." Withers v. Greene, 9 How. 213, 13 L. Ed. 109.

**41a. When defect available upon demurrer.**—*Hogan v. Ross*, 13 How. 173, 14 L. Ed. 100. See the title DEMURRERS, vol. 5, p. 302.

**42. Judgment by nil dicit where plea professes to, and does respond to part only of declaration or count.**—*Hogan v. Ross*, 13 How. 173, 14 L. Ed. 100. See the titles DEMURRERS, vol. 5, p. 302; JUDGMENTS AND DECREES, vol. 7, p. 559.

**43. Defects of form ground for special demurrer.**—See the title DEMURRERS, vol. 5, p. 302.

**44. Plea as aiding defects in declaration.**—*United States v. Morris*, 10 Wheat. 246, 6 L. Ed. 314.

**45. United States v. Morris**, 10 Wheat. 246, 6 L. Ed. 314.

**46. United States v. Morris**, 10 Wheat. 246, 6 L. Ed. 314.



d. *Particular Pleas*—(1) *Pleas in Abatement*.—See the title *ABATEMENT, REVIVAL AND SURVIVAL*, vol. 1, p. 30, et seq.

(2) *Pleas in Bar*—(a) *General Issue*—aa. *Definition, Nature and Effect of Such Pleas Generally*—(aa) *Definition and Nature*.—The general issue is a plea which traverses and denies, briefly and in general and summary terms, the whole declaration, without tendering new or special matter;<sup>47</sup> and pleas amounting to the general issue, should traverse the material averments in the declaration.<sup>48</sup>

(bb) *Operation and Effect*.—**Effect as Raising Issue upon Merits**.—The plea of the general issue raises an issue upon the merits of the declaration.<sup>49</sup> It puts the plaintiff to prove the material allegations in his declaration, and the defendant assumes by it to contest them.<sup>50</sup>

**Operation as Waiver of Objection to Jurisdictional Averments, etc.**—A plea of the general issue leaves the jurisdictional averments without a traverse.<sup>51</sup> It admits not only the competency of the plaintiffs to sue,<sup>52</sup> but to sue in the particular action which they bring.<sup>53</sup>

**After pleading the general issue, it is too late to take advantage of a defect in the writ**, or a variance between the writ and declaration.<sup>54</sup>

bb. *Evidence Admissible under Plea*.—As to what evidence is admissible under the plea of the general issue, see the particular forms of the plea set out in the following section, and the cross references there found.

cc. *Forms of Plea in Particular Actions*—(aa) *Non Assumpsit*.—In actions of assumpsit the proper form of the general issue is non assumpsit.<sup>55</sup>

(bb) *Non Cepit*.—The proper form of the general issue in actions of replevin is non cepit.<sup>56</sup>

47. **Definition and nature of general issue**.—Black's Law Dict., title General Issue. And see *Alexander v. Harris*, 4 Cranch 299, 2 L. Ed. 627.

48. **Pleas of general issue must traverse material allegations**.—*Garland v. Davis*, 4 How. 131, 11 L. Ed. 907.

49. **Raises issue on merits of declaration**.—*Philadelphia, etc., R. Co. v. Quigley*, 21 How. 202, 16 L. Ed. 73.

Where a declaration in assumpsit upon bonds of a county issued to a railroad company, alleges that the bonds were issued by the county in pursuance of an act of legislature named, and that they were purchased by the plaintiffs for value and before any of them fell due, a plea of the general issue puts in issue the question of authority to issue, bona fides and notice. *Chambers County v. Clews*, 21 Wall. 317, 22 L. Ed. 517.

50. *McKenna v. Fisk*, 1 How. 241, 11 L. Ed. 117; *Packet Co. v. Clough*, 20 Wall. 528, 22 L. Ed. 406; *Alexander v. Harris*, 4 Cranch 299, 2 L. Ed. 627.

Ordinarily the general issue in an action of trespass on the case imposes upon the plaintiff the necessity of proving all the material facts averred in the declaration. *Packet Co. v. Clough*, 20 Wall. 528, 22 L. Ed. 406.

If, in the action of ejectment, the defendant pleads nothing but the general issue, and is found in possession of any part of the land demanded, he is considered as taking defense for the whole. *Greer v. Mezes*, 24 How. 268, 16 L. Ed. 661.

**A traverse can only be taken on matter**

**of fact**, and it is always inadmissible to tender an issue on mere matter of law. *Clearwater v. Meredith*, 1 Wall. 25, 17 L. Ed. 604.

51. **Leaves jurisdictional averments untraversed**.—*Philadelphia, etc., R. Co. v. Quigley*, 21 How. 202, 16 L. Ed. 73; *Deputron v. Young*, 134 U. S. 241, 33 L. Ed. 923.

52. **Admission of plaintiffs' capacity to sue**.—*Society for the Propagation of the Gospel v. Pawlet*, 4 Pet. 480, 7 L. Ed. 927; *Yeaton v. Lynn*, 5 Pet. 224, 8 L. Ed. 105; *United States v. Insurance Companies*, 22 Wall. 99, 22 L. Ed. 816.

53. *Society for the Propagation of the Gospel v. Pawlet*, 4 Pet. 480, 7 L. Ed. 927.

"It is well settled, that, in a suit by a corporation, a plea of the general issue admits the competency of the plaintiff to sue as such. *Society for the Propagation of the Gospel v. Pawlet*, 4 Pet. 480, 7 L. Ed. 927." *Pullman v. Upton*, 96 U. S. 328, 24 L. Ed. 818.

54. **Effect as waiver of defects in the writ, etc.**—*McKenna v. Fisk*, 1 How. 241, 11 L. Ed. 117.

Generally, as to the effect of pleading in bar as waiving all pleas, and the right to plead in abatement, see the title *ABATEMENT, REVIVAL AND SURVIVAL*, vol. 1, p. 39, et seq.

55. **Nonassumpsit**.—See the titles *ASSUMPSIT*, vol. 2, p. 656; *BILLS, NOTES AND CHECKS*, vol. 3, p. 361.

56. **Non cepit**.—See the title *REPLEVIN*.



(cc) *Non Detinet*.—Non detinet is the proper form of the general issue in actions of detinue.<sup>57</sup>

(dd) *Nil Debet*.—**When Proper**.—Nil debet is the proper form of the general issue in actions of debt on simple contract;<sup>58</sup> but is an improper plea to an action of debt upon a specialty or deed, where it is the foundation of the action.<sup>59</sup>

**Effect**.—The plea of nil debet puts the whole declaration in issue.<sup>60</sup>

(ee) *Non Est Factum*.—**When Proper**.—Non est factum is the proper form of the general issue in actions of debt on bond or other specialty.<sup>61</sup>

**Effect**.—The plea of non est factum amounts to a denial that the instrument declared on was the defendant's deed at the time of action brought.<sup>62</sup> It is the proper plea to set up rature of a deed.<sup>63</sup>

**Conclusion**.—A plea of non est factum rightly concludes to the country,<sup>64</sup> and so the plaintiff has no opportunity to reply specially any new matter of fact. He can only join the issue tendered.<sup>65</sup>

**Verification**.—In some jurisdictions it is provided by statute that no plea of non est factum shall be admitted or received, unless the truth thereof shall be proved by oath or affirmation,<sup>66</sup> and in courts of states in which such statute exists, a plea of non est factum without the affidavit required, is demurrable.<sup>67</sup>

(ff) *Not Guilty*.—**When Proper**.—Not guilty is the proper form of the general issue in actions of trespass, case and trover,<sup>68</sup> and in criminal prosecutions.<sup>69</sup>

(gg) *Nul Tiel Record*.—**When Proper**.—Nul tiel record is the proper form of the general issue in an action of debt on a judgment.<sup>70</sup>

**Nul tiel record puts in issue only the fact of the existence of the record, and is met by the production of the record itself valid upon its face, or an exemplification duly authenticated under the act of congress.**<sup>71</sup>

dd. *General Issue with Notice of Special Defense*.—By statute in some ju-

57. *Non detinet*.—See the title DETINUE, vol. 5, p. 346.

58. *Nil debet*.—See the titles BONDS, vol. 3, p. 431; DEBT, THE ACTION OF, vol. 5, p. 209.

59. *Improper where specialty or deed foundation of action*.—Sneed v. Wister, 8 Wheat. 690, 5 L. Ed. 117.

60. *Puts whole declaration in issue*.—Alexander v. Harris, 4 Cranch 299, 2 L. Ed. 627.

61. *Non est factum*.—Black's Law Dict., title Non Est Factum. See the title BONDS, vol. 3, p. 431.

62. "On non est factum, the present validity of the deed or contract is in issue; and every circumstance that goes to show that it is not the deed or contract of the party, is provable by parol evidence. It is of necessity, therefore, that the other party should support it by the same evidence." Speake v. United States, 9 Cranch 28, 3 L. Ed. 645.

**Effect**.—Philadelphia, etc., R. Co. v. Howard, 13 How. 307, 308, 14 L. Ed. 157.

63. *Proper plea to set up rature of deed*.—See, generally, the title ALTERATION OF INSTRUMENTS, vol. 1, p. 272.

If sealed and delivered, and subsequently altered, or erased in a material part, or if the seal was torn off, before action brought, the plea is supported. Philadelphia, etc., R. Co. v. Howard, 13 How. 307, 308, 14 L. Ed. 157.

64. *Concludes to the country*.—Phila-

delphia, etc., R. Co. v. Howard, 13 How. 307, 308, 14 L. Ed. 157.

65. *Philadelphia, etc., R. Co. v. Howard*, 13 How. 307, 308, 14 L. Ed. 157.

66. *Necessity for verification*.—Bell v. Vicksburg, 23 How. 443, 16 L. Ed. 579. See the title BONDS, vol. 3, p. 431.

67. *Demurrer for want of verification*.—Bell v. Vicksburg, 23 How. 443, 16 L. Ed. 579. See, generally, the title DEMURRERS, vol. 5, p. 305.

68. *Not guilty proper plea in trespass, case and trover*.—Garland v. Davis, 4 How. 131, 11 L. Ed. 907; United States v. Daniel, 6 How. 11, 12 L. Ed. 323. See the titles TRESPASS; TROVER AND CONVERSION.

"Pleas amounting to the general issue should traverse the material averments in the declaration, and when the action is one on the case for tort, should deny the tort by pleading 'not guilty.'" Garland v. Davis, 4 How. 131, 11 L. Ed. 907.

69. *In criminal prosecutions*.—See the title CRIMINAL LAW, vol. 5, p. 107, and also the titles relating to the particular criminal proceedings.

70. *Nul tiel record*.—See the titles FOREIGN JUDGMENTS, RECORDS AND JUDICIAL PROCEEDINGS, vol. 6, p. 366; JUDGMENTS AND DECREES, vol. 7, p. 610.

71. *Effect—How met*.—Hill v. Mendenhall, 21 Wall. 453, 22 L. Ed. 616.

risdictions it is provided that the defendant may plead the general issue, and under such issue give any special matter in evidence which is pertinent to the issue, and of which notice may be given in a prescribed manner and time to the opposite party or his attorney.<sup>72</sup>

(b) *Special Pleas*—aa. *General Rules as to Nature, Propriety and Sufficiency.*—**Nature and Effect.**—A special plea or plea in confession and avoidance, is one which, while admitting expressly or by implication the averments in the declaration, alleges new facts which obviate and repel their legal effect.<sup>73</sup>

**When Proper.**—As appears from the definitions above given, a special plea is proper where the defendant desires to avoid the action by setting up special matter which the plaintiff would not be bound to prove or dispute in the first instance on the general issue.<sup>74</sup>

**Special Matter Must Be Such as to Bar the Action.**—Special matter set up in a plea in bar of the action must be such that if true in point of fact, it will bar the action and defeat the plaintiff's right to recover.<sup>75</sup>

**72. General issue with notice of special matter, etc.**—United States *v.* Stone, 106 U. S. 525, 27 L. Ed. 163; Gelston *v.* Hoyt, 3 Wheat. 246, 333, 4 L. Ed. 381; Lincoln *v.* Iron Co., 103 U. S. 412, 26 L. Ed. 518; Lyon *v.* Pollard, 20 Wall. 403, 22 L. Ed. 361; Teese *v.* Huntingdon, 23 How. 2, 16 L. Ed. 479; Parks *v.* Booth, 102 U. S. 96, 26 L. Ed. 54.

Where a person agreed to serve in superintending a large hotel for another, at a compensation specified, either party being at liberty to terminate the contract on thirty days' notice to the other, and the person agreeing to superintend was ejected by the other on less than thirty days' notice, held, in a suit for damages by the party thus ejected—the general issue being pleaded and notice of special matter given—that the defendant might prove that the party ejected was unfit to perform his duty by reason of the use of opiates, and by reason of unsound mental condition. Lyon *v.* Pollard, 20 Wall. 403, 22 L. Ed. 361.

By the 15th section of the patent act of the 4th of July, 1836, the defendant is permitted to plead the general issue and give any special matter in evidence, provided notice in writing may have been given to the plaintiff or his attorney thirty days before the trial. Teese *v.* Huntingdon, 23 How. 2, 16 L. Ed. 479. See the title PATENTS, ante, p. 136.

**As to striking out notice of special matter,** where evidence of such matter is admissible under the general issue, see ante, "Motion to Strike Out," VII, A, 2.

**73. Definitions.**—Bouv. Law Dict., title Plea. And see United States *v.* Linn, 1 How. 104, 11 L. Ed. 64; Oscanyan *v.* Arms Co., 103 U. S. 261, 26 L. Ed. 539.

"A plea in confession and avoidance is one which avows and confesses the truth of the averments of fact in the declaration, either expressly or by implication, but then proceeds to allege new matter which tends to deprive the facts admitted of their ordinary legal effect, or to obviate, neutralize, or avoid them." Black's Law Dict., title Confession and Avoidance.

"The general rule of pleading is, that when an issue is properly joined, he who asserts the affirmative must prove it; and if the defendant, by his plea, confesses and avoids the count, he admits the fact stated in the count." Simonton *v.* Winter, 5 Pet. 141, 8 L. Ed. 75.

Where the plea is payment of the sums of money demanded in the declaration, it will confess and avoid the count, and the affirmative will rest upon defendant to prove payment. Simonton *v.* Winter, 5 Pet. 141, 8 L. Ed. 75.

**Matter must be well pleaded to operate as admission.**—If matter is not well pleaded and is no answer to the breach assigned in the declaration, it cannot be considered an admission of the cause of action stated in the declaration. Simonton *v.* Winter, 5 Pet. 141, 8 L. Ed. 75.

**74. When proper.**—Bouv. Law Dict., title Plea. And see Hill *v.* Mendenhall, 21 Wall. 453, 22 L. Ed. 616; Oscanyan *v.* Arms Co., 103 U. S. 261, 26 L. Ed. 539.

Where suit is brought on a record which shows that service was not made on the defendant, but which shows also that an appearance was entered for him by an attorney of the court, it is not allowable, under a plea of nul tiel record only, to prove that the attorney had no authority to appear. Presumptively, an attorney of a court of record, who appears for a party, has authority to appear for him; and though the party for whom he has appeared, when sued on a record in which judgment has been entered against him on such attorney's appearance, may prove that the attorney has no authority to appear, yet he can do this only on a special plea, or on such plea as under systems which do not follow the common-law system of pleading, is the equivalent of such plea. Hill *v.* Mendenhall, 21 Wall. 453, 22 L. Ed. 616.

**As to special pleas in actions on bills, notes and checks,** see the title BILLS, NOTES AND CHECKS, vol. 3, p. 361.

**75. Special matter must be such as to bar the action, etc.**—United States *v.* Linn, 1 How. 104, 11 L. Ed. 64.

**Plea Bad as Amounting to General Issue.**—A special plea which amounts to the general issue is bad;<sup>76</sup> and is ground for special demurrer where such demurrers are allowed;<sup>77</sup> or for motion to strike out.<sup>78</sup>

bb. *Defenses Properly Made by Special Plea*—(aa) *Accord and Satisfaction*.—See the titles ACCORD AND SATISFACTION, vol. 1, p. 69; APPEAL AND ERROR, vol. 2, p. 190.

(bb) *Autrefois, Acquit and Convict*.—See the title AUTREFOIS, ACQUIT AND CONVICT, vol. 2, p. 762.

(cc) *Former Recovery*.—See the title RES ADJUDICATA.

(dd) *Justification*.—**When Proper**.—See the titles FALSE IMPRISONMENT, vol. 6, p. 243; LIBEL AND SLANDER, vol. 7, p. 857; TRESPASS.

**Form and Sufficiency.**—Whenever one justifies in a special plea an act which in itself constitutes at common law a wrong, upon the process, order, or authority of another, he must set forth substantially and in a traversable form the process, order, or authority relied upon, and no mere averment of its legal effect, without other statement, will answer.<sup>79</sup>

**A plea, alleging a seizure for a forfeiture, as a justification,** should not only state the facts relied on to establish the forfeiture, but aver that thereby the property became and was actually forfeited, and was seized as forfeited.<sup>80</sup>

(ee) *Ne Unques Administrator*.—See the title EXECUTORS AND ADMINISTRATORS, vol. 6, p. 180.

(ff) *Non Damnificatus*.—Non damnificatus is the proper plea in cases of covenants to indemnify and save harmless.<sup>81</sup>

(gg) *Payment*.—See the title PAYMENT, ante, p. 319.

(hh) *Plene Administravit*.—See the title EXECUTORS AND ADMINISTRATORS, vol. 6, p. 173.

**76. Special plea amounting to general issue bad.**—*Van Ness v. Forrest*, 8 Cranch 30, 3 L. Ed. 478; *Liter v. Green*, 2 Wheat. 306, 4 L. Ed. 246. And see *Pollak v. Brush Electric Ass'n*, 128 U. S. 446, 32 L. Ed. 474.

If the declaration be upon a joint note, and the defendant plead that the note is a separate note or one of the defendant's, and was given to and accepted by the plaintiff, in full satisfaction of the debt, this plea is bad, upon special demurrer, because it amounts to the general issue. *Van Ness v. Forrest*, 8 Cranch 30, 3 L. Ed. 478.

**77. Ground for special demurrer.**—*Van Ness v. Forrest*, 8 Cranch 30, 3 L. Ed. 478; *Pendleton County v. Amy*, 13 Wall. 297, 20 L. Ed. 579. See the title DEMURRERS, vol. 5, pp. 296, 298.

**78. As to striking out pleas amounting to the general issue,** see ante, "Motion to Strike Out," VII. A. 2.

**79. Necessity for setting forth order or authority relied upon.**—*Bean v. Beckwith*, 18 Wall. 510, 21 L. Ed. 849. See the title FALSE IMPRISONMENT, vol. 6, p. 243.

**Plea held sufficient though informal.**—In a suit of trespass de bonis asportatis, against C. (a sheriff) and D. (the plaintiff in a writ of attachment executed by the said sheriff), a plea contains all the averments essential to a justification when it alleges sufficiently that the chattels mentioned in the declaration were the prop-

erty of B. on the 4th of May, 1867, that on the 3d of the same May a writ of attachment was issued out of the court of a county named in favor of D., directed to the sheriff of the said county, commanding him to attach so much of the personal and real estate of said B. as should be sufficient to satisfy a sum specified; that on the said 3d of May, the said C. was sheriff of the county named; that on the said day the writ of attachment was delivered to him to execute; and that on the 4th of said May, he levied upon the said goods and chattels as the property of the said B., by virtue of the said writ, and that these were the supposed trespasses. And this is so, even though the plea do not allege that D. was a creditor of B., nor that the attachment was otherwise regularly issued, nor that D. did the acts complained of under the direction of the sheriff, nor that the attachment had been returned. However informal such a plea may be, the informality is not such as that, after a traverse of its allegations, issue, and trial, it can be taken advantage of on error. The plaintiff should be demurred. *Deutsch v. Wiggins*, 15 Wall. 539, 21 L. Ed. 228.

**80. Requisite of plea alleging seizure for forfeiture as justification.**—*Gelston v. Hoyt*, 3 Wheat. 246, 4 L. Ed. 381. See the title PENALTIES AND FORFEITURES, ante, p. 357.

**81. Non damnificatus.**—See the titles BONDS, vol. 3, p. 432; COVENANTS, vol. 5, p. 19.



(ii) *Release*.—See the title RELEASE.

(jj) *Set-Off*.—See the title SET-OFF, RECOUPMENT AND COUNTERCLAIM.

(kk) *Statute of Limitations*.—See the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, p. 900.

(ll) *Usage and Custom*.—See the title USAGES AND CUSTOMS.

(mm) *Usury*.—See the title USURY.

e. *Joint Pleas*.—If several defendants join in pleading in bar, if the plea is bad as to one defendant it is bad as to all.<sup>82</sup>

**F. Answer**—1. IN EQUITY.—See the title EQUITY, vol. 5, p. 862, et seq.

2. UNDER CODES AND PRACTICE ACTS—*a. Nature and Effect*.—The answer, under the various codes and practice acts, takes the place of all pleas at common law, whether general or special, in abatement or to the merits.<sup>83</sup>

*b. Form, Requisites and Sufficiency*—(1) *General or Specific Denial*—(a) *Necessity*.—In General.—It is the usual provision in the codes and practice acts of the various states that the answer shall contain a general or specific denial of each material allegation of the complaint or petition, controverted by the defendant,<sup>84</sup> or of any knowledge or information thereof sufficient to form a belief.<sup>85</sup>

**Requirement of Specific Denial**.—In some states, however, a specific denial to every allegation intended to be controverted would seem to be required.<sup>86</sup>

**Effect of Failure to Controvert**.—It is a common provision of the various codes that each material allegation of the complaint or petition, not controverted by the answer, must, for the purpose of the action, be taken as true.<sup>87</sup>

(b) *Form and Sufficiency of Denial*.—**Positive Denial of Each and Every Allegation**.—According to the practice in some states, a positive denial in the answer of "each and every allegation" in the petition or complaint, puts in issue every material allegation therein, as fully as if it had been specifically and separately denied.<sup>88</sup> In at least one state however, it is specifically provided that with regard to certain allegations in the complaint or petition, it shall not be sufficient to controvert them in terms contradictory of the allegations, but the facts relied on shall be specifically stated.<sup>89</sup>

**Denial of All Allegations Not Admitted**.—In some jurisdictions it has been held that the rule as to denials in the answer is complied with where the an-

82. Joint plea as to one defendant bad as to all.—United States v. Linn, 1 How. 104, 11 L. Ed. 64; Marsteller v. McClean, 7 Cranch 156, 3 L. Ed. 300.

"The reason is, because the plea, being entire, cannot be good in part and bad in part, an entire plea not being divisible, and consequently, if the matter jointly pleaded be insufficient as to one of the parties, it is so in toto." United States v. Linn, 1 How. 104, 11 L. Ed. 64.

83. Supplants all pleas at common law.—Roberts v. Lewis, 144 U. S. 653, 36 L. Ed. 579.

84. General or specific denial.—Burley v. German-American Bank, 111 U. S. 216, 28 L. Ed. 406; Roberts v. Lewis, 144 U. S. 653, 36 L. Ed. 579; Robertson v. Perkins, 129 U. S. 233, 32 L. Ed. 686; Glenn v. Sumner, 132 U. S. 152, 33 L. Ed. 301; Hardy v. Johnson, 1 Wall. 371, 17 L. Ed. 502.

85. Denial of knowledge or information, etc.—Burley v. German-American Bank, 111 U. S. 216, 28 L. Ed. 406; Robertson v. Perkins, 129 U. S. 233, 32 L. Ed. 686; Glenn v. Sumner, 132 U. S. 152, 33 L. Ed. 301.

**Provision of § 56 of Montana Practice Act as to denial of information, etc.**—By § 56 of the Montana Practice Act, it is provided that "in denying any allegation in the complaint, not presumptively within the knowledge of the defendant it shall be sufficient to put such allegation in issue for the defendant to state that, as to any such allegation, he has not and cannot obtain sufficient knowledge or information upon which to base the belief." Maclay v. Sands, 94 U. S. 586, 24 L. Ed. 211.

86. Necessity for specific denial.—By § 56 of the Montana Practice Act it is provided that "the answer of the defendant shall contain a specific denial to each allegation in the complaint intended to be controverted by the defendant." Maclay v. Sands, 94 U. S. 586, 24 L. Ed. 211.

87. Uncontroverted material allegations taken as true.—Robertson v. Perkins, 129 U. S. 233, 32 L. Ed. 686.

88. Positive denial of "each and every allegation."—Roberts v. Lewis, 144 U. S. 653, 36 L. Ed. 579, decided under the Nebraska Code, which was modeled after the Code of New York.

89. Necessity for specific statement of

swer admits certain allegations in the petition or complaint and denies all except those expressly admitted.<sup>90</sup>

**Denial on Information and Belief.**—Though when the facts are such as must presumptively have been within the personal knowledge of the defendant, a denial upon information and belief might perhaps be properly treated as evasive,<sup>91</sup> yet, when the facts are not of this nature, it would seem that a denial upon information and belief will be sufficient.<sup>92</sup>

**Denial Amounting to Negative Pregnant Insufficient.**—A negative preg-

**facts relied on.**—Under the Iowa Code (§ 2717), where a petition in an action ex contractu, in setting out the cause of action alleges, as it may properly do, that "the plaintiff duly performed all the conditions upon his part to be kept and performed," a statement in the answer that the defendant "denies each and every allegation in said petition, and the three several counts thereof contained as fully and to the same purpose and effect as though each special allegation were herein specifically put in issue," is insufficient, and admits the performance of a condition precedent in the contract as to deposit of money by the plaintiff. *Halferty v. Wilmering*, 112 U. S. 713, 28 L. Ed. 858.

So, also, under § 2717 of the Iowa Code, where the plaintiff in his petition alleges generally, or as a legal conclusion, the capacity or relation of the plaintiff or defendant, it will not be sufficient to controvert such allegation in terms contradictory of the allegation, but the facts relied on must be specifically stated. *Halferty v. Wilmering*, 112 U. S. 713, 28 L. Ed. 858.

**90. Denial of all allegations not admitted.**—*Burley v. German-American Bank*, 111 U. S. 216, 28 L. Ed. 406; *Nemaha County v. Frank*, 120 U. S. 41, 30 L. Ed. 584.

In New York, under § 500 of the code of civil procedure, an answer which makes certain statements, and then denies every allegation of the complaint, "except as hereinbefore stated or admitted," amounts to a sufficient general denial of all allegations of the complaint not admitted, to authorize evidence to be given to show any of such allegations to be untrue. An objection that such denial is indefinite or uncertain must be taken by a motion made, before trial, to make the answer definite and certain, by amendment, and cannot be availed of by excluding evidence at the trial. *Burley v. German-American Bank*, 111 U. S. 216, 28 L. Ed. 406. See ante, "Motion to Make More Definite and Certain," VII, A, 3.

"It is well settled, in New York, that a denial in the form here in question is proper. The form is, that every allegation is denied 'except as hereinbefore stated or admitted.' In *Youngs v. Kent*, 46 N. Y. 672, material allegations in a complaint, which, if controverted, presented an issue of fact for trial were not expressly admitted, and were not alluded to in the statement of special facts alleged in the answer, and it was held that they were

to be regarded as controverted under a denial of each and every allegation of the complaint not 'herein admitted or stated.' In *Allis v. Leonard*, 46 N. Y. 688, fully reported in 22 Albany Law Journal 28, the same principle was applied to an answer which admitted certain allegations in a complaint and denied all except those expressly admitted. We regard it as the rule in New York, that a denial such as is found in the answer in this case, in connection with the rest of the answer, is a sufficient denial to raise an issue as to the plaintiff's ownership of the notes and to warrant evidence to show any other ownership. Under such a denial a defendant has a right to prove anything that will show the allegation covered by the denial to be untrue. *Wheeler v. Billings*, 38 N. Y. 263; *Hier v. Grant*, 47 N. Y. 278; *Greenfield v. Massachusetts Mutual Life Insurance Company*, Id. 430, 437; *Weaver v. Barden*, 49 Id. 286." *Burley v. German-American Bank*, 111 U. S. 216, 28 L. Ed. 406.

**91. Such denial improper as to facts presumptively within defendant's knowledge.**—*Maclay v. Sands*, 94 U. S. 586, 24 L. Ed. 211.

**92. Such denial proper as to matters not presumptively within defendant's personal knowledge.**—Under the Civil Practice Act of Montana, judgment cannot be entered against a defendant, as upon default for want of issues to be tried, where there is on file in the cause an answer, specifically denying, upon information and belief only, all the allegations in the complaint, if it appears that the facts in controversy were not within the personal knowledge of the defendant, and that the information upon which he based his belief came from his agents employed to transact the business out of which the litigation arose. *Maclay v. Sands*, 94 U. S. 586, 24 L. Ed. 211.

"The business of the defendants, in respect to which they were sued, was that of common carriers, and must necessarily have been conducted to a considerable extent through agents. Under such circumstances, their knowledge as to many of their transactions would properly come from information. If the facts had been such as must have been within their personal knowledge, a denial upon information and belief might perhaps have been properly treated as evasive; but here any presumption of personal knowledge has been overcome by the statements in the

nant in pleading is such a form of negative expression as may imply or carry within it an affirmative;<sup>93</sup> and a denial in an answer which amounts to a mere negative pregnant, is insufficient.<sup>94</sup>

(c) *Matters Admissible under General Denial*.—Under the general denial, as under the general issue at common law, it would seem that any facts are admissible in evidence, which show that the plaintiff never had a valid cause of action, as, for instance, the invalidity of the contract sued on.<sup>95</sup>

(2) *Statement of New Matter Constituting Defense or Counterclaim*.—(a) *Necessity*.—**In General**.—In addition to the provisions as to a general or spe-

verification, and unless parties under such circumstances are permitted to qualify their denials, they will be compelled to swear positively to that which they only believed to be true because they have information to that effect. We do not think that parties, upon a fair construction of the statute, are driven to that extremity. The denial, when made, must be specific; but it is none the less specific because based on information and belief. Provision is made for an issue by a formal denial, where sufficient knowledge or information upon which to base a belief cannot be obtained. This implies that, if the necessary information can be obtained, a statement must be made predicated upon that; and, if it is to be made, we cannot see what harm can result from adding the grounds on which it is based. It is the same for all the purposes of an issue whether the qualification is given or not, and the issue is the material thing to be attained." *Macley v. Sands*, 94 U. S. 586, 24 L. Ed. 211.

**93. Negative pregnant**.—*Bouv. Law Dict.*, title Negative Pregnant.

**94. Denial by negative pregnant insufficient**.—*Ex parte Wall*, 107 U. S. 265, 27 L. Ed. 552.

"As, in urging this argument, much stress is laid upon the fact that the petitioner, by his answer, denied the charge contained in the rule to show cause, it is proper to notice the manner in which this denial was made. The charge, as we have seen, was specific and particular: 'That J. B. Wall, an attorney of this court, did, on the sixth day of this present month, engage in and with an unlawful, tumultuous, and riotous gathering, he advising and encouraging thereto, take from the jail of Hillsborough County and hang by the neck until he was dead, one John, otherwise unknown, thereby showing an utter disregard and contempt for the law and its provisions,' etc. The denial of this charge was a mere negative pregnant, amounting only to a denial of the attending circumstances and legal consequences ascribed to the act. The respondent denied 'counselling, advising, encouraging, or assisting an unlawful, tumultuous, and riotous gathering or mob in taking one John from the jail of Hillsborough County and causing his death by hanging, in contempt and defiance of the law.' He was not required to answer under oath, and

did not do so. Yet, free from this restriction, he did not come out fully and fairly and deny that he was engaged in the transaction at all; but only that he did not engage in it with the attendant circumstances and legal consequences set out in the charge. Even the name of the victim is made a material part of the traverse. Upon such a special plea as this, we think the court was justified in regarding the denial as unsatisfactory. It was really equivalent to an admission of the substantial matter of the charge." *Ex parte Wall*, 107 U. S. 265, 27 L. Ed. 552.

**95. Invalidity of contract sued on**.—"Whatever shows the invalidity of the contract, shows that in fact no such contract as alleged ever existed. The general denial under the code of procedure of New York, or the general issue at common law, is, therefore, sustained by proof of the invalidity of the transaction which is designated in the complaint or declaration as a contract." *Oscanyan v. Arms Co.*, 103 U. S. 261, 26 L. Ed. 539.

"Whilst, however, at the common law, under the general issue in assumpsit, it was always admissible to give in evidence any matter which showed that the plaintiff never had a valid cause of action, in practice many other matters were allowed under that plea, such as went to the discharge of the original cause of action, and showed that none subsisted at the commencement of the suit—such as payment, release, accord and satisfaction, and a former recovery, and excuses for nonperformance of the contract; and also that it had become impossible or illegal to perform it. 1 *Chitty, Pleading*, 493; *Craig v. Missouri*, 4 *Pet.* 410, 426, 7 L. Ed. 903; *Edson v. Weston*, 7 *Cow.* (N. Y.) 278; *Young v. Rummell*, 2 *Hill* (N. Y.) 478. It followed that there were many surprises at the trial by defenses which the plaintiff was not prepared to meet. The English courts, under the authority of an act of Parliament passed in the reign of William IV, adopted rules which, to some extent, corrected the evils arising from this practice of allowing defenses under the general issue which did not go directly to the validity of the original cause of action. And the code of procedure of New York did away entirely with the practice in that state, and required parties relying upon anything which, admitting the original existence of the cause of action, went to



cific denial, the various codes usually require the answer to contain a statement of any new matter constituting a defense or counterclaim.<sup>96</sup>

**When Such Statement Proper.**—Where the defendant relies upon anything which, admitting the original existence of the cause of action, goes to show its discharge, such as a release,<sup>97</sup> payment,<sup>98</sup> or other matter, he is required to plead it specially, in order that the plaintiff may be apprised of the grounds of defense to the action.<sup>99</sup>

(b) *Right to Plead Several Defenses.*—Under the codes and practice acts, the defendant may set forth by his answer as many defenses and counterclaims as he may have.<sup>1</sup> When a general denial is pleaded in connection with a special defense of new matter, or two inconsistent defenses are set up, the admissions in the one cannot be used to destroy the effect of the other.<sup>2</sup>

(c) *Form and Sufficiency of Statement.*—The statement of new matter in the answer should be in ordinary and concise language, without repetition.<sup>3</sup>

c. *Verification.*—See ante, "Verification," IV, F.

d. *Objections to Answer.*—**Demurrer.**—Where an answer is of such a character as to present no issuable questions of fact going to the merits of the suit, it is properly demurred to.<sup>4</sup>

**Motion to Strike Out Special Defenses Available under General Denial.**—See ante, "Motion to Strike Out," VII, A, 2.

**Motion to Make More Definite and Certain.**—See ante, "Motion to Make More Definite and Certain," VII, A, 3.

e. *Amendment of Answers.*—See the title AMENDMENTS, vol. 1, p. 301.

**G. Replication.**—1. DEFINITION AND NATURE.—The replication is the plaintiff's reply to the defendant's plea, either denying the same or setting up matter in avoidance.<sup>5</sup>

A replication *de injuria* is the replication by which, in an action of tort,

show its discharge—such as a release or payment, or other matter—to plead it specially, in order that the plaintiff might be apprised of the grounds of defense to the action. We do not understand that the code makes any other change in the matters admissible under the general denial." *Oscanyan v. Arms Co.*, 103 U. S. 261, 26 L. Ed. 539.

96. *Statement of new matter, etc.*—*Burley v. German-American Bank*, 111 U. S. 216, 28 L. Ed. 406; *Roberts v. Lewis*, 144 U. S. 653, 36 L. Ed. 579; *Glenn v. Sumner*, 132 U. S. 152, 33 L. Ed. 301; *Hardy v. Johnson*, 1 Wall. 371, 17 L. Ed. 502.

97. *Release.*—*Oscanyan v. Arms Co.*, 103 U. S. 261, 26 L. Ed. 539. See the title RELEASE.

98. *Payment.*—*Oscanyan v. Arms Co.*, 103 U. S. 261, 26 L. Ed. 539.

99. *Oscanyan v. Arms Co.*, 103 U. S. 261, 26 L. Ed. 539.

"An answer to be good must overcome the case made by the complaint. If the facts well pleaded in the complaint are admitted, as in this case, it must state other facts, sufficient, if true, to defeat the action in whole or in part, or it will not avail as a defense." *Gillette v. Bullard*, 20 Wall. 571, 22 L. Ed. 387.

1. *Right to plead several defenses.*—By the Code of Washington Territory (§ 83, subdivision 3) "the defendant may set forth, by answer, as many defenses and counterclaims as he may have, whether they be such as have been heretofore de-

nominated legal or equitable, or both." *Brown v. Rank*, 132 U. S. 216, 33 L. Ed. 340.

Under the Arizona statute (Revised Statute, 1887, § 734), it is provided that the "defendant in his answer may plead as many several matters whether of law or fact, as may be necessary for his defense, and which may be pertinent to the cause, but such pleas shall be stated in the following order and filed at the same time: 1. Matters denying the jurisdiction of the court. 2. Matters in the abatement of a suit. 3. Matters denying the sufficiency of the complaint, or of any cause of action therein, by demurrer, general or special. 4. Matters of counterclaim and set-off." *Murphy v. Utter*, 186 U. S. 95, 46 L. Ed. 1070.

2. *Effect of pleading general denial in connection with new matter, etc.*—*Smith v. Gale*, 144 U. S. 509, 36 L. Ed. 521.

3. *New matter to be stated in ordinary and concise language, etc.*—*Burley v. German-American Bank*, 111 U. S. 216, 28 L. Ed. 406; *Glenn v. Sumner*, 132 U. S. 152, 33 L. Ed. 301.

4. *Demurrer for failure to present issuable questions of fact, etc.*—*Chicot County v. Sherwood*, 148 U. S. 529, 37 L. Ed. 546. See, generally, the title DEMURRERS, vol. 5, p. 303.

5. *Definition and nature of replications generally.*—*Bouv. Law Dict.*, title Replication. *United States v. Buford*, 3 Pet. 12, 7 L. Ed. 585.

the plaintiff denies the effect of excuse or justification offered by the defendant.<sup>6</sup> According to numerous decisions in this country it would seem that such replication can only be used where the plea sets up matter of excuse and is not good where matter of justification is set up. Other cases, however, seem to question the correctness of this doctrine.<sup>7</sup>

2. **NECESSITY**—a. *At Common Law.*—**In General.**—In the correct order of pleading at common law, where the plea sets up new matter in bar, and does not merely traverse the declaration,<sup>8</sup> it is necessary that the facts of the plea shall be traversed or avoided by the replication.<sup>9</sup>

**Replication by Way of New Assignment.**—A plea need answer only the gist of the action, and if the matter alleged in aggravation be relied on as a substantive trespass, it should be replied by way of new assignment.<sup>10</sup>

b. *Under Codes and Practice Acts.*—Under the codes of some states, no replication is necessary in the absence of a counterclaim,<sup>11</sup> unless ordered by the court.<sup>12</sup> In other states it has been expressly declared by statute that new matter in an answer shall, on trial, be deemed controverted by the adverse party.<sup>13</sup>

3. **FILING, WITHDRAWAL AND SUBSTITUTION**—a. *Time and Leave to File.*—**In General.**—Where the defendant has filed his plea, the plaintiff should reply within the time fixed by the rules of the court,<sup>14</sup> and for a failure to reply within such time, the defendant has a right to judgment by default against the plaintiff.<sup>15</sup>

6. **Replication de injuria.**—Bouv. Law Dict., title De Injuria.

The replication of de injuria, interposed to a special plea, justifying the seizure and conviction of property sued for by one as collector of internal revenue under an assessment against the plaintiff, duly made by the assessor of the district and certified to him, puts in issue the material averments of that plea. It throws upon the defendant the burden of proving so much of the plea as constitutes a defense to the action. *Erskine v. Hohnbach*, 14 Wall. 613, 20 L. Ed. 745.

7. **Test as to propriety of such replication.**—"We are aware of numerous decisions in this country to the effect that the replication de injuria is only a good replication where the plea sets up matter of excuse, and is not good where the plea sets up matter of justification, though the justification be under process from a court not of record, or rest upon some authority of law other than a judgment of a court. Such are the decisions of the supreme court of New York, and they proceed upon the supposed doctrine of the resolutions in *Crogate's Case*. But an examination of that case will show that the doctrine is not supported to the extent laid down in the New York decisions." *Erskine v. Hohnbach*, 14 wall. 613, 20 L. Ed. 745.

8. **As to necessity for joinder of issue**, where the plea is by way of traverse, and concludes to the country, see ante, "Non Est Factum," XII, E, 2, d, (2), (a), cc, (ee); post, "Similiter," XV, A, 2.

9. **Necessity at common law.**—*United States v. Buford*, 3 Pet. 12, 7 L. Ed. 585.

"Legal effect of a replication is, that it puts in issue all the matters well alleged

in the answer, and the rule is, that if none be filed, the answer will be taken as true, and no evidence can be given by the complainant to contradict anything which is therein well alleged." *Clifford, J. Brown v. Pierce*, 7 Wall. 205, 19 L. Ed. 134.

10. **Replication by way of new assignment.**—*Gelston v. Hoyt*, 3 Wheat. 246, 4 L. Ed. 381.

Thus, to trespass for taking and detaining and converting property, it is sufficient to plead a justification of the taking and detention, and if the plaintiff relies on the conversion, he should reply it by way of new assignment. *Gelston v. Hoyt*, 3 Wheat. 246, 4 L. Ed. 381. See the titles TRESPASS; TROVER AND CONVERSION.

11. **Unnecessary in absence of counterclaim.**—*North Carolina Code Civ. Procedure*, § 105. *Glenn v. Sumner*, 132 U. S. 152, 33 L. Ed. 301. And see *Daggs v. Phoenix Nat. Bank*, 177 U. S. 549, 44 L. Ed. 882.

12. **Power of court to order.**—*Glenn v. Sumner*, 132 U. S. 152, 33 L. Ed. 301.

13. **New matter in answer deemed controverted on trial.**—Under a statute of California, which provides that new matter in an answer shall on the trial be deemed controverted by the adverse party, witnesses may properly be examined, in a case where such an answer having new matter is put in. *Cheang-Kee v. United States*, 3 Wall. 320, 18 L. Ed. 72.

14. **Replication to be filed within time fixed by rules of court.**—*Keator Lumber Co. v. Thompson*, 144 U. S. 434, 36 L. Ed. 495. And see, generally, the title RULES OF COURT.

15. **Default for failure to reply within proper time.**—*Keator Lumber Co. v.*

**Necessity for Leave to File during Progress of Trial.**—The filing of a replication during the progress of the trial, without leave of court, is irregular, and if made to appear during the term that the defendant was unaware, prior to the entry of judgment, that they were so filed, may be ground for setting aside the judgment.<sup>16</sup> The objection that replications were not filed when the trial commenced, nor before judgment, with leave of the court, comes too late, however, after judgment has been entered.<sup>17</sup>

b. *Withdrawal and Substitution.*—When a plaintiff replies to a plea, and his replication being demurred to, is held to be insufficient, and he withdraws that replication and substitutes a new one—the substituted one being complete in itself, not referring to or making part of the one which preceded—he waives the right to question in the appellate court the decision of the court below on the sufficiency of what he had first replied. The same is true when he abandons a second replication, and with leave of the court files a third and last one.<sup>18</sup>

4. **FORM, REQUISITES AND SUFFICIENCY**—a. *Must Contain Full and Complete Answer to Plea in Bar.*—It is a rule of pleading that a replication should, of itself, contain a full and complete answer to the bar.<sup>19</sup>

b. *Must Take Issue on Material Allegation of Plea.*—Under the common-law rule it is not sufficient that the facts alleged in the replication be inconsistent with those stated in the plea; an issue must be taken on the material allegations of the plea.<sup>20</sup>

c. *Can Traverse Only Matters of Fact.*—A traverse can only be taken on matters of fact, and it is always inadmissible to tender an issue on mere matters of law.<sup>21</sup>

Thompson, 144 U. S. 434, 36 L. Ed. 495. See the title JUDGMENTS AND DECREES, vol. 7, p. 657.

16. **Irregular filing ground for setting aside judgment.**—Keator Lumber Co. v. Thompson, 144 U. S. 434, 36 L. Ed. 495. See, generally, the title JUDGMENTS AND DECREES, vol. 7, p. 580.

17. **Objection too late after judgment entered.**—Keator Lumber Co. v. Thompson, 144 U. S. 434, 36 L. Ed. 495. See, generally, the title APPEAL AND ERROR, vol. 2, p. 114.

18. **Withdrawal and substitution of replication.**—Clearwater v. Meredith, 1 Wall. 25, 17 L. Ed. 604.

19. **Replication must contain complete answer to bar.**—Marsteller v. McClean, 7 Cranch 156, 3 L. Ed. 300.

"The plea in this case was non est factum, which amounts to a denial that the instrument declared on was the defendant's deed at the time of action brought. If sealed and delivered, and subsequently altered, or erased, in a material part, or if the seal was torn off, before action brought, the plea is supported. 5 Co., 23, 119 b.; 11 Co., 27, 28; Co. Litt., 35 b., n. 6, 7. It follows that a replication to the effect that on some day, long before action brought, the instrument was the deed of the defendant, would be bad on demurrer, for it would not completely answer the plea." Philadelphia, etc., R. Co. v. Howard, 13 How. 307, 308, 14 L. Ed. 157.

20. **Must take issue on material allegations of plea.**—United States v. Buford, 3 Pet. 12, 7 L. Ed. 585. And see Erskine v. Hohnbach, 14 Wall. 613, 20 L. Ed. 745.

As to objections to sufficiency of repli-

cation to put such material allegations in issue, see post, "Raising, Waiving and Curing Objections to Replication," XII, G, 6.

21. **Must traverse matters of fact, etc.**—Clearwater v. Meredith, 1 Wall. 25, 17 L. Ed. 604.

"The replication to this plea is that the matters, neglects, and defaults in the said three breaches in the declaration were not the same matters, neglects, and defaults in the said plea mentioned, and in respect to which the judgment was recovered. We think the replication is bad, on the ground that it raises an issue of law, rather than one of fact." Chapman v. Smith, 16 How. 114, 14 L. Ed. 868.

In a suit upon a sheriff's bond, where the plea was that this proceeding had been resorted to by the plaintiff and a verdict found for the sheriff, a replication to this plea alleging that the property in question in that trial was not the same property mentioned in the breach assigned in the declaration, was a bad replication and demurrable. It submitted a question of law to the jury. Chapman v. Smith, 16 How. 114, 14 L. Ed. 868.

The statute of Indiana, passed February 23, 1853, which authorizes connected railroad corporations to merge and consolidate their stock, and make one joint company of the roads thus connected, causes, when the consolidation is effected—as is declared by the supreme court of the state, in McMahon v. Morrison (16 Indiana 172)—a dissolution of the previous companies, and creates a new corporation with new liabilities derived from those which have passed out of existence.



d. *Must Be Direct and Positive.—In General.*—In accordance with the general rule as to pleadings,<sup>22</sup> the replication must be direct and positive in its averments, and, as has been seen, an allegation of facts inconsistent with those stated in the plea will not be sufficient.<sup>23</sup>

**Sufficiency of Denial of Each and Every Allegation of Counterclaim.**—Under code practice, where an answer has set up a counterclaim, a denial by the plaintiff of each and every one of its allegations would seem to be a sufficient replication.<sup>24</sup>

e. *Must Plead Facts and Not Conclusions of Law.*—A replication must, in accordance with the usual rule, plead facts and not conclusions of law.<sup>25</sup>

f. *Must Not Depart from Declaration or Complaint.*—In accordance with the general rule as to departure in pleadings,<sup>26</sup> the replication must not contain matter not pursuant to the declaration or complaint.<sup>27</sup>

Hence, where the declaration avers that the defendant had agreed that stock of a particular railroad in Indiana should be worth a certain price at a certain time and in a certain place, and the plea sets up that under the above-mentioned statute of February 23, 1853, the stock of the railway named was merged and consolidated by the consent of the party suing, with a second railway named; so forming "one joint stock company of the said two corporations," under a corporate name stated, such plea is good, though it does not aver that the consolidation was done without the consent of the defendants. And a replication which tenders issue upon the destruction of the first company and upon the fact that its stock is destroyed, rendered worthless, and of no value, traverses a conclusion of law, and is bad. *Clearwater v. Meredith*, 1 Wall. 25, 17 L. Ed. 604.

<sup>22.</sup> See ante, "Must Be Direct and Positive," IV, C, 2, a, (1).

<sup>23.</sup> **Allegations of facts inconsistent with plea insufficient.**—See ante, "Must Take Issue on Material Allegation of Plea," XII, G, 4, b.

<sup>24.</sup> **Denial of each and every allegation of counterclaim.**—*Daggs v. Phoenix Nat. Bank*, 177 U. S. 549, 44 L. Ed. 882.

"The counterclaims of plaintiffs in error present these facts: The making of the five thousand dollar note by W. A. and P. P. Daggs, and its delivery to Thomas Armstrong, Jr.; its assignment by the latter to the Phoenix National Bank (appellee), and by the bank, in writing, for a valuable consideration to the defendant, A. J. Daggs (one of the appellants); the insolvency of the makers, W. A. and P. P. Daggs, and the nonpayment of the note or any part of it. To the counterclaim there was a demurrer for insufficiency, and a denial of each and every one of its allegations. The denial was not verified. The supreme court of the territory, considering an error assigned on the overruling of appellants' motion for judgment on the counterclaim, held it insufficient because it did not allege that due diligence to correct the note had been exercised, as required by the statute of the territory, or that any effort had been made to collect

the same. By this ruling it is urged that the court assumed that the counterclaim was based on the rights of a surety instead of upon the direct obligation of the Phoenix Bank, as assignor of the Armstrong note on account of Armstrong's insolvency. Articles 122, 1226 and 788 of the Arizona statutes. Assuming without deciding that appellants are correct in their construction of the Arizona statutes, and assuming that the answer to the counterclaim did not put in issue the making of the Armstrong note, and its assignment to plaintiff in error, nevertheless the answer to the counterclaim did put in issue the other facts alleged, to wit, the insolvency of the makers of the note and its nonpayment." *Daggs v. Phoenix Nat. Bank*, 177 U. S. 549, 44 L. Ed. 882.

<sup>25.</sup> **Must plead facts and not conclusions of law.**—*Braun v. Sauerwein*, 10 Wall. 218, 19 L. Ed. 895. See ante, "Facts and Not Conclusions of Law to Be Plead," IV, C, 1, a, (3).

"The replication to the defendant's pleas fails to state when the appeal was made. True, the averment is, it was 'duly' made, but that is pleading a conclusion of law rather than a fact." *Braun v. Sauerwein*, 10 Wall. 218, 19 L. Ed. 895.

<sup>26.</sup> See ante, "Departure," IV, C, 3.

<sup>27.</sup> **Replication must not depart from declaration or complaint.**—*Union Pac. R. Co. v. Wyler*, 158 U. S. 285, 39 L. Ed. 983; *Ankeny v. Clark*, 148 U. S. 345, 37 L. Ed. 475.

"Chitty on Pleading, 1, pp. 674, 675, states the principle as follows: 'A departure may be either in the substance of the action or defense or the law on which it is founded; as if a declaration be founded on the common law, and the replication attempt to maintain it by a special custom or act of parliament.' *Union Pac. R. Co. v. Wyler*, 158 U. S. 285, 39 L. Ed. 983.

"It does, indeed, appear that, in the case of *Distler v. Dabney*, the supreme court of the state of Washington has construed the code of that state as meaning that the plaintiff's complaint must contain his real cause of action, and that he cannot be permitted to meet matter set up in the answer by resorting, in his rep-

*g. Must Not Be Double.*—Where a replication unites two or more breaches, it is bad for duplicity.<sup>28</sup>

5. OPERATION AND EFFECT—*a. Operation as Abandonment of Demurrer.*—When parties, after a demurrer interposed by them to an answer is overruled, instead of relying upon its sufficiency, file a replication, they thereby abandon the demurrer, and it ceases henceforth to be a part of the record.<sup>29</sup>

*b. Effect as Aiding Defective Declaration.*—Under certain circumstances it seems that an averment fatally defective in a declaration may be remedied by a fuller averment in the replication.<sup>30</sup>

*c. Effect as Aiding Defective Plea.*—A defective plea may be aided, in some cases, by the replication.<sup>31</sup>

6. RAISING, WAIVING AND CURING OBJECTIONS TO REPLICATION.—See, generally, ante, "Raising, Waiving and Curing Objections to Pleading," VII.

**Where an immaterial issue is tendered**, the proper course for the defendant to pursue is to demur to the replication, and thus force the plaintiff to join issue on the merits of the defense pleaded, or to allow judgment to pass against him.<sup>32</sup>

lication, to a new cause of action inconsistent with the statement made in the complaint." *Ankeny v. Clark*, 148 U. S. 345, 37 L. Ed. 415.

If the defendant plead the bankruptcy of the indorser in bar, a replication, stating that the note was given to the indorser, in trust for the plaintiff, is not a departure from the declaration, which alleges the note to have been given by the defendant, for value received. *Wilson v. Codman*, 3 Cranch 193, 2 L. Ed. 408.

**28. Replication bad for duplicity.**—*Clearwater v. Meredith*, 1 Wall. 25, 17 L. Ed. 604. See *Shelby v. Guy*, 11 Wheat. 361, 6 L. Ed. 495.

The statute of Indiana, passed February 23, 1853, which authorizes connected railroad corporations to merge and consolidate their stock, and make one joint company of the roads thus connected, causes, when the consolidation is effected—as is declared by the supreme court of the state, in *McMahon v. Morrison* (16 Indiana 172)—a dissolution of the previous companies, and creates a new corporation with new liabilities derived from those which have passed out of existence. Hence, where the declaration avers that the defendant had agreed that stock of a particular railroad in Indiana should be worth a certain price at a certain time and in a certain place, and the plea sets up that under the above-mentioned statute of February 23, 1853, the stock of the railway named was merged and consolidated by the consent of the party suing, with a second railway named; so forming "one joint stock company of the said two corporations," under a corporate name stated, such plea is good, though it does not aver that the consolidation was done without the consent of the defendants. Such a plea as that just mentioned contains two points, and two points only, which the plaintiff can traverse—the fact of consolidation and the fact of consent; and these must be denied separately. If denied together, the replication is double, and bad. *Clearwater*

*v. Meredith*, 1 Wall. 25, 17 L. Ed. 604.

"In this plea there were two points, and two only, which the plaintiff had the right to traverse. He could deny either the act of consolidation, or that he gave his consent to it. He could not deny both, for that would make his replication double. And if either fact was untrue, the defense was destroyed. The truth of both was essential to perfect the defense. But traverse can only be taken on matter of fact, and it is always inadmissible to tender an issue on mere matter of law." *Clearwater v. Meredith*, 1 Wall. 25, 17 L. Ed. 604.

**29. Operation as abandonment of demurrer.**—*Young v. Martin*, 8 Wall. 354, 19 L. Ed. 418. See, generally, the title DEMURRERS, vol. 5, p. 307.

**30. Effect as remedying defective declaration.**—*McNitt v. Turner*, 16 Wall. 352, 21 L. Ed. 341, citing *Lafayette Ins. Co. v. French*, 18 How. 404, 405, 15 L. Ed. 451.

A defective declaration may be cured by sufficient averments in a replication demurred to. *Railroad Co. v. Harris*, 12 Wall. 65, 20 L. Ed. 354.

**31. Effect as aiding defective plea.**—"It is laid down by Chitty (*Chitty on Plead.* 547), and for which he cites adjudged cases which support him, that, as a defective declaration may be aided at common law by the plea, so a defective plea may be aided, in some cases, by the replication. As if, in debt or bond, to make an estate to A., the defendant pleads, that he enfeoffed another to the use of A. (which is not sufficient, without showing that A. was a party, or had the deed), yet if the plaintiff reply that he did not enfeoff, this aids the bar. So, if the defendant plead an award, without sufficient certainty, and the plaintiff makes a replication which imports the award to have been made, it aids the uncertainty of the bar." *United States v. Morris*, 10 Wheat. 246, 6 L. Ed. 314.

**32. Demurrer where immaterial issue tendered.**—*Erskine v. Hohnbach*, 14 Wall.

**Want of Replication to Special Plea Not Available on Appeal.**—Where a case has been tried and a verdict rendered as if the pleadings had been perfect, the failure to reply to a special plea setting up a matter of defense furnishes no ground for reversing the judgment.<sup>33</sup>

**As to objection that replication was not filed before trial, or with leave of court,** see ante, "Time and Leave to File," XII, G, 3, a.

**Objection to Sufficiency Cured by Verdict.**—The question of the sufficiency of a replication *de injuria*, to put the material averments of the plea in issue, cannot be raised after verdict.<sup>34</sup>

**H. Rejoinder and Subsequent Pleadings**—1. **NATURE AND PROPRIETY.**—A rejoinder is the second pleading on the part of the defendant, being his answer of matter of fact to the plaintiff's replication.<sup>35</sup>

The pleadings subsequent to the rejoinder, consist of the surrejoinder, the rebutter, and surrebutter. All these special pleadings, and even others, without specific names, may be necessary before issue is finally joined between the parties, under the common law, and have in fact been used in modern practice, in jurisdictions where the common-law forms still prevail.<sup>36</sup>

2. **REQUISITES OF REJOINDER.**—**Must Traverse All Material Averments in Replication.**—The rejoinder must traverse all material averments in the replication, which are traversable,<sup>37</sup> or such matter will be considered to have been admitted.<sup>38</sup>

**Must Not Depart from Plea.**—A rejoinder must not depart from the defense made by the plea, by setting up matters not pursuant thereto and not sup-

613, 20 L. Ed. 745. See, generally, the title DEMURRERS, vol. 5, p. 303.

**As to award of repleader where verdict rendered on immaterial issue,** see ante, "Repleader," X.

**33. Objection for want of replication too late on appeal.**—*Laber v. Cooper*, 7 Wall. 565, 19 L. Ed. 151, reaffirmed in *Nauvoo v. Ritter*, 97 U. S. 389, 24 L. Ed. 1050. See the title APPEAL AND ERROR, vol. 2, p. 113.

**34. Objection to sufficiency too late after verdict.**—*Ersine v. Hohnbach*, 14 Wall. 613, 20 L. Ed. 745.

Generally, as to defects in pleadings cured by verdict, see the title AMENDMENTS, vol. 1, p. 310.

**35. Rejoinder defined.**—*Black's Law Dict.*, title Rejoinder. And see *Toland v. Sprague*, 12 Pet. 300, 9 L. Ed. 1093.

**36. Use of rejoinder and subsequent pleadings in modern practice.**—See *Baker v. Cummings*, 181 U. S. 117, 45 L. Ed. 776, in which the court said: "A perusal of the record in this case demonstrates at least how conservative congress has heretofore been in relation to the adoption of any amendment of the law relating to pleading and procedure in the District of Columbia. The last of the series of pleadings herein by which the question of the validity of the defense of *res adjudicata* was finally brought before the court is denominated 'defendant's joinder of issue on plaintiff's second surrejoinder to defendant's fourth rejoinder to plaintiff's third replication.' Replications, rejoinders, surrejoinders, rebutters, surrebutters and demurrers abound, and they all seem to have been regarded as properly filed for

the purpose of presenting the question whether the decree in the equity case was *res adjudicata* or not. In reading these pleadings we seem to be transported back to the days when the practice of the special pleader had become a science by itself."

**37. Must traverse all traversable material allegations in replication.**—*Toland v. Sprague*, 12 Pet. 300, 9 L. Ed. 1093.

**38. Admission by failure to traverse.**—*Toland v. Sprague*, 12 Pet. 300, 9 L. Ed. 1093.

**Averment held not to be material and not admitted by failure to traverse.**—"It is said, that the plaintiff having averred in his replication, that there was no account stated or settled between him and the defendant, and the defendant not having traversed that averment in his rejoinder, the matter contained in that averment is admitted. It is a rule in pleading, that where in the pleading of one party, there is material averment, which is traversable, but which is not traversed by the other party, it is admitted. We think that the rule does not apply to this case, because the negative averment in the replication that no account had been stated between the parties, was not a necessary part of the plaintiff's replication, to bring him within the exception of the statute in relation to merchant's accounts. Inasmuch, then, as the replication, without that averment, would be sufficient; we do not consider it as one of those material averments, the omission to traverse which, is admission of its truth, within the rule before stated." *Toland v. Sprague*, 12 Pet. 300, 9 L. Ed. 1093.



porting and fortifying it.<sup>39</sup>

3. EFFECT OF FILING AMENDED REJOINDER.—Where there is a demurrer to a rejoinder, which demurrer is sustained by the court below, and the party, on leave, files an amended rejoinder, the appellate court cannot be asked to decide upon the demurrer. The point was waived by the filing of the amended rejoinder.<sup>40</sup>

### XIII. Affidavit of Merits or Defense.

A. Right of Court to Require.—A court may adopt a rule requiring an affidavit of merits or defense to be filed in actions *ex contractu*,<sup>41</sup> and the validity of such a rule has been repeatedly upheld.<sup>42</sup>

B. Purpose of Requirement.—The purpose of such a rule is to preserve the court from frivolous defenses, and to defeat attempts to use formal pleading as means to delay the recovery of just demands.<sup>43</sup>

39. Must not depart from plea.—Union Pac. R. Co. v. Wyler, 158 U. S. 285, 39 L. Ed. 983. See ante, "Departure," IV, C, 3.

"Comyn's Digest, 'Pleader' (F. 8), states the same rule, and gives the following illustrations of departure: In debt on bond by sheriff against his bailiff to pay him 20d. for every defendant's name in every warrant in mesne process, defendant pleads he had paid it, plaintiff replies that he had not paid it for A; defendant rejoins Stat. 23 H. 6. and 3 G. it is a departure; for pleading he has had and rejoining he ought not to pay; and for pleading common-law plea, and rejoining a statute. *Balantine v. Irwin*, M. 4 G. C. B. Fort. 368. 'So, if a man avows, for that A. being seized in fee granted to him a rent, and the defendant pleads, nothing in the tenements at the time of the grant, and the plaintiff rejoins that A. was cestuy que use in fee, which use is now executed by the statute of uses; this is a departure.' Pl. Com. 105 b." Union Pac. R. Co. v. Wyler, 158 U. S. 285, 39 L. Ed. 983.

40. Effect of filing amended rejoinder after demurrer sustained.—United States v. Boyd, 5 How. 29, 12 L. Ed. 36.

41. Provision of rule 73 of the supreme court of the District of Columbia.—The seventy-third rule of this court is as follows: "In any action arising *ex contractu*, if the plaintiff or his agent shall have filed, at the time of bringing his action, an affidavit setting out distinctly his cause of action, and the sum he claims to be due, exclusive of all set-offs and just grounds of defense, and shall have served the defendant with copies of his declaration and of said affidavit, he shall be entitled to a judgment for the amount so claimed, with interest and costs, unless the defendant shall file, along with his plea, if in bar, an affidavit of defense denying the right of the plaintiff as to the whole or some specified part of his claim, and specifically stating also, in precise and distinct terms, the grounds of his defense, which must be such as would, if true, be sufficient to defeat the plaintiff's claim in whole or in part. And where the defendant shall have acknowledged in his affidavit of de-

fense his liability for a part of the plaintiff's claim as aforesaid, the plaintiff, if he so elect, may have judgment entered in his favor for the amount so confessed to be due. § 2. The provisions of this rule shall not apply to defendants who are representatives of a decedent's estate except when the affidavit filed with the declaration sets forth that the contract sued on was directly with such representative, or that a promise to pay was made by him. § 3. When the defendant is a corporation, the affidavit of defense may be made by an officer, agent or attorney of such corporation. Rules of the supreme court of the District of Columbia adopted at the April term, 1898, p. 28." *Fidelity, etc., Co. v. United States*, 187 U. S. 315, 47 L. Ed. 194.

42. Validity of rule.—"The rule was formerly number 75 and has existed a long time. The court of appeals of the district has sustained its validity in a number of cases. This court also sustained its validity in *Smoot v. Rittenhouse*, decided January 10, 1876. The case is questioned as authority because, it is said, that 'if this court upheld a rule of such important character and doubtful validity it would give the grounds of its decision.' But the objection assumes that the court had doubts. The better inference is that the court regarded the grounds of challenge to the validity of the rule as without foundation. And its validity was challenged and necessarily passed on, which disposes of the contention that the decision was based on another point." *Fidelity, etc., Co. v. United States*, 187 U. S. 315, 47 L. Ed. 194.

"If it were true that the rule deprived the plaintiff in error of the right of trial by jury, it would be void without reference to cases. But it does not do so. It prescribes the means of making an issue. The issue made as prescribed, the right of trial by jury accrues." *Fidelity, etc., Co. v. United States*, 187 U. S. 315, 319, 47 L. Ed. 194.

43. Purpose of rule.—*Fidelity, etc., Co. v. United States*, 187 U. S. 315, 47 L. Ed. 194.

**C. Requisites and Sufficiency of Affidavit.**—An affidavit of defense must not only deny the right of the plaintiff, but must also state, in precise and distinct terms the grounds of defense, which must be such as would, if true, be sufficient to defeat the plaintiff's claim in whole or in part.<sup>44</sup>

**D. Facts Stated in Affidavit Accepted as True.**—Facts stated in the affidavit of defense will be accepted as true.<sup>45</sup>

#### XIV. Affidavits Attacking Validity of Instrument Sued on, or Introduced in Evidence.

**Essential to Denial of Execution of Instrument Sued on.**—In a number of jurisdictions, it is provided by statute, or required by rules of court, that no person shall be permitted to deny the signature when sued on a written instrument, unless he makes an affidavit denying the signature.<sup>46</sup>

**Affidavit as to Forgery of Instrument Sought to Be Introduced in Evidence.**—In some jurisdictions an affidavit is essential where it is desired to prevent the admission in evidence of a recorded instrument, on the ground that such instrument is believed to be a forgery.<sup>47</sup>

#### XV. Issues and Proof.

**A. Definition, Nature and Formation of Issues**—1. IN GENERAL.—An issue is a single, certain and material point,<sup>48</sup> arising out of the allegations or

**44. Requisites and sufficiency of affidavit of defense.**—*Fidelity, etc., Co. v. United States*, 187 U. S. 315, 47 L. Ed. 194.

"As early as 1879 the supreme court of the district recited the history of the rule and explained its purpose. 'It was a rule,' the court said, 'to prevent vexatious details in the maturing of a judgment where there is no defense. \* \* \* Now, what does the rule mean, this being its office? It is couched in very plain language. It says the defendant shall set out his grounds of defense and swear to them. It does not mean a defense in all its details of incident and fact, but the foundation of defense. That is all. Those grounds ought not to be vague and indefinite. They should have significance and meaning, and should express the idea of defense upon the ground to which they are addressed. It was never contemplated that this rule required a party to follow his case through all lights and shadows of the evidence in it. That would be to hold it essential that he should try his case in his plea.' *Bank v. Hitz, MacArthur & Mackey*, 198. This interpretation was affirmed in *Cropley v. Vogeler*, 2 App. D. C. 28; see, also, 2 App. D. C. 340; *Gleason v. Hoeke*, 5 App. D. C. 1; 12 App. D. C. 161; *Bailey v. District of Columbia*, 4 App. D. C. 356. And the facts stated in the affidavit of defense will be accepted as true. *Straus v. Hensey*, 7 App. D. C. 289." *Fidelity, etc., Co. v. United States*, 187 U. S. 315, 47 L. Ed. 194.

**45. Facts stated accepted as true.**—*Fidelity, etc., Co. v. United States*, 187 U. S. 315, 47 L. Ed. 194.

**46. Necessity for affidavit denying execution of written instrument.**—See ante, "Necessity," IV, F, 1, and cross references there found.

**47. Affidavit alleging forgery of instrument sought to be introduced in evidence.**

—The law of Texas provides as follows: "Every instrument in writing (properly recorded) shall be admitted as evidence without the necessity of proving its execution, provided that the party who wishes to give it in evidence shall file the same among the papers of the suit three days before the trial and give notice to the opposite party of such filing, and unless such opposite party, or some other person for him, shall within one day after such notice file an affidavit stating that he believes such instrument to be forged." *McPhaul v. Lapsley*, 20 Wall. 264, 22 L. Ed. 344; *Cox v. Hart*, 145 U. S. 376, 36 L. Ed. 741. And see the title RECORDING ACTS.

The object of such an affidavit is to throw the burden of proof on the defendant. *McPhaul v. Lapsley*, 20 Wall. 264, 22 L. Ed. 344.

**Affidavit stricken out where not filed in time.**—In *McPhaul v. Lapsley*, 20 Wall. 264, 22 L. Ed. 344, the notice was given on the 16th of January, 1872, and the affidavit was not filed until the 5th of February following, while the trial was in progress. It was held that such affidavit was properly stricken out.

**Sufficiency of affidavit filed for another purpose.**—In *Cox v. Hart*, 145 U. S. 376, 36 L. Ed. 741, it was queried whether an affidavit that one of the deeds relied on in the chain of title was forged, filed in an action of trespass to try title in Texas, for the purpose of obtaining a continuance, was such an affidavit as would, under Rev. Stats. Texas, Art. 2257, affect its admissibility in evidence.

**48. Issue defined.**—*Simonton v. Winter*, 5 Pet. 141, 8 L. Ed. 75.

"The law requires every issue to be

pleadings of the parties;<sup>49</sup> and, generally, should be made up by an affirmative and negative.<sup>50</sup>

**The issue gives notice to the parties of the point which is to be tried, and which the testimony must support.**<sup>51</sup>

2. **SIMILITER.**—Under modern practice the addition of the similiter as indicating the acceptance of an issue of fact tendered by the pleadings of the opposite party, is considered but a matter of form, and its omission is cured by trial and verdict.<sup>52</sup>

**B. Burden of Proof.**—The general rule of pleading is, that when an issue is properly joined, he who asserts the affirmative must prove it.<sup>53</sup>

**C. Correspondence of Allegata and Probata.**—**In General.**—It is undoubtedly the rule in equity, as well as at law, that the proofs must correspond with the allegations,<sup>54</sup> and that evidence irrelevant or applicable to the latter should be regarded as immaterial.<sup>55</sup> The purpose of the rule which requires that the allegations and the proofs must correspond, is that the opposite party may be fairly apprised of the specific nature of the question involved in the issue.<sup>56</sup>

**Unnecessary to Prove Matters Admitted by Pleading.**—That which is admitted by the pleadings need not be proved.<sup>57</sup>

## XVI. Admissions in Pleadings, and Pleadings as Evidence.

**Admission by Failure to Deny Traversable Matters in Plaintiff's Pleadings.**—As to the general rule that material averments in pleadings not traversed by the other party are admitted, see ante, "Effect of Failure to Traverse Material Allegations in Adversary's Pleading," IV, B, 1, c. As to the effect of a plea in confession and evidence as admitting the facts alleged in the declaration, see ante, "General Rules as to Nature, Propriety and Sufficiency," XII, E, 2, d, (2), (b), aa. As to the rule, under code practice, that material allegations of the complaint or petition, not controverted by the answer, must, for the purpose of the action, be taken as true, see ante, "Necessity," XII, F, 2, b, (1), (a). As to the effect of failure to file a replication, see ante, "Necessity," XII, G, 2. As to the effect of failure of the rejoinder to traverse all material allegations in the replication, see ante, "Requisites of Rejoinder," XII, H, 2.

founded upon some certain point; that the parties may come prepared with their evidence, and not be taken by surprise, and the jury may not be misled by the introduction of various matters." *Minor v. Mechanics' Bank*, 1 Pet. 46, 7 L. Ed. 47.

49. **Arises from allegations or pleadings of parties.**—*Simonton v. Winter*, 5 Pet. 141, 8 L. Ed. 75.

Generally, as to necessity of pleadings for the purpose of forming an issue, see ante, "Definition, Purpose and Necessity of Proceedings," II.

50. **Made up by affirmative and negative.**—*Simonton v. Winter*, 5 Pet. 141, 8 L. Ed. 75.

51. **Issue gives notice of point to be tried, etc.**—*Alexander v. Harris*, 4 Cranch 299, 2 L. Ed. 627.

52. **Addition of similiter matter of form—Omission cured by verdict.**—*Dermott v. Wallach*, 1 Black 96, 17 L. Ed. 50; *Laber v. Cooper*, 7 Wall. 565, 19 L. Ed. 151.

The addition of a similiter to the plea of property in an action of replevin is but matter of form, and its omission does not affect its validity. *Dermott v. Wal-*

*lach*, 1 Black 96, 17 L. Ed. 50. See the title AMENDMENTS, vol. 1, p. 311.

53. **Burden of proof on party asserting affirmative.**—*Simonton v. Winter*, 5 Pet. 141, 8 L. Ed. 75. See the title PRESUMPTIONS AND BURDEN OF PROOF, and cross references there found.

54. **Allegations and proof must correspond.**—*Byers v. Surget*, 19 How. 303, 15 L. Ed. 670; *Nash v. Towne*, 5 Wall. 689, 18 L. Ed. 527; *Wilcox v. Hunt*, 13 Pet. 378, 10 L. Ed. 209; *Boone v. Chiles*, 10 Pet. 177, 9 L. Ed. 383; *Sheehy v. Mandeville*, 7 Cranch 208, 3 L. Ed. 317; *Baird v. United States*, 131 U. S., cvi, 21 L. Ed. 519; *Harshman v. Knox County*, 122 U. S. 306, 30 L. Ed. 1152. See the titles EQUITY, vol. 5, p. 883; VARIANCE.

55. *Byers v. Surget*, 19 How. 303, 15 L. Ed. 670. See the title EVIDENCE, vol. 5, p. 1010.

56. **Purpose of rule requiring correspondence of allegata and probata.**—*Nash v. Towne*, 5 Wall. 689, 18 L. Ed. 527.

57. **Proof unnecessary of matters admitted by pleadings.**—*Alexander v. Harris*, 4 Cranch 299, 2 L. Ed. 627. See post,



**Admissions by Pleading Several Matters.**—See ante, "Right to Plead Several Matters," XII, E, 2, c, (2); "Right to Plead Several Defenses," XII, F, 2, b, (2), (b).

**Admissions by Answer in Equity.**—See the title EQUITY, vol. 5, p. 870.

**Admissibility and Conclusiveness of Equity Pleadings as Evidence in Suit.**—See the title EQUITY, vol. 5, p. 886.

**Admissibility and Conclusiveness of Sworn Pleadings, Affidavits, Depositions and Agreements, as Evidence in Another Suit.**—When a bill or answer in equity or a pleading in an action at law is sworn to by the party, it is competent evidence against him in another suit as a solemn admission by him of the truth of the facts stated.<sup>58</sup>

**PLEAS IN ABATEMENT.**—See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 30.

"Admissions in Pleadings and Pleadings as Evidence," XVI.

**58. Sworn pleadings, affidavits, depositions, etc., as evidence in another suit.**—See the title ESTOPPEL, vol. 5, p. 985.

**Inadmissibility of unsworn complaint signed only by plaintiff's attorney.**—Where a subcontractor brought an action against one of the parties to the original contract, the defendant sought to introduce

the complaint brought by the present plaintiff against his assignor in a prior action on the same contract, as an admission by the plaintiff that he had no case against the present defendant. The complaint was not under oath and signed only by the plaintiff's attorney. It was held to be clearly inadmissible. *Delaware County Comm'rs v. Diebold Safe, etc., Co.*, 133 U. S. 473, 33 L. Ed. 674.

# PLEDGE AND COLLATERAL SECURITY.

BY JOHN CALLAN BROOKS.

- I. Definitions and Distinctions, 459.**
- II. Delivery and Possession, 461.**
  - A. Necessity of Delivery, 461.
    - 1. In General, 461.
    - 2. When Pledge Made by Private Deed, 462.
    - 3. In Case of Stocks and Other Choses in Action, 462.
  - B. What Amounts to Delivery, 462.
  - C. Right to Retain Possession, 463.
    - 1. In General, 463.
    - 2. After Debt Is Barred by Statute of Limitations, 464.
  - D. Necessity of Retaining Possession, 464.
- III. What Property May Be Pledged, 464.**
- IV. Rights, Duties and Liabilities of Parties, 464.**
  - A. Care Required of Pledgee, 464.
  - B. Right of Pledgee to Sell upon Default of Pledgor, 464.
  - C. Pledgee Forbidden to Purchase at Own Sale, 465.
    - 1. General Rule, 465.
    - 2. Power Expressly Granted by Pledgor, 465.
- V. Assignment or Transfer of Pledge by Pledgee, 465.**
  - A. In General, 465.
  - B. To Bona Fide Purchaser without Notice, 465.
  - C. Transfer to Creditors, 466.
- VI. Tender of Debt, 466.**
- VII. Rules Applicable to Corporate Bonds, 466.**
  - A. Indorsement of Bonds as Waiver, 466.
  - B. Necessity for Tender, 466.
- VIII. Promissory Notes Delivered as Collateral Security, 466.**
- IX. Conflict of Laws, 466.**
- X. Bankruptcy, 467.**

## CROSS REFERENCES.

See the titles **ASSIGNMENTS**, vol. 2, p. 549; **ATTACHMENT AND GARNISHMENT**, vol. 2, p. 660; **BANKRUPTCY**, vol. 2, p. 792; **BANKS AND BANKING**, vol. 3, p. 1; **BILLS OF LADING**, vol. 3, p. 232; **BILLS, NOTES AND CHECKS**, vol. 3, p. 257; **BONDS**, vol. 3, p. 382; **BOTTOMRY AND RESPONDENTIA**, vol. 3, p. 449; **CHATTEL MORTGAGES**, vol. 3, p. 609; **CORPORATIONS**, vol. 4, p. 621; **CREDITORS' SUITS**, vol. 5, p. 22; **EXECUTORS AND ADMINISTRATORS**, vol. 6, p. 119; **FACTORS AND COMMISSION MERCHANTS**, vol. 6, p. 232; **GUARANTY**, vol. 6, p. 580; **LIENS**, vol. 7, p. 890; **MORTGAGES AND DEEDS OF TRUST**, vol. 8, p. 452; **MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES**, vol. 8, p. 650; **POWERS**; **RAILROADS**; **STOCKS AND STOCKHOLDERS**; **TRUSTS AND TRUSTEES**; **WAREHOUSES AND WAREHOUSEMEN**; **USURY**.

As to property mortgaged or pledged being subject to attachment, see the title **ATTACHMENT AND GARNISHMENT**, vol. 2, p. 676. As to property pledged being subject to garnishment, see the title **ATTACHMENT AND GARNISHMENT**, vol. 2, p. 695. As to security for advances, see the title **BANKRUPTCY**, vol. 2, p. 948.

As to bank's lien in general, see the title *BANKS AND BANKING*, vol. 3, p. 166. As to banker's lien generally, see the title *BANKS AND BANKING*, vol. 3, p. 39. As to notice of equity, see the title *BANKS AND BANKING*, vol. 3, p. 66. As to right of banks to hold more than one security, see the title *BANKS AND BANKING*, vol. 3, p. 66. As to railroad bonds as security, see the title *BANKS AND BANKING*, vol. 3, p. 61. As to power of bank to loan on security of bank's own stock and on security of another national bank stock, see the title *BANKS AND BANKING*, vol. 3, p. 61. As to specific pledge excluding general lien, see the title *BANKS AND BANKING*, vol. 3, p. 40. As to necessity for actual delivery of bank stock to constitute a pledge, see the title *BANKS AND BANKING*, vol. 3, p. 169. As to rules applicable to national bank as pledgee, see the title *BANKS AND BANKING*, vol. 3, p. 141. As to liability of pledgee of national bank stocks without transfer to pledgee and after transfer, see the title *BANKS AND BANKING*, vol. 3, pp. 139, 140. As to liability of national banks on national bank stock owned by it as pledge or security, see the title *BANKS AND BANKING*, vol. 3, p. 136. As to liability for conversion by superior force, see the title *BANKS AND BANKING*, vol. 3, p. 66. As to liability for fraudulent use by owner of property pledged, see the title *BANKS AND BANKING*, vol. 3, p. 67. As to release of bank debt or security, see the title *BANKS AND BANKING*, vol. 3, p. 93. As to securities by cashier of bank, see the title *BANKS AND BANKING*, vol. 3, p. 89. As to deposit of security, see the title *BANKS AND BANKING*, vol. 3, p. 69. As to relation of the strict rule requiring notice to a bill in respect to collateral security, see the title *BILLS, NOTES AND CHECKS*, vol. 3, p. 327. As to collateral security for a pre-existing debt, see the title *BILLS, NOTES AND CHECKS*, vol. 3, p. 298. As to exchange of securities and surrender of collateral constituting a valuable consideration, see the title *BILLS, NOTES AND CHECKS*, vol. 3, p. 298. As to right of holder to benefit of mortgage to secure endorser, see the title *BILLS, NOTES AND CHECKS*, vol. 3, p. 314. As to exchange of securities, see the title *BILLS, NOTES AND CHECKS*, vol. 3, p. 298. As to collateral security for pre-existing debt, see the title *BILLS, NOTES AND CHECKS*, vol. 3, p. 298. As to duty of holder of collateral to present, see the title *BILLS, NOTES AND CHECKS*, vol. 3, p. 321. As to instrument transferred as collateral security for debt, see the title *BILLS, NOTES AND CHECKS*, vol. 3, p. 312. As to surrender of collateral, see the title *BILLS, NOTES AND CHECKS*, vol. 3, p. 298. As to payment of accommodation bill of exchange by endorser, see the title *BILLS, NOTES AND CHECKS*, vol. 3, p. 350. As to the taking of security from the principal debtor, see the title *BILLS, NOTES AND CHECKS*, vol. 3, p. 354. As to transfer of bill of lading as collateral security for pre-existing debt, see the title *BILL OF LADING*, vol. 3, p. 233. As to rights of purchaser of draft with bill of lading attached, see the title *BILL OF LADING*, vol. 3, p. 242. As to taking collateral security, see the title *BONDS*, vol. 3, p. 422. As to pledge of bonds, see the title *BONDS*, vol. 3, p. 420. As to hypothecation of ship and cargo, see the title *BOTTOMRY AND RESPONSENTIA*, vol. 3, pp. 450, 455. As to excessiveness of security, see the title *CHATTEL MORTGAGES*, vol. 3, p. 739. As to effect of delivery of goods in pledge, see the title *CHATTEL MORTGAGES*, vol. 3, p. 738. As to pledge and collateral security, see the title *CHATTEL MORTGAGES*, vol. 3, p. 748. As to equity of redemption, see the titles *CHATTEL MORTGAGES*, vol. 3, pp. 759, 766; *MORTGAGES AND DEEDS OF TRUST*, vol. 8, p. 452. As to necessity for a creditor to first resort to collateral, see the title *CREDITORS' SUITS*, vol. 5, p. 37. As to securities held jointly, see the title *EXECUTORS AND ADMINISTRATORS*, vol. 6, p. 132. As to right to pledge or mortgage, see the title *EXECUTORS AND ADMINISTRATORS*, vol. 6, p. 141. As to authority of factor to pledge generally and under the factor's acts, see the title *FACTORS AND COMMISSION MERCHANTS*, vol. 6, p. 232. As to landlord's lien, see the title *LANDLORD AND TENANT*, vol. 7, p. 841.

### I. Definitions and Distinctions.

A pledge is defined as a bailment of personal property as security for some



debt or engagement. The word is also applied to the res or personal property forming the subject matter of the bailment. Pawn was synonymous with pledge at common law, but modern usage tends to restrict these words to the bailment of tangible chattels for money advanced, and has introduced the term collateral security, or simply collateral, to designate the subject matter of a pledge given as security for an engagement other than a simple borrowing of money, and particularly when the subject matter consists of incorporeal chattels such as stocks, bonds, or choses in action.<sup>1</sup>

**"Pawn" and "Antichresis" in Louisiana.**—Under the law of Louisiana, there are two kinds of pledges; the pawn and the antichresis. A thing is said to be pawned when a movable is given as a security; the antichresis is when the security given consists in immovables.<sup>2</sup>

**Distinction between Mortgage and Pledge.**—The difference ordinarily

1. **Definition.**—Bouvier's Law Dict., vol. 2, p. 683.

The Civil Code of Louisiana says, "the pledge is a contract, by which the debtor gives something to his creditor as a security for his debt. Section 20, art. 3100." *Livingston v. Story*, 11 Pet. 351, 388, 9 L. Ed. 746. See, also, *Freiburg v. Dreyfus*, 135 U. S. 478, 34 L. Ed. 206.

**What constitutes a pledge under Louisiana law.**—Where on the face of notes given for money loaned it is stated that the notes are secured by a pledge of securities (warehouse receipts for goods in store), and in case of its nonpayment the holder is authorized to sell the said securities at public or private sale, without recourse to legal proceeding and to make any transfers that may be required, it was held that the contract was a real and not a simulated one, and that the pledge was made in conformity to the laws of the state of Louisiana. *Freiburg v. Dreyfus*, 135 U. S. 478, 34 L. Ed. 206. See the title **WAREHOUSES AND WAREHOUSEMEN**.

Where the attendant circumstances were not such as to arouse suspicion in the mind of a reasonably prudent man, and the loan and pledge have all the appearance of an ordinary business transaction, then the pledge was not fraudulent or void. *Freiburg v. Dreyfus*, 135 U. S. 478, 34 L. Ed. 206.

Under the circumstances the transfer of the property from an insolvent to the pledgor, though good between the parties, and vesting title in the pledgor, was subject to be set aside at the instance of the insolvent's creditors until so set aside, the title being in the pledgor, he could create a valid pledge in favor of a bona fide party. *Freiburg v. Dreyfus*, 135 U. S. 478, 479, 34 L. Ed. 206.

**"Cotton notes" as security.**—Where a dealer in cotton borrowed from defendant bank about sixty-four thousand dollars, and in every instance, as such advances were made, the firm deposited with the bank what were known as "cotton notes," which were instruments made by a warehouse company, whose business it was to receive and take care of cotton until it

was sold, or its delivery demanded by the person who originally deposited it in the warehouse, or by some holder of the cotton notes, each note represented a bale of cotton, held, that the bank never had anything more than a pledge of the cotton as a security for the payment of its debt. *McLeod v. Fourth Nat. Bank*, 122 U. S. 528, 529, 30 L. Ed. 1237.

2. **"Pawn" and "antichresis" in Louisiana.**—*Livingston v. Story*, 11 Pet. 351, 9 L. Ed. 746.

**Contract of antichresis.**—On the 25th of July, 1822, *Livingston* applied to for and obtained from *Fort & Story*, a loan of \$22,936, on the security of a lot of ground in New Orleans, on which stores were then being built; this sum was received, part in cash, part in a promissory note, and \$8,000 were to be paid to the contractor for finishing the stores on the lot. The property was conveyed by *Livingston* to *Fort & Story*, by a deed of absolute conveyance; and he received from *F. & S.* a counter letter, by which they promised to reconvey the property to him, if, on or before the 1st of February, 1823, he paid them \$25,000; by the counter letter, on payment of the loan, the property was to revert to *L.*; if not, it was to be sold by an auctioneer of the city of New Orleans, and the residue of the proceeds of the same paid to *L.*; the money advanced by *F. & S.*, with the interest and the expenses, being first deducted; the agreement for building the stores was transferred by *L.* to *F. & S.*, and they agreed to pay the \$8,000, as the work proceeded, in installments. On the 1st of February, 1823, the buildings had not been completed, and *F. & S.* agreed, that the payment of the sum due on that day should be postponed until the 2d of June, 1823; the sum of \$25,000, to be increased to \$27,000, being at the rate of eighteen per cent per annum, for four months, and the residue, for expenses of selling the property at auction, etc., an agreement was made, that if the amount named should not be paid on the 1st of June, 1823, the property should be sold at auction, and after the repayment of the sum of \$27,500, the expenses of sale, etc., the resi-

recognized between a mortgage and a pledge is that title is transferred by the former and possession by the latter.<sup>3</sup>

## II. Delivery and Possession.

**A. Necessity of Delivery**—1. IN GENERAL.—A pledge, in the legal sense, requires to be delivered to the pledgee. He must have possession of it. He may then in default of payment of the debt for which the thing is pledged, sell

due should be paid to L.; by the same agreement, the counter letter was to be delivered up, and the record of it cancelled. On the 2d of June, the money not being paid by L. to F. & S., it was agreed that if, on or before the 5th of August, 1823, the sum due, with interest, at eighteen per cent annum, to amount to \$27,860.76, should not be paid by L. to F. & S., the lot, and all the buildings, should become the full and absolute property of F. & S.; the money was not paid; and F. & S. protested, as they had done on the 4th of February, for noncompliance with the agreement to pay the money agreed to be paid. From this time, F. & S. continued in possession of the lot and the buildings, until the death of Fort, in 1828; when S. purchased the share which had belonged to F., and he continued to hold the property. The evidence in the case showed that after July, 1822, the contractor did not apply the \$8,000 to the completion of the stores on the property; and although F. & S. knew that he was so neglecting to apply the funds, they continued to pay over the same to him, in weekly payments, according to the contract. In 1832, L. having become a citizen of New York, filed bill in the district court of the United States for the eastern district of Louisiana, claiming to have the property held by S. reconveyed to him, on the payment to S. of the sum due to him, and interest on the same, deducting the rents and profits of the estate; or that the same should be sold according to the terms of the counter letter; and after the payment to S. of the amount due to him, with interest, the same deductions having been made, that the balance remaining from the sale should be so paid to him. After much inquiry and deliberation, and a comparison of the civil code of Louisiana with the civil law from which it derives its origin, and with which it is still in close connection, we have come to the conclusion, that the original contract and counter letter, constituted a pledge of real property; a kind of contract especially provided for by the laws of Louisiana, denominated "an antichresis;" by this kind of contract, the possession of the property is transferred to the person advancing the money; that was done in this case; in case of failure to pay, the property is to be sold by judicial process, and the sum which it may bring, over the amount for what it was pledged, is to be paid to the person making the pledge. In this case, a provision was made for a sale by the

parties, upon the failure of payment; but this feature of the contract is rather confirmatory of the contract and counter letter being an antichresis, than otherwise; for it is, at most, only a substitution by the parties of what the laws of Louisiana require. The decree of the court was in conformity to those principles. *Livingston v. Story*, 11 Pet. 351, 9 L. Ed. 746.

**Rules applicable to contract of antichresis.**—The antichresis must be reduced to writing; the creditor acquires by this contract the right of reaping the fruits or other rewards of the immovables given to him in pledge; on condition of deducting, annually, their proceeds from the interest, if any be due to him, and afterwards from the principal of his debt; the creditor is bound, unless the contrary is agreed on, to pay the taxes, as well as the annual charges of the property given to him in pledge; he is likewise bound, the penalty of damages, to provide for the keeping and necessary repairs of the pledged estate; and may lay out, from the revenues of the estate, sufficient for such expenses. *Livingston v. Story*, 11 Pet. 351, 9 L. Ed. 746.

The creditor does not become proprietor of the pledged immovables, by the failure of payment at the stated time; any clause to the contrary is null; and in that case, it is only lawful for him to sue his debtor before the court, in order to obtain a sentence against him, and to cause the objects which have been put into his hands to be seized and sold. *Livingston v. Story*, 11 Pet. 351, 9 L. Ed. 746.

The debtor cannot, before the full payment of his debt, claim the enjoyment of the immovables which he has given in pledge; but the creditor who wishes to free himself from the obligation under the antichresis may always, unless he has renounced this right, compel the debtor to retake the enjoyment of his immovables. *Livingston v. Story*, 11 Pet. 351, 9 L. Ed. 746.

The doctrine of prescription, under the civil law, does not apply to this case, which is one of pledge; and if it does, the time before the institution of this suit had not elapsed, in which, by the law of Louisiana a person may sue for immovable property. *Livingston v. Story*, 11 Pet. 351, 9 L. Ed. 746. See the title **PRESCRIPTION**.

**3. Distinction between mortgage and pledge.**—*Casey v. Cavaroc*, 96 U. S. 467, 477, 24 L. Ed. 779. See the titles **CHAT-**

it for the purpose of raising the amount by merely giving proper notice to the pledgor.<sup>4</sup> The thing pledged may be in the temporary possession of the pledgor as special bailee, without defeating the legal possession of the pledgee; but where it has never been out of the pledgor's actual possession, and has always been subject to his disposal by way of collection, sale, substitution, or exchange, no pledge or privilege exists as against third persons.<sup>5</sup>

2. **WHEN PLEDGE MADE BY PRIVATE DEED.**—It is required in order to create a pledge, not only that delivery should accompany the private deed, but that the instrument itself should exhibit the nature and extent of the rights and obligations of the contracting parties reciprocally.<sup>6</sup>

3. **IN CASE OF STOCKS AND OTHER CHOSSES IN ACTION.**—In the case of stocks and other choses in action, the pledgee must have possession of the certificate or other documentary title, with a transfer executed to himself, or in blank (unless payable to bearer), so as to give him the control and power of disposal of it. Such things are then called pledges, but more generally collaterals; and they may be used in the same manner as pledges properly so called. If there is not transfer attached to, or accompanying the document, it is imperfect as a pledge, and requires a resort to a court of equity to give it effect.<sup>7</sup>

**B. What Amounts to Delivery.**—Possession is of the essence of a pledge; and without it, no privilege can exist as against third persons.<sup>8</sup> But the pos-

TEL MORTGAGES, vol. 3, p. 699; MORTGAGES AND DEEDS OF TRUST, vol. 8, p. 452.

**Distinction between mortgage and pledge.**—W. executed a written contract for the sale to G., in accordance with a schedule of prices in gold, of a large number of cattle. The contract provided that M. was to retain a lien on the cattle until the purchase money, amounting to nearly \$8,000, should be paid; and it, for the purpose of preserving said lien, authorized him to designate some person as his agent to go along with and retain possession of the cattle. In the event of the balance of the purchase money not being paid on or before a certain date, such agent was to sell all or such portion of the cattle as would pay the purchase money then due, as well as wages and other expenses of the agent. After the contract was signed, M. executed to one P. a power of attorney, authorizing him to accompany the cattle, and retain the lien provided for. The cattle having arrived, the purchase money not having been paid by G., P. took forcible possession of the cattle, and drove them from the ranch where they were grazing to that of one A., some distance off. G. then brought replevin against M. and P. to recover possession of the cattle, and damages for their wrongful detention. Held, that this contract created a charge upon the property not in the nature of a pledge, but of a mortgage. *Gregory v. Morris*, 96, 619, 24 L. Ed. 740.

By a mortgage of personal property, differing in this respect from a pledge, it is not merely the possession or a special property that passes; but, both at law and in equity, the whole title is transferred to the mortgagee, as security for the debt, subject only to be defeated by performance of the condition, or by redemption on bill in equity within a rea-

sonable time; and the right of possession, when there is no express stipulation to the contrary, goes with the right of property. Story on Bailments, § 287; Story Eq. Jur., §§ 1030, 1031; *Conard v. Atlantic Ins. Co.*, 1 Pet. 386, 441, 7 L. Ed. 189; *Casey v. Cavaroc*, 96 U. S. 467, 477, 24 L. Ed. 779; *Waterman v. Mackenzie*, 138 U. S. 252, 258, 34 L. Ed. 923. See the title CHATTEL MORTGAGES, vol. 3, p. 699.

4. **Necessity of delivery in general.**—Story on Bailments, § 297, et seq. *Casey v. Cavaroc*, 96 U. S. 467, 24 L. Ed. 779; *Christian v. Atlantic, etc., R. Co.*, 133 U. S. 233, 241, 33 L. Ed. 589; *Casey v. Schuchardt*, 96 U. S. 494, 24 L. Ed. 790.

5. **In temporary possession of pledgor as special bailee.**—*Casey v. Cavaroc*, 96 U. S. 467, 24 L. Ed. 779, cited in *Casey v. Schuchardt*, 96 U. S. 494, 24 L. Ed. 790.

6. **Pledge by private deed.**—*Freiburg v. Dreyfus*, 135 U. S. 478, 482, 34 L. Ed. 206.

7. **In case of stocks and other choses in action.**—Story on Bailments, § 297, et seq. *Christian v. Atlantic, etc., R. Co.*, 133 U. S. 233, 241, 33 L. Ed. 589; *Casey v. Schuchardt*, 96 U. S. 494, 24 L. Ed. 790.

8. **Possession is of the essence of a pledge.**—*Casey v. Cavaroc*, 96 U. S. 467, 24 L. Ed. 779; *Third Nat. Bank v. Buffalo German Ins. Co.*, 193 U. S. 581, 588, 48 L. Ed. 805; *Casey v. National Bank*, 96 U. S. 492, 24 L. Ed. 789. See ante, "In General," II, A, 1.

This doctrine is in accordance with both the common and the civil law, the Code Napoleon (art. 2076), and the civil code of Louisiana (art. 3162). *Casey v. Cavaroc*, 96 U. S. 467, 24 L. Ed. 779.

Where it was agreed that a bank should deposit bills and notes with its president and his partner, by way of pledge to secure a loan made by a third party, and the president delivers them back to the bank officers for collection, with power to sub-



session need not be actual: it may be constructive; as where the key of a warehouse containing the goods pledged is delivered, or a bill of lading is assigned. In such case, the act done will be considered as a token, standing for actual delivery of the goods. It puts the property under the power and control of the creditor.<sup>9</sup> In some cases, such constructive delivery cannot be effected without doing what amounts to a transfer of the property also. The assignment of a bill of lading is of that kind. Such an assignment is necessary, where a pledge is proposed, in order to give the constructive possession required to constitute a pledge; and yet it formally transfers the title also. In such a case, there is a union of two distinct forms of security—that of mortgage and that of pledge; mortgage by virtue of the title, and pledge by virtue of the possession. This advantage exists when notes and bills are transferred to a creditor by way of collateral security. His possession of them gives them the character of a pledge. Their indorsement is payable to order, or their delivery if payable to bearer, gives him the title also, which is something more than a pledge.<sup>10</sup>

**C. Right to Retain Possession**—1. **IN GENERAL**.—Until he shall be paid, the pledgee is entitled to the possession of the property which he holds under a valid pledge as security for his debt against the pledgors, notwithstanding a sub-

stitute other securities therefor, it is not such a delivery and possession as is necessary to create a privilege by the law of Louisiana. *Casey v. Cavaroc*, 96 U. S. 467, 24 L. Ed. 779.

The stock and dividends of the state of North Carolina, now in question, have nothing about them in the nature of a pledge. The 10th section of the act of 1855, relied on by the complainant for creating a pledge, must be understood as using the word in a popular and not in a technical sense. That section declares, first, that as security for the redemption of said certificates of debt the public faith of the state is hereby pledged to the holders thereof. This is no more than a solemn promise on the part of the state to redeem the certificates. The section next, in addition to the pledge of the public faith, declares that all the stock held by the state in the Atlantic and North Carolina Railroad Company shall be pledged for the same purpose, and any dividend of profit declared thereon shall be applied to the payment of the interest on said bonds. This was nothing more than a promise that the stock should be held and set apart for the payment of the bonds, and that the dividends should be applied to the interest. There was no actual pledge. It was no more of a pledge than is made by a farmer when he pledges his growing crop, or his stock of cattle, for the payment of a debt, without any delivery thereof. He does not use the word in its technical, but in its popular sense. *Christian v. Atlantic, etc.*, R. Co. 133 U. S. 233, 242, 33 L. Ed. 589.

Under the statutes of Louisiana relating to pledges of negotiable and other securities, which was in force in the year of 1873, when the transaction in this case took place, the actual delivery of such securities was sufficient to constitute a pledge. *Casey v. Schneider*, 96 U. S. 496, 24 L. Ed. 790.

**9. Constructive possession**.—*Casey v. Cavaroc*, 96 U. S. 467, 477, 24 L. Ed. 779. See the title **BILL OF LADING**, vol. 3, p. 232; **WAREHOUSES AND WAREHOUSEMEN**.

**10. Constructive possession**.—*Casey v. Cavaroc*, 96 U. S. 467, 477, 24 L. Ed. 779.

"Whether constructive possession in the creditor can be affirmed, where an article to which his only title is that of pledge is actually redelivered to the debtor, with general authority to dispose of it and substitute another article of equal value in its place, is the question which we have to meet in this case. Such a redelivery for a mere temporary purpose, as for shoeing a horse which has been pledged and is owned by the farrier, or for repairing a carriage, which has been been pledged and is owned by the carriage maker, does not amount to an interruption of the pledgee's possession. The owner is but a mere special bailee for the creditor. So, when the debtor is employed in the creditor's service, his temporary use of the pledged article in the creditor's business does not effect a restoration of the possession to the debtor. This is in accordance both with the common and the civil law." *Casey v. Cavaroc*, 96 U. S. 467, 477, 24 L. Ed. 779.

The case of *Clark v. Iselin*, 21 Wall. 360, 22 L. Ed. 568, being a New York case, and governed by New York law, the authority cited was necessarily of great weight, if not controlling. When, as in that case, the title has been transferred to the creditor, and the collections are made for his benefit, the pledgor merely acting as his servant or agent in making them, the character of the security is not affected at the common law by the debtor having actual possession of the collaterals, there being no fraud in the transaction. In such case, they are held by the creditor by way of mortgage as well as pledge; and a mortgage is valid notwithstanding the mortgagor has the possession. *Casey*

sequent adjudication of bankruptcy against them; and his refusal to surrender it to their assignees is not a conversion of it.<sup>11</sup>

2. **AFTER DEBT IS BARRED BY STATUTE OF LIMITATIONS.**—If a pledgee holds property as security for a debt, the statute of limitations does not affect his right to hold the pledge until the debt is paid; it does not authorize the debtor to claim the pledge without paying the debt. The creditor is in possession. If the statute runs against any one (so far as relates to the pledge), it runs against the pledgor. The creditor, by operation of the statute, may lose his right of action for a personal judgment against the debtor; but he has a right to hold on to the pledge until the debt is paid. It is the debtor's concern to see that he does not lose his right to redeem the pledge.<sup>12</sup>

**D. Necessity of Retaining Possession.**—Where securities are pledged, the voluntary parting with possession discharges the pledge.<sup>13</sup>

### III. What Property May Be Pledged.

**Estate of Corporation.**—Where the directors of a bank agree to pledge to the government of the United States the entire estate of the corporation as a security for the payment of the original principal of a claim, such a pledge or transfer was held to be valid.<sup>14</sup>

### IV. Rights, Duties and Liabilities of Parties.

**A. Care Required of Pledgee.**—A pledgee is only bound to take that care of the pledge which a careful man bestows on his own property.<sup>15</sup>

**B. Right of Pledgee to Sell upon Default of Pledgor.**—By virtue of the pledge, the pledgee has the right by law, on the default of the pledgor, to sell the property pledged in satisfaction of the pledgor's obligation. As in that transaction the pledgee is the vendor, he cannot also be the vendee.<sup>16</sup> The subsequent

*v. Cavaroc*, 96 U. S. 467, 476, 24 L. Ed. 779.

Though in such a case the pledgee, by a real action against the pledgor of his heirs, may, under the law of Louisiana, recover possession of the thing, he cannot sustain a privilege thereon as against creditors, or against a bank receiver, or an assignee in bankruptcy, who represents them. *Casey v. Cavaroc*, 96 U. S. 467, 24 L. Ed. 779.

**11. Pledgee's right to retain possession.**—*Yeatman v. Savings Institution*, 95 U. S. 764, 24 L. Ed. 589.

Where personal property is pledged, the pledgee acquires the legal title and the possession. In some cases, it is true, it may remain in the apparent possession of the pledgor, but, if so, it can be only where the pledgor holds as agent of the pledgee. *Easton v. German-American Bank*, 127 U. S. 532, 536, 32 L. Ed. 210; *Pauly v. State Loan, etc., Co.*, 165 U. S. 606, 618, 41 L. Ed. 844.

**12. After debt barred by statute of limitation.**—*Clay v. Freeman*, 118 U. S. 97, 106, 30 L. Ed. 104.

The Code of Louisiana declares that "the creditor who is in possession of the pledge can only be compelled to return it when he has received the whole payment of the principal as well as the interest and costs." *Pev. Code La.*, § 3164. *Yeatman v. Savings Institution*, 95 U. S. 764, 766, 24 L. Ed. 589.

**13. Voluntary parting with possession.**—*Hubbard v. Tod*, 171 U. S. 474, 498, 43

L. Ed. 246; *Gregory v. Morris*, 96 U. S. 619, 623, 24 L. Ed. 740.

**14.** *United States v. Robertson*, 5 Pet. 641, 648, 8 L. Ed. 257. Cited in *Planters' Bank v. Sharp*, 6 How. 301, 323, 12 L. Ed. 447.

The great object of the agreement was, to pledge the estate of the bank, to secure, so far as it would secure, the payment of the debt due to the United States. None could give this pledge but those whose official duty it was to manage that property; and they could only give it in the character in which they were intrusted with its management. They alone, in their political character, and their successors, could redeem this pledge; for only those who retain the management of the affairs of the bank, during the five years given for the payment of the debt, could keep the estate together, and apply it exclusively to the use of the United States. *United States v. Robertson*, 5 Pet. 641, 651, 8 L. Ed. 257; *McLemore v. Louisiana State Bank*, 91 U. S. 27, 28, 23 L. Ed. 196.

**15. Waiving right of pledgor.**—Numerous decisions of the court of appeals of the state of New York sustain contracts of pledge waiving the right of the pledgor to exact strict performance of the common-law duties of a pledgee. *Hiscock v. Varick Bank*, 206 U. S. 28, 38, 51 L. Ed. 945.

**16. Right of pledgee to sell upon default of pledgor.**—*Eastern v. German-American Bank*, 127 U. S. 532, 536, 32 L.



bankruptcy of the pledgor of a negotiable instrument does not deprive the pledgees of their right to dispose of it upon his default.<sup>17</sup>

**C. Pledgee Forbidden to Purchase at Own Sale.**—1. **GENERAL RULE.**—In reference to the pledge and to the pledgor, the pledgee occupies a fiduciary relation, by virtue of which it becomes his duty to exercise his right of sale for the benefit of the pledgor. He is in the position of a trustee to sell, and is by a familiar maxim of equity forbidden to purchase for his own use at his own sale.<sup>18</sup>

2. **POWER EXPRESSLY GRANTED BY PLEDGOR.**—In absence of fraud, the pledgee may buy at his own sale held without notice, or demand, or advertisement, when power so to do is expressly granted by the pledgor.<sup>19</sup>

## V. Assignment or Transfer of Pledge by Pledgee.

**A. In General.**—The pawnee may, by the common law, deliver over the pawn to a stranger for safe custody without consideration; or he may sell or assign all his interest in the pawn; or he may convey the same interest conditionally, by way of pawn, to another person, without in either case destroying or invalidating his security. But if the pawnee should undertake to pledge the property (not being negotiable securities) for a debt beyond his own, or to make a transfer thereof as if he were the actual owner, it is clear that in such case he would be guilty of a breach of trust, and his creditor would acquire no title beyond that held by the pawnee.<sup>20</sup>

**B. To Bona Fide Purchaser without Notice.**—Where the pledgee parts with the pledge to a bona fide purchaser without notice of any right or claim of the pledgor, the latter cannot recover against such purchaser without first tender-

Ed. 210; *Pauly v. State Loan, etc., Co.*, 165 U. S. 606, 618, 41 L. Ed. 844. See ante, "In General," II, A, 1.

**17. Subsequent bankruptcy.**—*Jerome v. McCarter*, 94 U. S. 734, 24 L. Ed. 136. See the title **BANKRUPTCY**, vol. 2, p. 792.

**18. Pledgee forbidden to purchase at own sale.**—*Easton v. German-American Bank*, 127 U. S. 532, 536, 32 L. Ed. 210; *Pauly v. State Loan, etc., Co.*, 165 U. S. 606, 620, 41 L. Ed. 844; *Harmon v. National Park Bank*, 172 U. S. 644, 43 L. Ed. 1182.

**Application to creditor.**—The same principle applies with a like result where real estate is conveyed by a debtor directly to a creditor as security for the payment of an obligation, with a power to sell in case of default. There the creditor is not a trustee to sell, and cannot purchase the property at his own sale for his own use. *Easton v. German-American Bank*, 127 U. S. 532, 537, 32 L. Ed. 210.

In the present case, the bonds of the Bowen Brothers, secured by the deed of trust, were pledged to the German-American Bank as security for the repayment of the loan made to the Bowen Brothers, but those bonds have not in fact been sold, unless the transfer of them by the bank to Dore be considered a sale. It was not such, however, in point of fact or of law; nothing was paid for them, and they were delivered to Dore merely as muniments of title in connection with his purchase of the real estate. At that time they were of no value, for they were merely the personal obligations of the Bowen Brothers, from which they had

been released by the discharge in bankruptcy. No suit could have been maintained upon them as against the only obligors by whose discharge in bankruptcy they had lost their character as well as their value as property. *Easton v. German-American Bank*, 127 U. S. 532, 537, 32 L. Ed. 210.

**19. Power expressly granted by pledgor.**—*Hiscock v. Varick Bank*, 206 U. S. 28, 38, 51 L. Ed. 945; *McLemore v. Louisiana State Bank*, 91 U. S. 27, 28, 23 L. Ed. 196.

**Failure of pledgee to sustain purchase.**—There is no tenable basis for the proposition that the failure of pledgees to sustain their purchase at a sale as a defense affects their rights as pledgees, when they stood on all their rights and were not put to an election. *Hubbard v. Tod*, 171 U. S. 474, 495, 43 L. Ed. 246.

**20. Statement by Story, J.**—*Talty v. Freedman's, etc., Trust Co.*, 93 U. S. 321, 324, 23 L. Ed. 886.

As to "pawn" being synonymous with "pledge" at common law, see ante, "Definitions and Distinctions," I.

**Assignment of interest of pledgee.**—"If the Merchants' Bank held the certificates as a pledge, it had a special property which might be sold and assigned. The assignee in such cases becomes invested with all the legal rights which belonged to the assignor. Such is the rule of the common law, and it has subsisted from an early period." *Merchants' Bank v. State Bank*, 10 Wall. 604, 643, 19 L. Ed. 1008. See the title **BANKS AND BANKING**, vol. 3, p. 1.



ing him the amount due on the pledge.<sup>21</sup>

**C. Transfer to Creditors.**—In the case of a strict pledge, if the pledgee transfers the same to his own creditor, the latter may hold the pledge until the debt of the original owner is discharged.<sup>22</sup>

## VI. Tender of Debt.

**Necessity for.**—A tender to the second pledgee of the amount due from the first pledgor to the first pledgee extinguishes ipso facto the title of the second pledgee; but that there can be no recovery against him without tender of payment is equally well settled.<sup>23</sup>

## VII. Rules Applicable to Corporate Bonds.

**A. Indorsement of Bonds as Waiver.**—The indorsement of municipal bonds payable to bearer, by a pledgor of the bonds, and delivery of them in that condition to the pledgee, with the knowledge that they had been or were to be sold again by the pledgee, and for the purpose of enabling him to transfer them with a good title, must be considered a waiver of any right to sue on account of a former sale, as well as a consent by both parties to the second sale.<sup>24</sup>

**B. Necessity for Tender.**—Where a pledgee of bonds has made a transfer of them with the consent and aid of the pledgor, the pledgor, after waiting some time after the sale, during which time the price of the bonds had risen to par, cannot maintain an action in equity to recover the value of the bonds, where he had never made any tender for the purpose of redeeming them, nor any effort to reclaim them.<sup>25</sup>

## VIII. Promissory Notes Delivered as Collateral Security.

“Where promissory notes are pledged by a debtor to secure a debt, the pledgee acquires a special property in them. That property is not lost by their being re-delivered to the pledgor to enable him to collect them, the principal debt being still unpaid. Money which he may collect upon them is the specific property of the creditor. It is deemed collected by the debtor in a fiduciary capacity.”<sup>26</sup>

## IX. Conflict of Laws.

Questions of the extent and validity of a pledge are local questions, and the

21. To bona fide purchaser without notice.—*Talty v. Freedman's, etc., Trust Co.*, 93 U. S. 321, 23 L. Ed. 886.

22. Transfer to creditors.—*Talty v. Freedman's, etc., Trust Co.*, 93 U. S. 321, 324, 23 L. Ed. 886.

23. Necessity for tender.—*Talty v. Freedman's, etc., Trust Co.*, 93 U. S. 321, 325, 23 L. Ed. 886. See ante, “To Bona Fide Purchaser without Notice,” V, B.

24. Indorsement of bonds as waiver.—*Lacombe v. Forstall's Sons*, 123 U. S. 562, 568, 31 L. Ed. 255.

25. Necessity for tender.—*Lacombe v. Forstall's Sons*, 123 U. S. 562, 568, 31 L. Ed. 255. See ante, “Tender of Debt,” VI.

26. Promissory notes delivered as collateral security.—*Clark v. Iselin*, 21 Wall. 360, 368, 22 L. Ed. 568.

“It is further argued in behalf of the assignee, that the pledge, on the 5th of April, 1869, of the collaterals, amounting to \$62,027.34, was void, because made at that date. The transaction, however, was a mere exchange of securities. The new collaterals were not pledged to secure an unsecured debt, or to give any preference to the defendants. They were no addition

to what the defendants had before; to what they had held from August 6th, 1868, when the loan to Dibblee & Co. was made. The exchange, therefore, withdrew nothing from the creditors generally which had not long before been withdrawn. The defendants owned the securities they then surrendered, and by surrendering them they enlarged the debtor's estate to the extent of the securities received in exchange. In *Cook v. Tullis*, 18 Wall. 332, 21 L. Ed. 933, we held that there is nothing in the bankrupt law which prevents an insolvent from dealing with his property—selling or exchanging it for other property—at any time before proceedings in bankruptcy are taken by or against him, provided such dealing be conducted without any purpose to delay or defraud his creditors, or to give a preference to any one, and does not impair the value of his estate. The same doctrine was asserted in its fullest extent in *Tiffany v. Boatman's Institution*, 18 Wall. 373, 21 L. Ed. 868.” *Clark v. Iselin*, 21 Wall. 360, 368, 22 L. Ed. 568.

When a person, borrowing money of another, pledges with that other a large

decisions of the courts of New York are to be followed by the federal supreme court.<sup>27</sup>

### X. Bankruptcy.

**Failure of Pledgee to Appear and Prove Claim.**—The failure of the pledgee to appear and prove his claim in the bankruptcy court forfeits only his right to participate in the distribution of the bankrupt's estate ordered by that court.<sup>28</sup>

**PLENE ADMINISTRAVIT.**—See the title EXECUTORS AND ADMINISTRATORS, vol. 6, p. 182.

**PLENIPOTENTIARIES.**—See the title AMBASSADORS AND CONSULS, vol. 1, p. 273.

**PLURIES WRIT.**—See the titles EXECUTIONS, vol. 6, p. 106; MANDAMUS, vol. 8, p. 96.

**POINT.**—As to rule that single point and not whole case must be certified to supreme court under act of 1802, see the title APPEAL AND ERROR, vol. 2, pp. 22, 26.

**POISONS AND POISONING.**—As to indictment for murder by poison, see the title HOMICIDE, vol. 6, p. 707.

**POLICE.**—See the title MUNICIPAL CORPORATIONS, vol. 8, p. 576. As to power of district commissioners over police, see the title DISTRICT OF COLUMBIA, vol. 5, p. 410.

number of bills receivable as collateral security for the loan (many of them overdue) the pledgee may properly hand them back to the debtor pledging them, for the purpose of being collected, or to be replaced by others. All money so collected is money collected by the debtor in a fiduciary capacity for the pledgee. And if a portion of the collaterals are subsequently replaced by others, the debtor's estate being left unimpaired, and the transaction be conducted without any purpose to delay or defraud the pledgor's creditors, or to give a preference to any one, the fact that proceedings in bankruptcy were instituted in a month afterwards and the pledgor was declared a bankrupt, will not avoid the transaction. *Clark v. Iselin*, 21 Wall. 360, 22 L. Ed. 568.

27. *Hiscock v. Varick Bank*, 206 U. S. 28, 38, 51 L. Ed. 945.

Where, in time of war, a bank was, notwithstanding the protest of its officers, put in liquidation by order of the commanding general of the United States forces, and its effects transferred to com-

missioners appointed by him, who, during their administration, sold for less than their face value choses in action held by the bank as collateral security at the time of the transfer, held, that as the proceedings of the commanding general and the commissioners constituted "superior force," which no prudent administrator of the affairs of a corporation could resist, the bank was neither responsible for those proceedings, nor for a loss thereby occasioned. *McLemore v. Louisiana State Bank*, 91 U. S. 27, 23 L. Ed. 196.

It is true, it was the duty of the bank to return the pledge, or show a good reason why it could not be returned. This it has done by proof, that without any fault on its part, and against its protest, the pledge was taken from it by superior force. Where this is the case, the common as well as the civil law holds that the duty of the pledgee is discharged. *McLemore v. Louisiana State Bank*, 91 U. S. 27, 29, 23 L. Ed. 196.

28. *Yeatman v. Savings Institution*, 95 U. S. 764, 24 L. Ed. 589.

# POLICE POWER.

BY HOMER RICHEY.

## I. Police Power Defined, 472.

## II. Where Vested, 473.

### A. As between the States and the United States, 473.

1. Generally in the States, 473.
2. Effect of Particular Provisions of the Federal Constitution, 474.
  - a. Fugitive Slave Clause, 474.
  - b. The Commerce Clause, 474.
  - c. The Fourteenth Amendment, 474.
3. Effect of Ordinance of 1787 and Acts of Admission as Stripping the States of Their Police Powers, 474.
4. Police Power of Congress, 475.
5. Exclusive and Concurrent Powers, 475.
  - a. Exclusive Powers, 475.
    - (1) Of the States, 475.
    - (2) Of the United States, 475.
    - (3) Neither Government to Encroach upon the Powers of the Other Through the Exercise of Implied Powers, or by Means of Legal Intendments or Technical Reasoning, 476.
    - (4) Neither Government to Authorize the Other to Transcend the Limits Fixed by the Constitution, 476.
    - (5) Neither Government to Control the Discretion nor to Interfere with the Exercise of Acknowledged Powers by the Other, 476.
    - (6) Federal Encroachment upon State Powers; What Constitutes, 477.
      - (a) Generally, 477.
      - (b) In the Exercise of the Taxing Power, 477.
      - (c) Regulation of Commerce, 477.
      - (d) By the Enactment of Postal Regulations, 478.
      - (e) Federal Control of Public Lands within the States, 478.
    - (7) State Encroachment upon or Interference with Federal Powers, Rights Derived from Federal Government, etc., 478.
      - (a) Generally, 478.
      - (b) Regulation of Patented Articles, Sale of Patent Rights, etc., 478.
      - (c) Federal Institutions within the States, 478.
      - (d) Regulations Affecting National Banks, 478.
      - (e) Regulations Affecting Indians; Ejectment of Intruders on Indian Lands, etc., 478.
      - (f) Right of Way Granted by Federal Government, 478.
  - b. Concurrent Powers, 479.
    - (1) Generally, 479.
    - (2) Supremacy in Case of Conflict, 479.
    - (3) Conflict Must Be Actual; Presumption as to Intention of Congress, 480.
    - (4) Remedy for Unreasonable Regulation by the States, 480.
- B. As between the Legislative and Judicial Departments, 481.
- C. As between the Legislature and Subordinate Agencies of the State; Delegation of Powers, 482.



**III. General Nature and Extent of the Police Power, 483.****IV. Persons Subject to the Police Power, 486.****V. Constitutional Limitations upon the Police Power, 486.**

- A. Generally as to the Supremacy of the Federal Constitution and Laws, 486.
- B. Encroachment upon the Powers of Congress, 487.
- C. As Restricted by the Interstate Commerce Clause of the Constitution, 487.
  - 1. Generally, 487.
  - 2. Exclusion of Dangerous and Infected Articles, Diseased Persons and Animals, Paupers, Criminals, etc., 489.
  - 3. Regulations Incidentally, Indirectly, or Remotely Affecting Commerce, 491.
    - a. Generally, 491.
    - b. Police Power as to the Instruments of Commerce, 491.
    - c. Quarantine and Health Laws, 491.
    - d. Limitation as to Regulations of This Character, 491.
  - 4. Matters Requiring One Uniform System of Regulation, 493.
- D. As to Contract and Vested Rights, 493.
  - 1. As to Vested Rights, 493.
  - 2. Not Lost by Nonuser, 493.
  - 3. A Continuing Power; Cannot Be Bargained Away, 494.
    - a. Generally, 494.
    - b. Limitations of Doctrine, 500.
      - (1) Where Grant Is Contained in the State Constitution, 500.
      - (2) Doctrine Not Universally True as to Matters Embraced within the Largest Definition of the Police Power, 500.
      - (3) But Even Charter and Contract Rights Subject to Police Regulation, 502.
- E. As Restricted by the Fourteenth Amendment, 505.
  - 1. Fourteenth Amendment Not Designed to Interfere with Legitimate Exercise of the Police Power, 505.
  - 2. Respects Wherein Police Power Is Restricted by Fourteenth Amendment, 506.
    - a. Generally, 506.
    - b. Certain Rights Not Subject to Invasion, 507.
    - c. Regulations Must Be Reasonable and Bona Fide, Having Some Substantial Relation to Ostensible Object, etc., 507.
    - d. Judicial Review, 509.

**VI. Application of the Police Power to Particular Subjects, 512.**

- A. Regulations Affecting Property, 512.
  - 1. Generally, 512.
  - 2. Regulation of the Use and Enjoyment of Property, 512.
  - 3. Exercise of Power Not Hampered by Obligation to Make Compensation for Injuries Sustained, 513.
  - 4. As to the Regulation and Control of Contract and Charter Rights, 514.
  - 5. As to Contracts between Individuals, 514.
  - 6. Limiting Height of Buildings, 514.
  - 7. Uncompensated Removal of Tracks, Pipes, Bridges, Tunnels, Paving of Tracks, etc., 514.
  - 8. Destruction of Property in the Interest of Public Safety, or Property Kept, Sold or Used in Violation of Law, 514.
- B. Regulation of Courts; Jurisdiction, Forms of Procedure, Remedies, Defenses, Measure of Damages, etc., 515.

1. In General, 515.
2. Torts, Actions, Damages, etc., 515.
- C. Militia; Bearing of Arms, etc.; Power to Regulate, 515.
- D. Prevention and Punishment of Crime; Ex Post Facto Laws, 515.
- E. Public Morals, etc., 516.
  1. Gambling; Option and Margin Contracts, etc., 515.
  2. Disorderly Houses, etc., 516.
- F. Highways; Establishment, Care, Maintenance, etc.; Ferries, Canals, etc., 516.
- G. Waters and Watercourses; Navigable Waters, 516.
  1. In General, 516.
  2. Drainage, 517.
- II. Animals, 518.
- I. Fish and Game, 518.
- J. Public Health, 518.
  1. In General, 518.
  2. Quarantine, 519.
  3. Vaccination, 519.
  4. Suppression of Nuisances, Dangerous and Noxious Trades, Occupations and Places, 519.
  5. Drainage of Swamps and Marshes, 520.
- K. Regulation of Business, Trade, Occupation or Profession, 520.
  1. Right of Citizens to Pursue Lawful Occupations, Enter into Contracts, Acquire and Dispose of Property, upon Terms of Equality, 520.
  2. Right to Be Exercised in Subordination to Law, 521.
  3. As to Power of State to Regulate, 521.
    - a. Generally, 521.
    - b. Business Subject to Regulation; Regulations to Be Imposed, 522.
      - (1) State to Select, 522.
      - (2) Business Affected with a Public Interest, 522.
      - (3) Doubtful and Immoral Vocations, 522.
    - c. Grounds of Interference, 523.
    - d. Limitations of Power, 523.
      - (1) Must Be Reasonable; Arbitrary Interference Not Permissible, 523.
      - (2) Regulation May Extend to Suppression, 524.
      - (3) As to the Retrospective Operation of Regulations; Interest or Estate in Profession, Business, etc., 526.
  4. Particular Regulations, 526.
    - a. Power to Prescribe Qualifications for Persons Seeking to Enter the Learned Professions or Occupations Requiring Peculiar Knowledge or Skill, 526.
    - b. Requiring Public Corporation to Bear Expense Incident to Its Regulation, 527.
    - c. Prohibiting Use of Flag for Advertising Purposes, 527.
    - d. Granting Exclusive Privileges to Pursue Particular Business or Profession, 527.
    - e. Suppression of Monopolies and Combinations in Restraint of Trade, 528.
    - f. Statute to Enforce Payment of Debts, 528.
    - g. Mechanics' Liens, 528.
    - h. Inspection Laws, 528.
    - i. Sunday Laws, 528.
    - j. Licenses; Occupation Taxes, 528.
    - k. Regulation of the Relation of Master and Servant; Protection of Employees. etc., 529.

- (1) Generally, 529.
- (2) Extends to Protection of Health and Morals, 529.
- (3) Protection of Laborer against Himself; Legislature Takes Notice That Employer and Employee Not upon an Equal Footing, 529.
- (4) Limitations; Regulations Must Be Reasonable; Arbitrary Interference Not Permissible, 530.
- (5) Same; Liberty of Contract Includes Both Parties, 530.
- (6) Abolishing or Modifying the Doctrine of Fellow Servants, 530.
- (7) Securing Payment of Wages Promptly and in Money, 530.
  - (a) Generally, 530.
  - (b) Store Order Acts, 530.
- (8) Limiting Days and Hours of Employment, 530.
  - (a) Sunday Laws, 530.
  - (b) Eight-Hour Laws, 530.
- 5. Application of Principles to Particular Business, Trade, Occupation or Profession, 530.
  - a. Regulation of the Import Trade, 530.
  - b. Common Carriers, 531.
  - c. Regulation of Railroads, 531.
  - d. Street Railways, 531.
  - e. Telegraphs and Telephones, 531.
  - f. Warehouses and Elevators, 532.
  - g. Port and Harbor Regulations, 533.
  - h. Pilots and Pilotage, 533.
  - i. Wharves and Wharfage, 533.
  - j. Insurance, 533.
  - k. Places of Amusement, Public Entertainment, etc., 533.
    - l. Sale of Drugs, Poisons, etc., 533.
  - m. Manufacture and Sale of Intoxicating Liquors, 533.
  - n. Manufacture and Sale of Cigarettes, 534.
  - o. Manufacture and Sale of Food Stuffs, 534.
  - p. Public Markets, 536.
  - q. Slaughter Houses, 536.
  - r. Hawkers, Peddlers, Hucksters, etc., 536.
  - s. Operation of Mines, 536.
  - t. Labor Agents, 537.
  - u. Sheep Grazing, 537.
  - v. Laundries, 537.
  - w. Lotteries, 538.
- L. Regulation of Rates, 538.
  - 1. Power to Regulate, 538.
    - a. In General, 538.
    - b. Power to Prescribe Rates a Legislative Function, 539.
    - c. Delegation of Power, 539.
    - d. Exercise of the Power with Respect to Particular Corporations, 540.
      - (1) Railroads and Other Public Service Companies, 540.
      - (2) Stock Yards, 540.
      - (3) Grain Elevators, 541.
    - e. Corporations Organized under Federal Statutes, 541.
  - 2. Reasonableness of Rates, 541.
    - a. Right of Courts to Interfere, 541.
    - b. Determination of Reasonableness of Rates, 543.
      - (1) Mere Reduction of Rates, 543.



- (2) Admissibility of Evidence, 544.
- c. Basis for Calculating Reasonableness of Rates, 544.
  - (1) In General, 544.
  - (2) Original Cost, 545.
  - (3) Capacity to Pay Dividends as a Factor, 544.
  - (4) Valuation of Property for Taxation, 546.
  - (5) Classification Based upon Amount of Business Done, 546.
    - (a) In General, 546.
    - (b) Amount of Aggregate Profits, 546.
- (6) Rule Where Private Business Is Merely Affected with Public Use, 547.

#### CROSS REFERENCES.

See the titles ANIMALS, vol. 1, p. 316; CARRIERS, vol. 3, p. 556; CIVIL RIGHTS, vol. 3, p. 814; CONSTITUTIONAL LAW, vol. 4, p. 1; CORPORATIONS, vol. 4, p. 621; CRIMINAL LAW, vol. 5, p. 43; CROSSINGS, vol. 5, p. 149; DAMAGES, vol. 5, p. 157; DRAINS AND SEWERS, vol. 5, p. 492; DUE PROCESS OF LAW, vol. 5, p. 499; EMINENT DOMAIN, vol. 5, p. 746; FISH AND FISHERIES, vol. 6, p. 291; GAMBLING CONTRACTS, vol. 6, p. 537; GAME AND GAME LAWS, vol. 6, p. 543; GAMING, vol. 6, p. 544; GAS, vol. 6, p. 545; HAWKERS AND PEDDLERS, vol. 6, p. 680; HEALTH, vol. 6, p. 681; INNS AND INNKEEPERS, vol. 7, p. 1069; INSPECTION LAWS, vol. 7, p. 16; INSURANCE, vol. 7, p. 66; INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 269; INTOXICATING LIQUORS, vol. 7, p. 518; LABOR, vol. 7, p. 786; LICENSES, vol. 7, p. 869; LOTTERIES, vol. 7, p. 1070; MARKET, vol. 8, p. 245; MONOPOLIES AND CORPORATE TRUSTS, vol. 8, p. 431; MUNICIPAL CORPORATIONS, vol. 8, p. 546; NAVIGABLE WATERS, vol. 8, p. 805; NUISANCES, vol. 8, p. 933; ORDINANCES, vol. 8, p. 1009; PAUPERS, ante, p. 318; PHYSICIANS AND SURGEONS, ante, p. 398; PILOTS, ante, p. 399; QUARANTINE; RAILROADS; RESTRAINT OF TRADE; STOCKYARDS; STREET RAILWAYS; STREETS AND HIGHWAYS; SUNDAYS AND HOLIDAYS; TELEGRAPHS AND TELEPHONES; THEATERS AND SHOWS; TRADING STAMPS; TREES AND TIMBER; TURNPIKES AND TOLLROADS; TURN-TABLES; UNION DEPOTS; WAREHOUSES AND WAREHOUSEMEN; WATER COMPANIES AND WATERWORKS; WATERS AND WATERCOURSES; WEIGHTS AND MEASURES; WHARVES AND WHARFINGERS.

#### I. Police Power Defined.

The general power of the state to enact such laws in relation to persons and property within its borders as may promote the public health, the public morals, the public safety, and the general prosperity and welfare of its inhabitants is somewhat generally described as the police power of the state, a detailed definition of which has been said to be difficult, if not impossible to give. It is always easier to determine whether a particular case comes within the general scope of the power, than to give an abstract definition of the power itself which will be in all respects accurate.<sup>1</sup> In its broadest sense, the police power is nothing more

1. **Police power defined.**—New York City v. Miln, 11 Pet. 102, 139, 9 L. Ed. 648; Passenger Cases, 7 How. 283, 423, 12 L. Ed. 702; Slaughter-House Cases, 16 Wall. 36, 62, 21 L. Ed. 394; Railroad Co. v. Husen, 95 U. S. 465, 471, 24 L. Ed. 527; Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. Ed. 989; Patterson v. Kentucky, 97 U. S. 501, 24 L. Ed. 1115; Stone v. Mississippi, 101 U. S. 814, 818, 25 L. Ed. 1079; County of Mobile v. Kimball, 102 U. S. 691, 698, 26 L. Ed. 238; Robbins v. Shelby County Taxing District, 120 U. S. 489, 493, 30 L. Ed. 694; Mugler v. Kansas, 123 U. S. 623, 31 L. Ed. 205; Smith v. Alabama, 124 U. S. 465, 31 L. Ed. 508; Bowman v. Chicago,

etc., R. Co., 125 U. S. 465, 497, 31 L. Ed. 700; Leisy v. Hardin, 135 U. S. 100, 108, 34 L. Ed. 128; In re Kemmler, 136 U. S. 436, 34 L. Ed. 519; Crowley v. Christensen, 137 U. S. 86, 34 L. Ed. 620; Crutcher v. Kentucky, 141 U. S. 47, 61, 35 L. Ed. 649; Brennan v. Titusville, 153 U. S. 289, 303, 308, 38 L. Ed. 719; Plumley v. Massachusetts, 155 U. S. 461, 478, 39 L. Ed. 223; Pittsburg, etc., Coal Co. v. Bates, 156 U. S. 577, 588, 39 L. Ed. 538; Pearsall v. Great Northern R. Co., 161 U. S. 646, 40 L. Ed. 838; Western Union Tel. Co. v. James, 162 U. S. 650, 40 L. Ed. 1105; Hennington v. Georgia, 163 U. S. 299, 41 L. Ed. 166; Missouri, etc., R. Co. v. Haber, 169 U.

nor less than the power of government inherent in every sovereignty to the extent of its dominions. It includes all legislation and almost every function of civil government, and whether a state passes a quarantine law, or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded or to regulate commerce within its limits, in every case it exercises the same powers; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion.<sup>2</sup>

## II. Where Vested.

**A. As between the States and the United States**—1. **GENERALLY IN THE STATES.**—The general police power is reserved to the states. The power to protect the public health and the public safety, to preserve good order and the public morals, to protect the lives and property of their citizens, "the power to govern men and things" within the limits of their dominions, by any legislation appropriate to that and which does not encroach upon rights guaranteed by the national constitution, nor come in conflict with the acts of congress passed in pursuance of that instrument, is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the constitution of the United States.<sup>3</sup>

S. 613, 635, 42 L. Ed. 878; *Chicago, etc., R. Co. v. Solan*, 169 U. S. 133, 42 L. Ed. 688; *Lake Shore, etc., R. Co. v. Smith*, 173 U. S. 684, 689, 43 L. Ed. 858; *Lake Shore, etc., R. Co. v. Ohio*, 173 U. S. 285, 291, 43 L. Ed. 702; *Austin v. Tennessee*, 179 U. S. 343, 349, 45 L. Ed. 224; *Lochner v. New York*, 198 U. S. 45, 53, 49 L. Ed. 937; *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 48 L. Ed. 268; *McLean & Co. v. Denver, etc., R. Co.*, 203 U. S. 38, 51 L. Ed. 78.

"This power is, and must be from its very nature, incapable of any very exact definition or limitation; upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property." (*Miller, J., delivering the opinion of the court.*) *Slaughter-House Cases*, 16 Wall. 36, 62, 21 L. Ed. 394. See, also, *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 666, 40 L. Ed. 838.

2. **Same; in its broadest sense.**—*New York City v. Miln*, 11 Pet. 102, 139, 9 L. Ed. 648; *License Cases*, 5 How. 504, 583, 12 L. Ed. 256; *Passenger Cases*, 7 How. 283, 424, 12 L. Ed. 702; *Munn v. Illinois*, 94 U. S. 113, 125, 24 L. Ed. 77; *Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. Ed. 923; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 661, 29 L. Ed. 516; *Kidd v. Pearson*, 128 U. S. 1, 26, 32 L. Ed. 346; *United States v. Knight Co.*, 156 U. S. 1, 11, 39 L. Ed. 325; *Lake Shore, etc., R. Co. v. Smith*, 173 U. S. 684, 689, 43 L. Ed. 858.

"What is the supreme police power of a state? It is one of the different means used by sovereignty to accomplish that great object, the good of the state. It is either national or municipal, in the confined application of that word to corporations and cities." (*Opinion of Wayne, J.*) *Passenger Cases*, 7 How. 283, 423, 12 L. Ed. 702.

Police powers and sovereign powers are the same, the former being considered so many particular rights under that name or word collectively placed in the hands of the sovereign. (*Opinion of Wayne, J.*) *Passenger Cases*, 7 How. 283, 424, 12 L. Ed. 702.

"We are aware, that it is at all times difficult to define any subject with proper precision and accuracy; if this be so in general, it is emphatically so in relation to a subject so diversified and multifarious as the one which we are now considering. If we were to attempt it, we should say that every law came within this description which concerned the welfare of the whole people of a state, or any individual within it; whether it related to their rights or their duties; whether it respected them as men, or as citizens of the state; whether in their public or private relations; whether it related to the rights of persons or of property, of the whole people of a state or of any individual within it; and whose operation was within the territorial limits of the state, and upon the persons and things within its jurisdiction." (*Opinion of Barbour, J.*) *New York City v. Miln*, 11 Pet. 102, 139, 9 L. Ed. 648.

3. **Where vested; generally in the states.**—*Gibbons v. Ogden*, 9 Wheat. 1, 203, 6 L. Ed. 23; *New York City v. Miln*, 11 Pet. 102, 147, 9 L. Ed. 648; *Groves v. Slaughter*, 15 Pet. 449, 505, 10 L. Ed. 800; *Prigg v. Pennsylvania*, 16 Pet. 539, 625, 10 L. Ed. 1060; *License Cases*, 5 How. 504, 12 L. Ed. 256; *Passenger Cases*, 7 How. 283, 12 L. Ed. 702; *Moore v. Illinois*, 14 How. 13, 18, 14 L. Ed. 306; *New York v. Dibble*, 21 How. 366, 370, 16 L. Ed. 149; *Conway v. Taylor*, 1 Black 603, 633, 17 L. Ed. 191; *Railroad Co. v. Fuller*, 17 Wall. 560, 568, 21 L. Ed. 710; *Patterson v. Kentucky*, 97 U. S. 501, 503, 24 L. Ed. 1115; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 667, 24 L. Ed. 1036; *Escanaba Co. v. Chicago*, 107 U. S. 678,



2. EFFECT OF PARTICULAR PROVISIONS OF THE FEDERAL CONSTITUTION—*a. Fugitive Slave Clause.*—See footnote.<sup>4</sup>

*b. The Commerce Clause.*—See, generally, the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 310, et seq.; 350, et seq. And see post, "As Restricted by the Interstate Commerce Clause of the Constitution," V, C, et seq.

*c. The Fourteenth Amendment.*—Notwithstanding the sweeping provisions of the fourteenth amendment, it did not have the effect of transferring the general police power from the states to the United States. The theory of our government remains unchanged, and the power to make the ordinary regulations of police remains with the individual states.<sup>5</sup>

3. EFFECT OF ORDINANCE OF 1787 AND ACTS OF ADMISSION AS STRIPPING THE STATES OF THEIR POLICE POWERS.—See the titles CONSTITUTIONAL LAW,

683, 27 L. Ed. 442; *Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. Ed. 923; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 215, 29 L. Ed. 158; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 661, 29 L. Ed. 516; *Mugler v. Kansas*, 123 U. S. 623, 659, 31 L. Ed. 205; *Bowman v. Chicago*, etc., R. Co., 125 U. S. 465, 31 L. Ed. 700; *Kidd v. Pearson*, 128 U. S. 1, 32 L. Ed. 346; *In re Rahrer*, 140 U. S. 545, 35 L. Ed. 572; *Plumley v. Massachusetts*, 155 U. S. 461, 474, 39 L. Ed. 223; *United States v. Knight Co.*, 156 U. S. 1, 11, 39 L. Ed. 325; *Missouri*, etc., R. Co. v. *Haber*, 169 U. S. 613, 628, 42 L. Ed. 878; *L'Hote v. New Orleans*, 177 U. S. 587, 596, 44 L. Ed. 899; *Ambrosini v. United States*, 187 U. S. 1, 6, 47 L. Ed. 49; *Cummings v. Chicago*, 188 U. S. 410, 427, 47 L. Ed. 525; *Jacobson v. Massachusetts*, 197 U. S. 11, 25, 49 L. Ed. 643; *Matter of Heff*, 197 U. S. 488, 505, 49 L. Ed. 848; *South Carolina v. United States*, 199 U. S. 437, 454, 50 L. Ed. 261; *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 318, 50 L. Ed. 204, (followed in *Gardner v. Michigan*, 199 U. S. 325, 50 L. Ed. 212); *Western Turf Ass'n v. Greenberg*, 204 U. S. 359, 363, 51 L. Ed. 520.

The states have retained all of the police power necessary to their internal government. Generally, all not delegated by them in the articles of confederation to the United States of America; all not yielded by them under the constitution of the United States. (Opinion of Wayne, J.) *Passenger Cases*, 7 How. 283, 424, 12 L. Ed. 702.

That there is a power, sometimes called the police power, which has never been surrendered by the states, in virtue of which they may, within certain limits, control everything within their respective territories, and upon the proper exercise of which, under some circumstances, may depend the public health, the public morals, or the public safety, is conceded in all the cases. *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 661, 29 L. Ed. 516; *Gibbons v. Ogden*, 9 Wheat. 1, 203, 6 L. Ed. 23.

Inspection laws, quarantine laws, health laws of every description as well as laws for regulating the internal commerce of a state, and those which respect turnpike

roads, ferries, etc., are component parts of that immense mass of legislation which embraces everything within the territory of a state not surrendered to the general government. No direct general power over those objects is granted to congress; and consequently they remain subject to state legislation. If the legislative power of the government can reach them, it must be for national purposes, and when the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given. *Gibbons v. Ogden*, 9 Wheat. 1, 203, 6 L. Ed. 23; *New York City v. Miln*, 11 Pet. 102, 147, 9 L. Ed. 648; *Conway v. Taylor*, 1 Black 603, 633, 17 L. Ed. 191.

4. Same; effect of fugitive slave clause. —In the case of *Prigg v. Pennsylvania*, 16 Pet. 539, 625, 10 L. Ed. 1060, Mr. Justice Story, in delivering the opinion of the majority of the court, and after declaring the Pennsylvania statute prohibiting the recapture and taking away of fugitive slaves unconstitutional, says: "To guard, however, against any possible misconception of our views, it is proper to state, that we are by no means to be understood, in any manner whatsoever, to doubt or to interfere with the police power belonging to the states, in virtue of their general sovereignty. That police power extends over all subjects within territorial limits of the states, and has never been conceded to the United States. It is wholly distinguishable from the right and duty secured by the provision now under consideration; which is exclusively derived from and secured by the constitution of the United States, and owes its whole efficacy thereto. We entertain no doubt whatever, that the states, in virtue of their general police power, possess full jurisdiction to arrest and restrain runaway slaves, and remove them from their borders, and otherwise to secure themselves against their depredations and evil example, as they certainly may do in cases of idlers, vagabonds and paupers."

5. Effect of fourteenth amendment as transferring police power from the states.

—*Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. Ed. 923; *Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205; *Minneapolis*, etc., R. Co. v. *Beckwith*, 129 U. S. 26, 29, 32 L. Ed.



vol. 4, pp. 124, 125, 334, 339; INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 391, 393, 395; NAVIGABLE WATERS, vol. 8, p. 805.

4. POLICE POWER OF CONGRESS.—Congress may establish police regulations as well as the states, confining their operations to the subjects over which it is given control by the constitution, or to those places over which it has exclusive powers of legislation.<sup>6</sup>

5. EXCLUSIVE AND CONCURRENT POWERS—*a. Exclusive Powers*—(1) *Of the States*.—The police powers of the states, in so far as they relate to those internal affairs which have never been surrendered or restrained, are essentially complete, unqualified and exclusive in the individual states, and cannot be assumed by the national government.<sup>7</sup>

(2) *Of the United States*.—On the other hand, whatever may be the nature and scope of the police powers of the states, they cannot be exercised over a subject confided exclusively to congress by the federal constitution. The states cannot invade the legislative domain which belongs exclusively to the national government, and any attempt in that direction is void no matter under what class of powers it may fall, or how closely allied it may be to powers conceded

585; In re Kemmler, 136 U. S. 436, 34 L. Ed. 519; Crowley v. Christensen, 137 U. S. 86, 34 L. Ed. 620; In re Converse, 137 U. S. 624, 34 L. Ed. 796; In re Rahrer, 140 U. S. 545, 555, 35 L. Ed. 572; Plumley v. Massachusetts, 155 U. S. 461, 474, 39 L. Ed. 223; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. Ed. 832; L'Hote v. New Orleans, 177 U. S. 587, 596, 44 L. Ed. 899; Compagnie Francaise v. Louisiana State Board of Health, 186 U. S. 380, 386, 393, 46 L. Ed. 1209; Lochner v. New York, 198 U. S. 45, 53, 49 L. Ed. 937.

See, generally, upon this point the titles CIVIL RIGHTS, vol. 3, pp. 816, 817, 826, 827, 828, 834, 835, 836, 837; CONSTITUTIONAL LAW, vol. 4, pp. 91, 141, 354, 356, 480, 481; DUE PROCESS OF LAW, vol. 5, pp. 530, 532, 540, 555, 578, 585, 616.

6. *Police power of congress*.—New York City v. Miln, 11 Pet. 102, 153n, 9 L. Ed. 648; United States v. Dewitt, 9 Wall. 41, 19 L. Ed. 593; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 215, 29 L. Ed. 158. See, also, The License Cases, 5 How. 504, 12 L. Ed. 256; Passenger Cases, 7 How. 283, 12 L. Ed. 702; License Tax Cases, 5 Wall. 462, 470, 18 L. Ed. 497; McCray v. United States, 195 U. S. 27, 49 L. Ed. 78; Schick v. United States, 195 U. S. 65, 49 L. Ed. 99.

7. *Exclusive police powers of the states*.—New York City v. Miln, 11 Pet. 102, 9 L. Ed. 648; License Cases, 5 How. 504, 599, 12 L. Ed. 256; New York v. Dibble, 21 How. 366, 370, 16 L. Ed. 149; Patterson v. Kentucky, 97 U. S. 501, 503, 24 L. Ed. 1115; Barbier v. Connolly, 113 U. S. 27, 28 L. Ed. 923; Bowman v. Chicago, etc., R. Co., 125 U. S. 465, 31 L. Ed. 700; In re Rahrer, 140 U. S. 545, 35 L. Ed. 572; Plumley v. Massachusetts, 155 U. S. 461, 474, 39 L. Ed. 223; United States v. Knight Co., 156 U. S. 1, 11, 39 L. Ed. 325; L'Hote v. New Orleans, 177 U. S. 587, 596, 44 L. Ed. 899; Ambrosini v. United States, 187 U. S. 1, 6, 47 L. Ed. 49; Matter of Heff, 197 U. S. 488, 505, 49 L. Ed. 848.

"I can discriminate no line of power between the different subjects of internal police, nor find any principle in the constitution, or rule for construing it by this court, that places any part of a police system within any jurisdiction except that of a state, or which can revise or in any way control its exercise, except as specified. Police regulations are not within any grant of powers to the federal government for federal purposes; congress may make them in the territories, this district, and other places where they have exclusive powers of legislation, but cannot interfere with the police of any part of a state. As a power excepted and reserved by the states, it remains in them in full and unimpaired sovereignty, as absolutely as their soil, which has not been granted to individuals or ceded to the United States; as a right of jurisdiction over the land and waters of a state, it adheres to both, so as to be incapable of exercise by any other power, without cession or usurpation." (Opinion of Baldwin, J.) New York City v. Miln, 11 Pet. 102, 153n, 9 L. Ed. 648.

"It is the highest and most sovereign jurisdiction, indispensable to the separate existence of a state; it is a power vested by original inherent right, existing before the constitution, remaining in its plentitude, incapable of any abridgment by any of its provisions." (Opinion of Baldwin, J.) New York City v. Miln, 11 Pet. 102, 153n, 9 L. Ed. 648.

"It will not be doubted that an act of congress attempting as a police regulation to punish the sale of liquor by one citizen of a state to another within the territorial limits of that state would be an invasion of the state's jurisdiction and could not be sustained, and it would be immaterial what the antecedent status of either buyer or seller was. There is in these police matters no such thing as a divided sovereignty. Jurisdiction is vested entirely in either the state or the nation and not di-

to belong to the states.<sup>8</sup> And since the range of a state's police power comes very near to the field committed by the constitution to congress, it is the duty of courts to guard vigilantly against any needless intrusion. No urgency for its use can authorize a state to exercise it in regard to a subject matter which has been confided exclusively to the discretion of congress.<sup>9</sup>

(3) *Neither Government to Encroach upon the Powers of the Other Through the Exercise of Implied Powers, or by Means of Legal Intendments or Technical Reasoning.*—See the title CONSTITUTIONAL LAW, vol. 4, pp. 53, 186, 187, 188.

(4) *Neither Government to Authorize the Other to Transcend the Limits Fixed by the Constitution.*—See the title CONSTITUTIONAL LAW, vol. 4, p. 214.

(5) *Neither Government to Control the Discretion nor to Interfere with the Exercise of Acknowledged Powers by the Other.*—The police power being reserved to the states in its broadest and fullest sense, the mode of exercising that power is left to their discretion, and is not subject to national supervision. So long as the state is acting within the scope of its legitimate powers, as to the end to be attained, it may use whatever means, appropriate to the end, it may think fit. Whether the policy pursued by the state is wise or unwise, it is not the province of the national authorities to determine. So long as it does not violate rights granted or secured by the supreme law of the land, its action in those respects is beyond the corrective power of the federal courts.<sup>10</sup>

vided between the two." Matter of Heff, 197 U. S. 488, 505, 49 L. Ed. 848.

8. **Exclusive powers of the United States.**—*Gibbons v. Ogden*, 9 Wheat. 1, 210, 6 L. Ed. 23; *Groves v. Slaughter*, 15 Pet. 449, 505, 10 L. Ed. 800; *Pollard v. Hagan*, 3 How. 212, 230, 11 L. Ed. 565; *Passenger Cases*, 7 How. 283, 408, 12 L. Ed. 702; *Welton v. Missouri*, 91 U. S. 275, 282, 23 L. Ed. 347; *Henderson v. Mayor*, 92 U. S. 259, 23 L. Ed. 543; *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. Ed. 550; *Railroad Co. v. Husen*, 95 U. S. 465, 24 L. Ed. 527; *Patterson v. Kentucky*, 97 U. S. 501, 506, 24 L. Ed. 1115; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 29 L. Ed. 516; *Walling v. Michigan*, 116 U. S. 446, 29 L. Ed. 691; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220; *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455, 464, 30 L. Ed. 237; *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 30 L. Ed. 694; *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, 359, 30 L. Ed. 1187; *Mugler v. Kansas*, 123 U. S. 623, 663, 31 L. Ed. 205; *Bowman v. Chicago*, etc., R. Co., 125 U. S. 465, 492, 31 L. Ed. 700; *Kidd v. Pearson*, 128 U. S. 1, 32 L. Ed. 346; *Leisy v. Hardin*, 135 U. S. 100, 108, 34 L. Ed. 128; *Brennan v. Titusville*, 153 U. S. 289, 299, 38 L. Ed. 719; *Gulf*, etc., R. Co. v. *Hefley*, 158 U. S. 98, 39 L. Ed. 910; *Western Union Tel. Co. v. James*, 162 U. S. 650, 653, 40 L. Ed. 1105; *Missouri*, etc., R. Co. v. *Haber*, 169 U. S. 613, 628, 42 L. Ed. 878; *Lake Shore*, etc., R. Co. v. *Ohio*, 173 U. S. 285, 297, 43 L. Ed. 702; *L'Hote v. New Orleans*, 177 U. S. 587, 596, 44 L. Ed. 899; *Compagnie Francaise v. Louisiana State Board of Health*, 186 U. S. 380, 388, 46 L. Ed. 1209; *Matter of Heff*, 197 U. S. 488, 505, 49 L. Ed. 848; *South Carolina v. United States*, 199 U. S. 437, 50 L. Ed. 261.

Neither the unlimited powers of a state

to tax, nor any of its large police powers, can be exercised to such an extent as to work a practical assumption of the powers conferred by the constitution upon congress. *Railroad Co. v. Husen*, 95 U. S. 465, 24 L. Ed. 527.

9. **Same; duty of courts to prevent intrusion.**—*Chy Lung v. Freeman*, 92 U. S. 275, 23 L. Ed. 550; *Henderson v. Mayor*, 92 U. S. 259, 23 L. Ed. 543; *Railroad Co. v. Husen*, 95 U. S. 465, 24 L. Ed. 527; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 662, 29 L. Ed. 516; *Brennan v. Titusville*, 153 U. S. 289, 299, 38 L. Ed. 719.

10. **Neither government to interfere with the exercise of the acknowledged powers of the other.**—*New York City v. Miln*, 11 Pet. 102, 9 L. Ed. 648; *Patterson v. Kentucky*, 97 U. S. 501, 504, 24 L. Ed. 1115; *Ouachita Packet Co. v. Aiken*, 121 U. S. 444, 447, 30 L. Ed. 976; *Lake Shore*, etc., R. Co. v. *Ohio*, 173 U. S. 285, 297, 43 L. Ed. 702; *L'Hote v. New Orleans*, 177 U. S. 587, 596, 44 L. Ed. 899; *Jacobson v. Massachusetts*, 197 U. S. 11, 25, 49 L. Ed. 643; *South Carolina v. United States*, 199 U. S. 437, 454, 50 L. Ed. 261; *Western Turf Ass'n v. Greenberg*, 204 U. S. 359, 363, 51 L. Ed. 520. See, also, the title CONSTITUTIONAL LAW, vol. 4, pp. 206, 207, 255-271.

Outside of the field directly occupied by the general government under the powers granted to it by the constitution, all questions arising within a state that relate to its internal order, or that involve the public convenience or the general good, are primarily for the determination of the state, and its legislative enactments relating to those subjects, and which are not inconsistent with the state constitution, are to be respected and enforced in the courts of the Union, if they do not by their operation directly trench upon



**Immaterial That Means Used May Be the Same.**—And it is immaterial that the means used may be the same, or so nearly the same, as scarcely to be distinguishable from those employed by congress acting under a different power, subject, of course, to the limitation that in the event of collision the law of the state must yield to the laws of congress enacted within the sphere of its power.<sup>11</sup>

**States Not to Impede the Exercise of Federal Powers.**—On the other hand, neither the police power of the states nor any other power can be set up to retard, impede, burden, or in any manner control the inhibitions of the federal constitution or the means employed by congress to carry into execution the powers vested in the general government.<sup>12</sup>

(6) *Federal Encroachment upon State Powers; What Constitutes*—(a) *Generally*.—See, generally, the titles CONSTITUTIONAL LAW, vol. 4, pp. 156, et seq.; 173, 206, et seq.; INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 433, et seq.; LICENSES, vol. 7, pp. 871, 882.

(b) *In the Exercise of the Taxing Power*.—See, generally, the titles CONSTITUTIONAL LAW, vol. 4, p. 209, et seq.; TAXATION.

**By Means of the So-Called Internal Revenue Licenses.**—See the titles CONSTITUTIONAL LAW, vol. 4, p. 173; INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 435; LICENSES, vol. 7, p. 882.

**Taxation of State Liquor Dispensaries.**—See the title CONSTITUTIONAL LAW, vol. 4, p. 211.

**Federal Taxation of Liquor Dealer's Bond as an Encroachment upon Police Power of State.**—See the title CONSTITUTIONAL LAW, vol. 4, p. 211.

**Excise upon Oleomargarine.**—An act of congress which imposes an excise tax upon artificially colored oleomargarine, of such heavy character as to destroy the business of manufacturing that product, is not unconstitutional as an infringement of or an assumption of the police powers of the states.<sup>13</sup>

(c) *Regulation of Commerce*.—See, generally, the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 332, 351, 433, et seq.

**Intraquarantine Regulations.**—See the title ANIMALS, vol. 1, p. 325.

**Regulation of Quality of Petroleum.**—See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 434.

**Power to Exclude Lottery Tickets from Channels of Interstate Commerce.**—See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 332.

the authority of the United States or violate some right protected by the national constitution. *Lake Shore, etc., R. Co. v. Ohio*, 173 U. S. 285, 297, 43 L. Ed. 702.

11. Immaterial that means used may be the same.—*New York City v. Miln*, 11 Pet. 102, 9 L. Ed. 648.

12. States not to impede the exercise of federal powers.—*McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *Weston v. Charleston*, 2 Pet. 449, 467, 7 L. Ed. 481; *Railroad Co. v. Peniston*, 18 Wall. 5, 34, 21 L. Ed. 787; *Henderson v. Mayor*, 92 U. S. 259, 23 L. Ed. 543; *Railroad Co. v. Husen*, 95 U. S. 465, 24 L. Ed. 527; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 29 L. Ed. 516; *Walling v. Michigan*, 116 U. S. 446, 29 L. Ed. 691; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220; *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455, 30 L. Ed. 237; *Mugler v. Kansas*, 123 U. S. 623, 663, 31 L. Ed. 205; *Bowman v. Chicago, etc., R. Co.*, 125 U. S. 465, 496, 31 L. Ed. 700; *Kidd v. Pearson*, 128 U. S. 1, 32 L. Ed. 346; *Minnesota v. Barber*,

136 U. S. 313, 322, 34 L. Ed. 455; *Brimmer v. Rehman*, 138 U. S. 78, 82, 34 L. Ed. 862; *Crutcher v. Kentucky*, 141 U. S. 47, 59, 35 L. Ed. 649; *Voight v. Wright*, 141 U. S. 62, 66, 35 L. Ed. 638; *Brennan v. Titusville*, 153 U. S. 289, 300, 38 L. Ed. 719; *Plumley v. Massachusetts*, 155 U. S. 461, 471, 39 L. Ed. 223. See, also, the title CONSTITUTIONAL LAW, vol. 4, p. 188.

In the hands of the state the police power can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States has been invested by the constitution. *Pollard v. Hagan*, 3 How. 212, 230, 11 L. Ed. 565.

13. Federal encroachment; prohibitive excise upon oleomargarine.—*McCray v. United States*, 195 U. S. 27, 49 L. Ed. 78; *Schick v. United States*, 195 U. S. 65, 49 L. Ed. 99.

**Same; not a license.**—See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 401. See, also, post, "Manufacture and Sale of Food Stuff," VI, K, 5, o.



(d) *By the Enactment of Postal Regulations.*—As to the power of congress to suppress fraud, crime and immorality through the enactment of postal regulations, see the titles CONSTITUTIONAL LAW, vol. 4, p. 172; LOTTERIES, vol. 7, p. 1071; POSTAL LAWS.

**Exclusion of Lottery Tickets, etc., from the Mails.**—See the titles CONSTITUTIONAL LAW, vol. 4, p. 172; LOTTERIES, vol. 7, pp. 1071, 1072; POSTAL LAWS.<sup>14</sup>

(e) *Federal Control of Public Lands within the States.*—See the titles CONSTITUTIONAL LAW, vol. 4, pp. 153, 160; PUBLIC LANDS.

(7) *State Encroachment upon or Interference with Federal Powers, Rights Derived from Federal Government, etc.*—(a) *Generally.*—See, generally, the titles CONSTITUTIONAL LAW, vol. 4, pp. 149, et seq., 188, et seq.; INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 269.

(b) *Regulation of Patented Articles, Sale of Patent Rights, etc.*—Congress never intended that the patent laws should displace the police powers of the states, meaning by that term those powers by which the health, good order, peace and general welfare of the community are promoted. Whatever rights are secured to inventors must be enjoyed in subordination to this general authority of the state over all property within its limits.<sup>15</sup>

(c) *Federal Institutions within the States.*—See the title CONSTITUTIONAL LAW, vol. 4, pp. 205, 206.

(d) *Regulations Affecting National Banks.*—See the titles BANKS AND BANKING, vol. 3, p. 17; CONSTITUTIONAL LAW, vol. 4, pp. 195, 199, 205.

(e) *Regulations Affecting Indians; Ejection of Intruders on Indian Lands, etc.*—See, generally, the titles DUE PROCESS OF LAW, vol. 5, p. 633; INDIANS, vol. 6, pp. 906, 931, 945.

(f) *Right of Way Granted by Federal Government.*—A right of way to a railroad company granted through the public domain within a state is amenable to the police power of the state. Congress must have assumed when making such a grant that in the natural order of events, as settlements were made along the line of the railroad, crossings of the right of way would become necessary and that other limitations in favor of the general public upon an exclusive right of occupancy by the railroad of its right of way might be justly imposed.<sup>16</sup> But

**14. Exclusion of lottery tickets, etc., from the mails.**—In addition to the cases there cited, see *Ex parte Jackson*, 96 U. S. 727, 24 L. Ed. 877.

**15. State regulation of patented articles, sale of patent rights, etc.**—*Allen v. Riley*, 203 U. S. 347, 354, 51 L. Ed. 216; *Patterson v. Kentucky*, 97 U. S. 501, 24 L. Ed. 1115; *Webber v. Virginia*, 103 U. S. 344, 26 L. Ed. 565; *Woods & Sons v. Carl*, 203 U. S. 358, 51 L. Ed. 219. See, also, the titles CIVIL RIGHTS, vol. 3, p. 822; CONSTITUTIONAL LAW, vol. 4, pp. 201, 205; INSPECTION LAWS, vol. 4, pp. 20, 21; INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 434, 435; PATENTS.

Where, by the application of the invention or discovery for which letters-patent have been granted by the United States, tangible property comes into existence, its use is, to the same extent as that of any other species of property, subject, within the several states, to the control which they may respectively impose in the legitimate exercise of their powers over their purely domestic affairs, whether of internal commerce or of police. *Pat-*

*terson v. Kentucky*, 97 U. S. 501, 24 L. Ed. 1115.

A party to whom such letters-patent were, in the usual form, issued, for "an improved burning oil," whereof he claimed to be the inventor, was convicted in Kentucky for there selling that oil. It had been condemned by the state inspector as "unsafe for illuminating purposes," under a statute requiring such inspection, and imposing a penalty for selling or offering to sell within the state oils or fluids, the product of coal, petroleum, or other bituminous substances, which can be used for such purposes, and which have been so condemned. It was admitted on the trial that the oil could not, by any chemical combination described in the specification annexed to the letters-patent, be made to conform to the standard prescribed by that statute. Held, that the enforcement of the statute interfered with no right conferred by the letters-patent. *Patterson v. Kentucky*, 97 U. S. 501, 24 L. Ed. 1115.

**16. State powers as to right of way granted by the federal government.**—*Northern Pac. R. Co. v. Townsend*, 190

such limitations are in no sense analogous to a claim of adverse ownership for private use, and individuals cannot acquire title to any part of such right of way by virtue of adverse ownership for the length of time prescribed in a state statute of limitations.<sup>17</sup>

b. *Concurrent Powers*—(1) *Generally*.—While the police power of the state is entirely distinct from any power granted to the federal government, yet when exercised it may sometimes reach subjects over which national legislation can be constitutionally extended. In other words, there are numerous cases in which the power of the states to legislate in the exercise of their police powers is concurrent with the power of congress to legislate concerning the same subjects. These cases all proceed upon the ground that the regulation of the enjoyment of the relative rights, and the performance of the duties, of all persons within the jurisdiction of a state belong primarily to such state under its reserved power to provide for the safety of all persons and property within its limits; and that even if the subject of such regulations be one that may be taken under the exclusive control of congress, and be reached by national legislation, any action taken by the state upon that subject that does not directly interfere with rights secured by the constitution of the United States or by some valid act of congress, must be respected until congress intervenes.<sup>18</sup>

(2) *Supremacy in Case of Conflict*.—It is familiar learning, of course, that in cases of this character congress may assume jurisdiction over the entire subject matter, thereby superseding any regulations that the states may have enacted, and that in case of conflict, the state law must give way to the federal. The framers of the constitution, it is said, foresaw his possibility of conflict and provided for it by declaring not only the supremacy of the constitution itself, but of all acts of congress enacted in pursuance thereof.<sup>19</sup>

U. S. 267, 272, 47 L. Ed. 1044; Northern Pac. R. Co. v. Ely, 197 U. S. 1, 5, 49 L. Ed. 639. See, generally, the title RAILROADS.

17. *Same*.—Northern Pac. R. Co. v. Townsend, 190 U. S. 267, 272, 47 L. Ed. 1044; Northern Pac. R. Co. v. Ely, 197 U. S. 1, 5, 49 L. Ed. 639.

18. *Concurrent powers of state and federal governments*.—Gibbons v. Ogden, 9 Wheat. 1, 210, 6 L. Ed. 23; New York City v. Miln, 11 Pet. 102, 9 L. Ed. 648; License Cases, 5 How. 504, 589, 592, 12 L. Ed. 256; Passenger Cases, 7 How. 283, 402, 12 L. Ed. 702; Sinnot v. Davenport, 22 How. 227, 243, 16 L. Ed. 243; Gilman v. Philadelphia, 3 Wall. 713, 18 L. Ed. 96; Ex parte McNeil, 13 Wall. 236, 20 L. Ed. 624; Sherlock v. Alling, 93 U. S. 99, 23 L. Ed. 819; Foster v. Master, etc., of New Orleans, 94 U. S. 246, 24 L. Ed. 122; Railroad Co. v. Husen, 95 U. S. 465, 473, 24 L. Ed. 527; Patterson v. Kentucky, 97 U. S. 501, 505, 24 L. Ed. 1115; Transportation Co. v. Parkersburg, 107 U. S. 691, 27 L. Ed. 584; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 215, 29 L. Ed. 158; New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 29 L. Ed. 516; Walling v. Michigan, 116 U. S. 446, 459, 29 L. Ed. 691; Huse v. Glover, 119 U. S. 543, 30 L. Ed. 487; Ouachita Packet Co. v. Aiken, 121 U. S. 444, 447, 30 L. Ed. 976; Smith v. Alabama, 124 U. S. 465, 475, 31 L. Ed. 508; Nashville, etc., Railway v. Alabama, 128 U. S. 96, 100, 32 L. Ed. 352; Minnesota v. Barber, 136 U. S. 313, 322, 34 L. Ed. 455; Brimmer v. Reb-

man, 138 U. S. 78, 82, 34 L. Ed. 862; Voight v. Wright, 141 U. S. 62, 66, 35 L. Ed. 638; Plumley v. Massachusetts, 155 U. S. 461, 471, 39 L. Ed. 223; United States v. Knight Co., 156 U. S. 1, 11, 39 L. Ed. 325; Hennington v. Georgia, 163 U. S. 299, 309, 41 L. Ed. 166; New York, etc., R. Co. v. New York, 165 U. S. 628, 631, 41 L. Ed. 853; Missouri, etc., R. Co. v. Haber, 169 U. S. 613, 635, 42 L. Ed. 878; Chicago, etc., R. Co. v. Solan, 169 U. S. 133, 42 L. Ed. 688; Lake Shore, etc., R. Co. v. Ohio, 173 U. S. 285, 297, 43 L. Ed. 702; Reid v. Colorado, 187 U. S. 137, 148, 47 L. Ed. 108; Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. Ed. 268; McLean & Co. v. Denver, etc., R. Co., 203 U. S. 38, 50, 51 L. Ed. 78.

See, generally, as to the concurrent powers of the state and national governments, the title CONSTITUTIONAL LAW, vol. 4, pp. 149, et seq; 174, et seq. As to concurrent powers with respect to interstate commerce, see the titles CONSTITUTIONAL LAW, vol. 4, p. 179; INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 332, 346, 351, et seq. 433.

19. *Supremacy in case of conflict*.—Gibbons v. Ogden, 9 Wheat. 1, 203, 6 L. Ed. 23; New York City v. Miln, 11 Pet. 102, 9 L. Ed. 648; Sinnot v. Davenport, 22 How. 227, 243, 16 L. Ed. 243; Henderson v. Mayor, 92 U. S. 259, 272, 23 L. Ed. 543; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 215, 29 L. Ed. 158; New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 661, 29 L. Ed. 516; Morgan's



(3) *Conflict Must Be Actual; Presumption as to Intention of Congress.*—It should never be held that congress intends to supersede or suspend the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested.<sup>20</sup> In the application of this principle of the supremacy of an act of congress, in a case where the state law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts can not be reconciled or consistently stand together.<sup>21</sup>

(4) *Remedy for Unreasonable Regulation by the States.*—In cases of this character, the remedy for unreasonable, harsh or oppressive regulations enacted by the states is to be found in the power of congress to supersede state regulations by the enactment of others of its own. Unless the state law is in direct conflict with the federal constitution, or so unreasonable as to amount to an

*Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455, 30 L. Ed. 237; *Mugler v. Kansas*, 123 U. S. 623, 659, 31 L. Ed. 205; *Smith v. Alabama*, 124 U. S. 465, 473, 31 L. Ed. 508; *Kidd v. Pearson*, 128 U. S. 1, 32 L. Ed. 346; *Plumley v. Massachusetts*, 155 U. S. 461, 479, 39 L. Ed. 223; *Pittsburg, etc., Coal Co. v. Louisiana*, 156 U. S. 590, 598, 39 L. Ed. 544; *United States v. Knight Co.*, 156 U. S. 1, 11, 39 L. Ed. 325; *Gulf, etc., R. Co. v. Hefley*, 158 U. S. 98, 104, 39 L. Ed. 910; *Hennington v. Georgia*, 163 U. S. 299, 309, 41 L. Ed. 166; *New York, etc., R. Co. v. New York*, 165 U. S. 628, 41 L. Ed. 853; *Missouri, etc., R. Co. v. Haber*, 169 U. S. 613, 635, 42 L. Ed. 878; *Chicago, etc., R. Co. v. Solan*, 169 U. S. 133, 42 L. Ed. 688; *Lake Shore, etc., R. Co. v. Ohio*, 173 U. S. 285, 297, 43 L. Ed. 702; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 558, 46 L. Ed. 679; *Compagnie Francaise v. Louisiana State Board of Health*, 186 U. S. 380, 388, 46 L. Ed. 1209; *Reid v. Colorado*, 187 U. S. 137, 148, 47 L. Ed. 108; *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 48 L. Ed. 268; *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. Ed. 679; *Jacobson v. Massachusetts*, 197 U. S. 11, 25, 49 L. Ed. 643; *McLean & Co. v. Denver, etc., R. Co.*, 203 U. S. 38, 50, 51 L. Ed. 78. See, generally, the titles CONSTITUTIONAL LAW, vol. 4, pp. 178, 180, 214, et seq; INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 346.

"When congress acts with reference to a matter confided to it by the constitution, then its statutes displace all conflicting local regulations touching that matter, although such regulations may have been established in pursuance of a power not surrendered by the states to the general government." *Gibbons v. Ogden*, 9 Wheat. 1, 210, 6 L. Ed. 23; *Sinnot v. Davenport*, 22 How. 227, 243, 16 L. Ed. 243; *Missouri, etc., R. Co. v. Haber*, 169 U. S. 613, 626, 42 L. Ed. 878; *Lake Shore, etc., R. Co. v. Ohio*, 173 U. S. 285, 297, 43 L. Ed. 702.

"The possibility of conflict between state and national enactments, each to be referred to the undoubted powers of the state and the nation, respectively, was not overlooked in *Gibbons v. Ogden*, 9

*Wheat*, 1, 6 L. Ed. 23, and Chief Justice Marshall said: 'The framers of our constitution foresaw this state of things, and provided for it by declaring the supremacy not only of the constitution itself, but of the laws made in pursuance of it. The nullity of any act inconsistent with the constitution is produced by the declaration that the constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties is to such acts of the state legislatures as do not transcend these powers, but, though enacted in the execution of acknowledged state powers, interfere with or are contrary to the laws of congress, made in pursuance of the constitution, or some treaty made under the authority of the United States. In every such case the act of congress, or the treaty, is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it.'" *Hennington v. Georgia*, 163 U. S. 299, 309, 41 L. Ed. 166.

Whether state laws be passed in virtue of a concurrent power of the state with congress to legislate upon the subject to which such laws apply, or whether in virtue of the power of the states to regulate their domestic trade and police, they must yield to the constitutional enactments of congress relating to the same subjects. This principle has been frequently affirmed by the federal supreme court, and is founded, as well on the nature of the government, as on the words of the constitution. *Gibbons v. Ogden*, 9 Wheat. 1, 240, 6 L. Ed. 23; *United States v. Knight Co.*, 156 U. S. 1, 11, 39 L. Ed. 325.

20. *Conflict must be actual; presumption as to intention of congress.*—*Reid v. Colorado*, 187 U. S. 137, 148, 47 L. Ed. 108.

21. *Same.*—*Sinnot v. Davenport*, 22 How. 227, 243, 16 L. Ed. 243; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 215, 29 L. Ed. 158; *Plumley v. Massachusetts*, 155 U. S. 461, 479, 39 L. Ed. 223; *Reid v. Colorado*, 187 U. S. 137, 148, 47 L. Ed. 108. See, generally, the titles CONSTITUTIONAL LAW, vol. 4, pp. 218, 251, 252; INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 346.



invasion of constitutional rights by round about means, the federal courts cannot take the initiative.<sup>22</sup>

**B. As between the Legislative and Judicial Departments.**—The enactment of police regulations is a legislative function,<sup>23</sup> and the courts cannot control the discretion of the legislative departments in this respect, either as to the necessity of any particular regulation, or as to the means employed,<sup>24</sup> pro-

**22. Remedy for unreasonable regulation by the states in cases of concurrent jurisdiction.**—*Cooley v. Board of Wardens*, 12 How. 299, 13 L. Ed. 996; *County of Mobile v. Kimball*, 102 U. S. 691, 26 L. Ed. 238; *Turner v. Maryland*, 107 U. S. 38, 27 L. Ed. 370; *Escanaba Co. v. Chicago*, 107 U. S. 678, 27 L. Ed. 442; *Transportation Co. v. Parkersburg*, 107 U. S. 691, 27 L. Ed. 584; *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455, 30 L. Ed. 237; *Huse v. Glover*, 119 U. S. 543, 30 L. Ed. 487; *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 493, 30 L. Ed. 694; *Ouachita Packet Co. v. Aiken*, 121 U. S. 444, 447, 30 L. Ed. 976. See, generally, the titles CONSTITUTIONAL LAW, vol. 4, pp. 253, 263, 264, et seq., 271; INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 432; NAVIGABLE WATERS, vol. 8, p. 861, and references there given.

**23. Where vested; as between legislative and judicial departments.**—*Munn v. Illinois*, 94 U. S. 113, 114, 24 L. Ed. 77; *Peek v. Chicago, etc., R. Co.*, 94 U. S. 164, 178, 24 L. Ed. 97; *Express Cases*, 117 U. S. 1, 29 L. Ed. 791; *Mugler v. Kansas*, 123 U. S. 623, 661, 31 L. Ed. 205; *Powell v. Pennsylvania*, 127 U. S. 678, 685, 32 L. Ed. 253; *Chicago, etc., R. Co. v. Minnesota*, 134 U. S. 418, 458, 33 L. Ed. 970; *Reagan v. Mercantile Trust Co.*, 154 U. S. 413, 38 L. Ed. 1028; *Reagan v. Mercantile Trust Co.*, 154 U. S. 418, 38 L. Ed. 1030; *Reagan v. Farmers' Loan, etc., Co.*, 154 U. S. 420, 38 L. Ed. 1031; *Reagan v. Farmers' Loan, etc., Co.*, 154 U. S. 362, 397, 38 L. Ed. 1014; *St. Louis, etc., R. Co. v. Gill*, 156 U. S. 649, 39 L. Ed. 567; *Cincinnati, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 196, 40 L. Ed. 935; *Texas, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 216, 40 L. Ed. 940; *Interstate Commerce Commission v. Cincinnati, etc., R. Co.*, 167 U. S. 479, 499, 42 L. Ed. 243; *McChord v. Louisville, etc., R. Co.*, 183 U. S. 483, 46 L. Ed. 289. See, also, the title CONSTITUTIONAL LAW, vol. 4, p. 228.

"But by whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions, so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security

of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the state, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety." *Mugler v. Kansas*, 123 U. S. 623, 661, 31 L. Ed. 205.

**24. Same; judicial control as to occasion, necessity, means employed, etc.**—*License Cases*, 5 How. 504, 592, 12 L. Ed. 256; *Willard v. Presbury*, 14 Wall. 676, 20 L. Ed. 719; *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155, 164, 24 L. Ed. 94; *Railroad Co. v. Husen*, 95 U. S. 465, 470, 24 L. Ed. 527; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 353, 28 L. Ed. 173; *Barbier v. Connolly*, 113 U. S. 27, 28 L. Ed. 923; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220; *Mugler v. Kansas*, 123 U. S. 623, 661, 31 L. Ed. 205; *Spencer v. Merchant*, 125 U. S. 345, 355, 31 L. Ed. 763; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. Ed. 253; *Kidd v. Pearson*, 128 U. S. 1, 32 L. Ed. 346; *Minnesota v. Barber*, 136 U. S. 313, 320, 34 L. Ed. 455; *Paulsen v. Portland*, 149 U. S. 30, 40, 37 L. Ed. 637; *Lawton v. Steele*, 152 U. S. 133, 136, 38 L. Ed. 385; *Plessy v. Ferguson*, 163 U. S. 537, 41 L. Ed. 256; *Gundling v. Chicago*, 177 U. S. 183, 188, 44 L. Ed. 725; *Petit v. Minnesota*, 177 U. S. 164, 168, 44 L. Ed. 716; *Austin v. Tennessee*, 179 U. S. 343, 45 L. Ed. 224; *Otis v. Parker*, 187 U. S. 606, 47 L. Ed. 323; *Atkin v. Kansas*, 191 U. S. 207, 48 L. Ed. 148; *Jacobson v. Massachusetts*, 197 U. S. 11, 25, 49 L. Ed. 643; *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 318, 50 L. Ed. 204; *Gardner v. Michigan*, 199 U. S. 325, 50 L. Ed. 212. See, also, the title CONSTITUTIONAL LAW, vol. 4, pp. 250, 255, 268, 314.

The police power of the state is exercised solely at the legislative will. *Paulsen v. Portland*, 149 U. S. 30, 40, 37 L. Ed. 637.

Thus the necessity for the construction of a sewer and the territory to be drained into the same, are matters of legislative discretion. *Paulsen v. Portland*, 149 U. S. 30, 40, 37 L. Ed. 637. Accord: *Willard v. Presbury*, 14 Wall. 676, 20 L. Ed. 719; *Spencer v. Merchant*, 125 U. S. 345, 355, 31 L. Ed. 763.

Whether the manufacture of oleomargarine, or imitation butter, of the kind described in the statute of Pennsylvania

vided, always, that the means adopted have some real and substantial relation to the object, lawful in itself, sought to be accomplished, and are not used as a mere subterfuge for the purpose of unreasonable and arbitrary oppression or discrimination.<sup>25</sup>

**C. As between the Legislature and Subordinate Agencies of the State; Delegation of Powers.**—The state may invest local bodies called into existence for purposes of local administration with authority in some appropriate way to safeguard the public health and the public safety.<sup>26</sup> Municipal

(Laws of Penn. 1885, p. 22, No. 25), is, or may be, conducted in such a way, or with such skill and secrecy, as to baffle ordinary inspection, or whether it involves such danger to the public health as to require, for the protection of the people, the entire suppression of the business, rather than its regulation in such manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients, are questions of fact and of public policy which belong to the legislative department to determine. If it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts. *Powell v. Pennsylvania*, 127 U. S. 678, 685, 32 L. Ed. 253.

Whether a statute conferring the power to regulate rates of water companies, upon a municipality, is expedient or not, is a question for the legislature, not for the courts. *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 353, 28 L. Ed. 173.

"If there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it can only be when that which the legislature has done comes within the rule that if a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution." *Mugler v. Kansas*, 123 U. S. 623, 661, 31 L. Ed. 205; *Minnesota v. Barber*, 136 U. S. 313, 320, 34 L. Ed. 455; *Atkin v. Kansas*, 191 U. S. 207, 223, 48 L. Ed. 148; *Jacobson v. Massachusetts*, 197 U. S. 11, 31, 49 L. Ed. 643.

It is no part of the function of a court or jury to determine which one of two modes was likely to be most effective for the protection of the public against disease. This is a legislative function and its determination is not subject to judicial review, unless the regulations enacted for that purpose have no real or substantial relation to those objects, or unless they are, beyond all question, a plain, palpable invasion of rights secured by the fundamental law. *Jacobson v. Massachusetts*, 197 U. S. 11, 30, 49 L. Ed. 643.

Thus, whether or not compulsory vaccination is an appropriate means to safeguard the community against an epidemic of smallpox is a question for the legislature, or for a municipal corporation acting under its authority, to determine, and in the light of common knowledge upon that subject, the courts cannot say that it is not an appropriate means or that it is an infringement upon a constitutional right of the individual. *Jacobson v. Massachusetts*, 197 U. S. 11, 30, 49 L. Ed. 643.

**25. Same; same; provided means have some relation to object, etc.**—*Railroad Co. v. Husen*, 95 U. S. 465, 471, 24 L. Ed. 527; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220; *Mugler v. Kansas*, 123 U. S. 623, 661, 31 L. Ed. 205; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. Ed. 253; *Minnesota v. Barber*, 136 U. S. 313, 320, 34 L. Ed. 455; *Lawton v. Steele*, 152 U. S. 133, 137, 38 L. Ed. 385; *Hennington v. Georgia*, 163 U. S. 299, 303, 41 L. Ed. 166; *Plessy v. Ferguson*, 163 U. S. 537, 41 L. Ed. 256; *Scott v. Donald*, 165 U. S. 58, 91, 41 L. Ed. 632; *Holden v. Hardy*, 169 U. S. 366, 42 L. Ed. 780; *Lake Shore, etc., R. Co. v. Ohio*, 173 U. S. 285, 43 L. Ed. 702; *Gundling v. Chicago*, 177 U. S. 183, 44 L. Ed. 725; *Austin v. Tennessee*, 179 U. S. 343, 45 L. Ed. 224; *Wisconsin, etc., R. Co. v. Jacobson*, 179 U. S. 287, 45 L. Ed. 194; *Otis v. Parker*, 187 U. S. 606, 47 L. Ed. 323; *Atkin v. Kansas*, 191 U. S. 207, 48 L. Ed. 148; *Daly v. Elton*, 195 U. S. 242, 49 L. Ed. 177; *Dobbins v. Los Angeles*, 195 U. S. 223, 49 L. Ed. 169; *Jacobson v. Massachusetts*, 197 U. S. 11, 49 L. Ed. 643; *Chicago, etc., R. Co. v. Drainage Comm'rs*, 200 U. S. 561, 50 L. Ed. 596. See, generally, the titles CONSTITUTIONAL LAW, vol. 4, pp. 271, 274, 361, 370, 372, et seq. See post, "Regulations Must Be Reasonable and Bona Fide, Having Some Substantial Relation to Ostensible Object, etc.," V, E, 2, c.

**26. Where vested; as between the legislature and subordinate agencies of the state; delegation of powers.**—*Jacobson v. Massachusetts*, 197 U. S. 11, 25, 49 L. Ed. 643. See, generally, the titles CONSTITUTIONAL LAW, vol. 4, pp. 290, 291, 366, 371; HEALTH, vol. 6, pp. 683, 684.

In case of a local epidemic of smallpox the power to determine when the necessity for the compulsory vaccination of all persons in that locality has arisen must be lodged somewhere and in somebody. Un-



bodies, under legislative sanction, may exercise the power to prescribe such regulations as may be reasonable, necessary and appropriate for the protection of the public health and comfort.<sup>27</sup> So the primary control of public service corporations may be vested in a board of commissioners.<sup>28</sup>

**Delegation to Single Officer, Board or Tribunal.**—See the titles CONSTITUTIONAL LAW, vol. 4, pp. 290, 292, 368, 371; LICENSES, vol. 7, p. 886.

### III. General Nature and Extent of the Police Power.

The states of the Union have the right to control all of their purely internal affairs, and, in so doing, to protect the property, lives, health, morals and safety of their people, and to suppress crime and disorder by regulations that do not interfere with the execution of the powers of the general government or violate rights secured by the constitution of the United States.<sup>29</sup> The police power of the states is not, however, limited to these subjects only. The power of the state, by appropriate legislation, to provide for the public comfort and convenience, and to promote the general prosperity and welfare of its inhabitants, stands upon the same ground precisely as its power by appropriate legislation to protect the public health, the public morals and the public safety, and whether legislation of either kind is inconsistent with any power granted to the general

der such circumstances it is an appropriate exercise of the legislative power to refer that question, in the first instance, to a board of health, composed of persons residing in the locality affected. To invest such a body with authority over such matters is not an unusual nor an unreasonable or arbitrary requirement. *Jacobson v. Massachusetts*, 197 U. S. 11, 27, 49 L. Ed. 643.

**27. Same; delegation of municipal corporations.**—*California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 318, 50 L. Ed. 204, followed in *Gardner v. Michigan*, 199 U. S. 325, 50 L. Ed. 212. See, also, *Yates v. Milwaukee*, 10 Wall. 497, 19 L. Ed. 984; *Weber v. Board of Harbor Comm'rs*, 18 Wall. 57, 21 L. Ed. 798; *Atlee v. Packet Co.*, 21 Wall. 389, 22 L. Ed. 619; *Prosser v. Northern Pac. Railroad*, 152 U. S. 59, 64, 38 L. Ed. 352; *Yesler v. Washington, etc., Comm'rs*, 146 U. S. 646, 36 L. Ed. 1119. See the title HEALTH, vol. 6, pp. 683, 684. And see, generally, the title CONSTITUTIONAL LAW, vol. 4, p. 289.

**28. Same; delegation to commissioners.**—*New York, etc., R. Co. v. Bristol*, 151 U. S. 556, 571, 38 L. Ed. 269; *Connecticut, etc., R. Co. v. Woodruff*, 153 U. S. 689, 38 L. Ed. 869. See, generally, the titles CARRIERS, vol. 3, p. 629; CONSTITUTIONAL LAW, vol. 4, p. 290.

Power of the state to exercise legislative control over railroad companies in all respects necessary to protect the public against danger, injustice and oppression may be exercised through boards of commissioners. *New York, etc., R. Co. v. Bristol*, 151 U. S. 556, 571, 38 L. Ed. 269; *Connecticut, etc., R. Co. v. Woodruff*, 153 U. S. 689, 38 L. Ed. 869.

**29. General nature and extent of the police power.**—*Gibbons v. Ogden*, 9 Wheat. 1, 203, 6 L. Ed. 23; *New York City v. Miln*, 11 Pet. 102, 147, 9 L. Ed. 648; *License Cases*, 5 How. 504, 631, 12 L. Ed.

256; *Moore v. Illinois*, 14 How. 13, 18, 14 L. Ed. 306; *New York v. Dibble*, 21 How. 366, 370, 16 L. Ed. 149; *Conway v. Taylor*, 1 Black 603, 633, 17 L. Ed. 191; *Slaughter-House Cases*, 16 Wall. 36, 62, 21 L. Ed. 394; *Railroad Co. v. Fuller*, 17 Wall. 560, 568, 21 L. Ed. 710; *Railroad Co. v. Husen*, 95 U. S. 465, 470, 24 L. Ed. 527; *Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989; *Patterson v. Kentucky*, 97 U. S. 501, 24 L. Ed. 1115; *Stone v. Mississippi*, 101 U. S. 814, 818, 25 L. Ed. 1079; *Escanaba Co. v. Chicago*, 107 U. S. 678, 683, 27 L. Ed. 442; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 661, 29 L. Ed. 516; *Mugler v. Kansas*, 123 U. S. 623, 659, 31 L. Ed. 205; *Kidd v. Pearson*, 128 U. S. 1, 32 L. Ed. 346; *In re Kemmler*, 136 U. S. 436, 34 L. Ed. 519; *Crowley v. Christensen*, 137 U. S. 86, 34 L. Ed. 620; *In re Converse*, 137 U. S. 624, 34 L. Ed. 796; *In re Rahrer*, 140 U. S. 545, 556, 35 L. Ed. 572; *Lawton v. Steele*, 152 U. S. 133, 38 L. Ed. 385; *Plumley v. Massachusetts*, 155 U. S. 461, 478, 39 L. Ed. 223; *Missouri, etc., R. Co. v. Haber*, 169 U. S. 613, 628, 42 L. Ed. 878; *Wilson v. Iseminger*, 185 U. S. 55, 61, 46 L. Ed. 804; *Cummings v. Chicago*, 188 U. S. 410, 427, 47 L. Ed. 525; *Jacobson v. Massachusetts*, 197 U. S. 11, 25, 49 L. Ed. 643; *Lochner v. New York*, 198 U. S. 45, 73, 49 L. Ed. 937; *Chicago, etc., R. Co. v. Drainage Comm'rs*, 200 U. S. 561, 592, 50 L. Ed. 596; *Bacon v. Walker*, 204 U. S. 311, 51 L. Ed. 499; *Bown v. Walling*, 204 U. S. 320, 51 L. Ed. 503.

"Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals." *Beer Co. v. Massachusetts*, 97 U. S. 25, 33, 24 L. Ed. 989.



government is to be determined by the same rules.<sup>30</sup> Indeed, the purposes for which the police power may be invoked are almost infinite, and the power to establish police regulations reaches everything within the territorial limits of the state not surrendered to the general government.<sup>31</sup>

**30. Same; extends to promotion of public comfort, convenience, general prosperity and welfare.**—*New York City v. Miln*, 11 Pet. 102, 9 L. Ed. 648; *Gilman v. Philadelphia*, 3 Wall. 713, 729, 18 L. Ed. 96; *Slaughter-House Cases*, 16 Wall. 36, 62, 21 L. Ed. 394; *Pound v. Turck*, 95 U. S. 459, 464, 24 L. Ed. 525; *Railroad Co. v. Husen*, 95 U. S. 465, 470, 24 L. Ed. 527; *Escanaba Co. v. Chicago*, 107 U. S. 678, 683, 27 L. Ed. 442; *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, 359, 30 L. Ed. 1187; *Lake Shore, etc., R. Co. v. Ohio*, 173 U. S. 285, 300, 43 L. Ed. 702; *Lake Shore, etc., R. Co. v. Smith*, 173 U. S. 684, 688, 43 L. Ed. 858; *Wilson v. Iseminger*, 185 U. S. 55, 61, 46 L. Ed. 804; *Cummings v. Chicago*, 188 U. S. 410, 427, 47 L. Ed. 525; *Chicago, etc., R. Co. v. Drainage Comm'rs*, 200 U. S. 561, 592, 50 L. Ed. 596; *North-western Nat. Life Ins. Co. v. Riggs*, 203 U. S. 243, 253, 51 L. Ed. 168; *Bacon v. Walker*, 204 U. S. 311, 317, 51 L. Ed. 499; *Bown v. Walling*, 204 U. S. 320, 51 L. Ed. 503; *Western Turf Ass'n v. Greenberg*, 204 U. S. 359, 363, 51 L. Ed. 520.

The police power is not confined to the suppression of what is offensive, disorderly or unsanitary. It extends to so dealing with the conditions which exist in the state as to bring out of them the greatest welfare of its people. *Bacon v. Walker*, 204 U. S. 311, 318, 51 L. Ed. 499; *Bown v. Walling*, 204 U. S. 320, 51 L. Ed. 503.

Each state possesses powers never surrendered to the general government; which powers the state, except as restrained by its own constitution or the constitution of the United States, may exert not only for the public health, the public morals, and the public safety, but for the general or common good, for the well being, comfort and good order of the people. *Western Turf Ass'n v. Greenberg*, 204 U. S. 359, 363, 51 L. Ed. 520.

It is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare by any and every act of legislation which it may deem to be conducive to these ends, where the power over the particular subject, or the manner of its exercise, are not surrendered, or restrained by the constitution of the United States. *New York City v. Miln*, 11 Pet. 102, 9 L. Ed. 648.

"It may be that such legislation is not within the 'police power' of a state as those words have been sometimes, although inaccurately, used. But in our opinion the power, whether called police, governmental or legislative, exists in each state, by appropriate enactments not for-

bidden by its own constitution or by the constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good." *Lake Shore, etc. R. Co. v. Ohio*, 173 U. S. 285, 297, 43 L. Ed. 702.

**31. Same; reaches everything not surrendered to federal government.**—*Gibbons v. Ogden*, 9 Wheat. 1, 203, 6 L. Ed. 23; *New York City v. Miln*, 11 Pet. 102, 147, 9 L. Ed. 648; *Groves v. Slaughter*, 15 Pet. 449, 505, 10 L. Ed. 800; *Passenger Cases*, 7 How. 283, 457, 12 L. Ed. 702; *Conway v. Taylor*, 1 Black 603, 633, 17 L. Ed. 191; *Slaughter-House Cases*, 16 Wall. 36, 63, 21 L. Ed. 394; *Railroad Co. v. Fuller*, 17 Wall. 560, 568, 21 L. Ed. 710; *Railroad Co. v. Husen*, 95 U. S. 465, 470, 24 L. Ed. 527; *Patterson v. Kentucky*, 97 U. S. 501, 503, 24 L. Ed. 1115; *Escanaba Co. v. Chicago*, 107 U. S. 678, 683, 27 L. Ed. 442; *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, 359, 30 L. Ed. 1187; *Mugler v. Kansas*, 123 U. S. 623, 659, 31 L. Ed. 205; *Kidd v. Pearson*, 128 U. S. 1, 32 L. Ed. 346; *In re Rahrer*, 140 U. S. 545, 556, 35 L. Ed. 572; *Crutcher v. Kentucky*, 141 U. S. 47, 61, 35 L. Ed. 649; *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, 701, 40 L. Ed. 849; *Lake Shore, etc., R. Co. v. Ohio*, 173 U. S. 285, 297, 43 L. Ed. 702; *Cummings v. Chicago*, 188 U. S. 410, 427, 47 L. Ed. 525; *Jacobson v. Massachusetts*, 197 U. S. 11, 25, 49 L. Ed. 643; *North-western Nat. Life Ins. Co. v. Riggs*, 203 U. S. 243, 253, 51 L. Ed. 168.

Inspection laws, quarantine laws, and health laws of every description as well as laws for regulating the internal commerce of the state, and those which respect turn-pike roads, ferries, etc., are component parts of that immense mass of legislation which controls everything within the territory of a state not surrendered to the general government, and all of which can be most advantageously administered by the states themselves. No direct general power over these objects has been granted to congress; and consequently they remain subject to state legislation. *Slaughter-House Cases*, 16 Wall. 36, 63, 21 L. Ed. 394, approving *Gibbons v. Ogden*, 9 Wheat. 1, 203, 6 L. Ed. 23; *New York City v. Miln*, 11 Pet. 102, 147, 9 L. Ed. 648; *Passenger Cases*, 7 How. 283, 457, 12 L. Ed. 702; *Conway v. Taylor*, 1 Black 603, 633, 17 L. Ed. 191; *Railroad Co. v. Fuller*, 17 Wall. 560, 568, 21 L. Ed. 710; *Railroad Co. v. Husen*, 95 U. S. 465, 471, 24 L. Ed. 527; *Patterson v. Kentucky*, 97 U. S. 501, 503, 24 L. Ed. 1115.

"Undoubtedly, under the reserve powers of the state, which are designated un-

**Relative Rights, Conduct, etc., of Citizens.**—Under this power the state may regulate the relative rights and duties of all persons and corporations within its jurisdiction, the manner in which its citizens shall conduct themselves one toward another, and the manner in which each shall use his property when such regulation becomes necessary for the public good.<sup>32</sup>

**No Rights Absolute.**—In short, no right is absolute. No person has an absolute right to be at all times and in all circumstances wholly freed from restraint. The maxim that no one shall so use his own as to injure another is of universal and pervading application. It is a condition upon which all rights, both of person and of property, are held. Under its doctrine, persons and property are subject to all kinds of restraints and burdens in order to secure the general comfort, health and prosperity of the state. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same rights by others. It is then liberty regulated by law.<sup>33</sup>

der that somewhat ambiguous term of police powers, regulations may be prescribed by the state for the good order, peace and protection of the community. The subjects upon which the state may act are almost infinite, yet in its regulations with respect to all of them there is this necessary limitation, that the state does not thereby encroach upon the free exercise of the power vested in congress by the constitution." *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, 359, 30 L. Ed. 1187.

"But whilst it is only such things as are clearly injurious to the lives and health of the people that are placed beyond the protection of the commercial power of congress, yet when that power, or some other exclusive power of the federal government, is not in question, the police power of the state extends to almost everything within its borders; to the suppression of nuisances; to the prohibition of manufactures deemed injurious to the public health; to the prohibition of intoxicating drinks, their manufacture or sale; to the prohibition of lotteries, gambling, horse racing or anything else that the legislature may deem opposed to the public welfare." *Crutcher v. Kentucky*, 141 U. S. 47, 61, 35 L. Ed. 649, citing *Bartemeyer v. Iowa*, 18 Wall. 129, 21 L. Ed. 929; *Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036; *Stone v. Mississippi*, 101 U. S. 814, 25 L. Ed. 1079; *Foster v. Kansas*, 102 U. S. 201, 28 L. Ed. 629; *Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. Ed. 253; *Kidd v. Pearson*, 128 U. S. 1, 32 L. Ed. 346; *Kimmish v. Ball*, 129 U. S. 217, 32 L. Ed. 695.

Under the police power the authority of the state extends to the right to enact all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of the other states. *Jacobson v. Massachusetts*, 197 U. S. 11, 25, 49 L. Ed. 643, reaffirmed in *Cantwell v. Missouri*, 199 U. S. 602, 50 L. Ed. 329; *Moeschen v. Tene-*

*ment House Department*, 203 U. S. 583, 51 L. Ed. 328.

**32. May regulate relative rights, conduct, etc., of citizens.**—*Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Railroad Co. v. Husen*, 95 U. S. 465, 470, 24 L. Ed. 527; *Patterson v. Kentucky*, 97 U. S. 501, 504, 24 L. Ed. 1115; *Budd v. New York*, 143 U. S. 517, 535, 36 L. Ed. 247; *Lake Shore, etc., R. Co. v. Ohio*, 173 U. S. 285, 297, 43 L. Ed. 702; *Northwestern Nat. Life Ins. Co. v. Riggs*, 203 U. S. 243, 253, 51 L. Ed. 168. See, also, the titles *DUE PROCESS OF LAW*, vol. 5, pp. 609, 610, 611; *NAVIGABLE WATERS*, vol. 8, p. 863.

**33. No rights absolute; no one to so use his own as to injure another; liberty not license.**—*License Cases*, 5 How. 504, 631, 12 L. Ed. 256; *Slaughter-House Cases*, 16 Wall. 36, 62, 21 L. Ed. 394; *Munn v. Illinois*, 94 U. S. 113, 124, 24 L. Ed. 77; *Railroad Co. v. Husen*, 95 U. S. 465, 470, 24 L. Ed. 527; *Patterson v. Kentucky*, 97 U. S. 501, 504, 24 L. Ed. 1115; *Beer Co. v. Massachusetts*, 97 U. S. 25, 32, 24 L. Ed. 989; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 672, 29 L. Ed. 516; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. Ed. 525; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683, 29 L. Ed. 510; *Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205; *In re Kemmler*, 136 U. S. 436, 34 L. Ed. 519; *Crowley v. Christensen*, 137 U. S. 86, 34 L. Ed. 620; *In re Converse*, 137 U. S. 624, 34 L. Ed. 796; *In re Rahrer*, 140 U. S. 545, 554, 35 L. Ed. 572; *Plumley v. Massachusetts*, 155 U. S. 461, 478, 39 L. Ed. 223; *Chicago, etc., R. Co. v. Chicago*, 166 U. S. 226, 252, 41 L. Ed. 979; *Missouri, etc., R. Co. v. Haber*, 169 U. S. 613, 42 L. Ed. 878; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 566, 43 L. Ed. 552; *Gundling v. Chicago*, 177 U. S. 183, 188, 44 L. Ed. 725; *Wilson v. Iseminger*, 185 U. S. 55, 61, 46 L. Ed. 804; *Jacobson v. Massachusetts*, 197 U. S. 11, 26, 49 L. Ed. 643; *Lochner v. New York*, 198 U. S. 45, 53, 49 L. Ed. 937; *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 318, 50 L.

**As Broad as the Taxing Power.**—The police power of a state is as broad and plenary as its taxing power; and property within the state is subject to the operations of the former so long as it is within the regulating restrictions of the latter.<sup>34</sup>

#### IV. Persons Subject to the Police Power.

The police power extends to every person, natural and artificial, within the territory of the state, whether citizen or aliens,<sup>35</sup> except foreign ministers and other diplomatic functionaries, and even they are bound to observe municipal regulations of police, though not liable to its penalties.<sup>36</sup>

#### V. Constitutional Limitations upon the Police Power.

**A. Generally as to the Supremacy of the Federal Constitution and Laws.**—As the constitution of the United States and the laws of congress enacted in pursuance thereof are the supreme law of the land, anything in the constitution or statutes of the states to the contrary, notwithstanding, no right granted or secured by the constitution can be impaired or destroyed by state enactment, whatever may be the source from which the power to pass such enactment may have been derived. While, therefore, the police power has been reserved to the states in its broadest sense, constitutional objections to state laws cannot be disposed of by saying that the law was enacted in the exercise

Ed. 204; *Gardner v. Michigan*, 199 U. S. 325, 50 L. Ed. 212. See, also, the title **DUE PROCESS OF LAW**, vol. 5, pp. 555, 557.

The police power extends, at least, to the protection of the lives, the health, and the property of the community against the injurious exercise by any citizen of his own rights. *Patterson v. Kentucky*, 97 U. S. 501, 504, 24 L. Ed. 1115.

"Without attempting to define what are the peculiar subjects or limits of this power, it may safely be affirmed that every law for the restraint and punishment of crime, for the preservation of public peace, health, and morals, must come within this category. As subjects of legislation, they are from their very nature of primary importance; they lie at the foundation of social existence; they are for the protection of life and liberty, and necessarily compel all laws on subjects of secondary importance, which relate only to property, convenience, or luxury, to recede, when they come in conflict or collision, 'salus populi suprema lex.' If a right to control these subjects be 'complete, unqualified, and exclusive' in the state legislatures, no regulations of secondary importance can supersede or restrain their operations on any ground of prerogative or supremacy. The exigencies of the social compact require that such laws be executed before and above all others." (Opinion of Grier, J.) *License Cases*, 5 How. 504, 631, 12 L. Ed. 256.

One's constitutional rights of liberty or of property are best secured in our government by the observance upon the part of all of such regulations as are established by competent authority to promote the common good. No one may rightfully do that which the lawmaking power, upon reasonable grounds, declares

to be prejudicial to the general welfare. *Mugler v. Kansas*, 123 U. S. 623, 663, 31 L. Ed. 205.

"Under these laws, personal rights, rights of property, and freedom of action, may be directly affected, and men may be fined, imprisoned and restrained, and property taken, converted and sold away from its owner." *Wilson v. Iseminger*, 185 U. S. 55, 61, 46 L. Ed. 804.

"The liberty secured by the fourteenth amendment, this court has said, consists, in part, in the right of a person 'to live and work where he will,' *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. Ed. 832, and yet he may be compelled by force if need be, against his will and without regard to his personal wishes or his pecuniary interests or even his religious or political convictions, to take his place in the ranks of the army of his country, and risk the chance of being shot down in its defense." *Jacobson v. Massachusetts*, 197 U. S. 11, 29, 49 L. Ed. 643.

**34. As broad as the taxing power.**—*Kidd v. Pearson*, 128 U. S. 1, 26, 32 L. Ed. 346.

**35. Persons subject to police power.**—*Passenger Cases*, 7 How. 283, 423, 12 L. Ed. 702; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. Ed. 1145; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 672, 29 L. Ed. 516; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. Ed. 525; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683, 29 L. Ed. 510; *Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. Ed. 253; *Dent v. West Virginia*, 129 U. S. 114, 32 L. Ed. 623; *Minneapolis, etc., R. Co. v. Beckwith*, 129 U. S. 26, 32 L. Ed. 585.

**36. Foreign ministers and other diplomatic functionaries.**—*Passenger Cases*, 7 How. 283, 423, 12 L. Ed. 702. See, gen-



of the police powers of the state; on the contrary, the police power of the states must yield to the constitution and laws of the United States, and the nullity of any act inconsistent therewith, even though it be an undisputed exercise of the police power, is produced by the declaration that this constitution and the laws of the United States made in pursuance thereof shall be the supreme law of the land.<sup>37</sup>

**Doctrine Applies to Municipal Corporations.**—This doctrine applies, of course, to any regulation adopted by a municipal corporation or other local governmental agency acting under the sanction of state legislation.<sup>38</sup>

**Conflict Must Be Plain and Palpable.**—The judiciary of the United States should not strike down a legislative enactment of a state—especially if it has direct connection with the social order, the health, and the morals of its people—unless such legislation plainly and palpably violates some right granted or secured by the national constitution or encroaches upon the authority delegated to the United States for the attainment of objects of national concern.<sup>39</sup>

**B. Encroachment upon the Powers of Congress.**—See ante, "Of the United States," II, A, 5, a, (2).

**C. As Restricted by the Interstate Commerce Clause of the Constitution.**—1. **GENERALLY.**—The authority of the state to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has

erally, the titles *AMBASSADORS AND CONSULS*, vol. 1, pp. 276, 277; *INTERNATIONAL LAW*, vol. 7, p. 245.

**37. Constitutional limitations; general supremacy of federal constitution and laws.**—*McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *Gibbons v. Ogden*, 9 Wheat. 1, 210, 6 L. Ed. 23; *Weston v. Charleston*, 2 Pet. 449, 7 L. Ed. 481; *Groves v. Slaughter*, 15 Pet. 449, 505, 10 L. Ed. 800; *Pollard v. Hagan*, 3 How. 212, 230, 11 L. Ed. 565; *Passenger Cases*, 7 How. 283, 408, 12 L. Ed. 702; *Sinnot v. Davenport*, 22 How. 227, 243, 16 L. Ed. 243; *Railroad Co. v. Peniston*, 18 Wall. 5, 34, 21 L. Ed. 787; *Henderson v. Mayor*, 92 U. S. 259, 23 L. Ed. 543; *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. Ed. 550; *Railroad Co. v. Husen*, 95 U. S. 465, 24 L. Ed. 527; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 215, 29 L. Ed. 158; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 29 L. Ed. 516; *Walling v. Michigan*, 116 U. S. 446, 459, 29 L. Ed. 691; *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455, 464, 30 L. Ed. 237; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220; *Mugler v. Kansas*, 123 U. S. 623, 663, 31 L. Ed. 205; *Bowman v. Chicago*, etc., R. Co., 125 U. S. 465, 492, 31 L. Ed. 700; *Powell v. Pennsylvania*, 127 U. S. 678, 686, 32 L. Ed. 253; *Kidd v. Pearson*, 128 U. S. 1, 32 L. Ed. 346; *Minnesota v. Barber*, 136 U. S. 313, 322, 34 L. Ed. 455; *Brimmer v. Rebman*, 138 U. S. 78, 82, 34 L. Ed. 862; *Voight v. Wright*, 141 U. S. 62, 66, 35 L. Ed. 638; *Crutcher v. Kentucky*, 141 U. S. 47, 59, 35 L. Ed. 649; *Brennan v. Titusville*, 153 U. S. 289, 299, 38 L. Ed. 719; *Plumley v. Massachusetts*, 155 U. S. 461, 471, 39 L. Ed. 223; *Gulf, etc., R. Co. v. Hefley*, 158 U. S. 98, 39 L. Ed. 910; *Western Union Tel. Co. v. James*, 162 U. S. 650, 653, 40 L. Ed. 1105; *Missouri, etc., R. Co. v. Haber*, 169 U. S. 613, 626, 42

L. Ed. 878; *Lake Shore, etc., R. Co. v. Smith*, 173 U. S. 684, 689, 43 L. Ed. 858; *Lake Shore, etc., R. Co. v. Ohio*, 173 U. S. 285, 297, 43 L. Ed. 702; *L'Hote v. New Orleans*, 177 U. S. 587, 596, 44 L. Ed. 899; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 558, 46 L. Ed. 679; *Compagnie Francaise v. Louisiana State Board of Health*, 186 U. S. 380, 388, 46 L. Ed. 1209; *Reid v. Colorado*, 187 U. S. 137, 151, 47 L. Ed. 108; *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. Ed. 679; *Dobbins v. Los Angeles*, 195 U. S. 223, 236, 49 L. Ed. 169; *Daly v. Elton*, 195 U. S. 242, 49 L. Ed. 177; *Centrai of Georgia R. Co. v. Murphey*, 196 U. S. 194, 206, 49 L. Ed. 444; *Jacobson v. Massachusetts*, 197 U. S. 11, 25, 49 L. Ed. 643; *Matter of Heff*, 197 U. S. 488, 505, 49 L. Ed. 848; *South Carolina v. United States*, 199 U. S. 437, 50 L. Ed. 261; *Gardner v. Michigan*, 199 U. S. 325, 50 L. Ed. 212; *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 318, 50 L. Ed. 204; *Western Turf Ass'n v. Greenberg*, 204 U. S. 359, 363, 51 L. Ed. 520.

The police power of the state cannot draw within its jurisdiction objects which lie beyond it. It meets the commercial power of the Union in dealing with subjects under the protection of that power, yet it can only be exerted under peculiar emergencies and to a limited extent. In guarding the safety, the health, and morals of its citizens, a state is restricted to appropriate and constitutional means. (*Opinion of McLean, J.*) *Passenger Cases*, 7 How. 283, 408, 12 L. Ed. 702.

**38. Same; doctrine applies to municipal corporations.**—*Jacobson v. Massachusetts*, 197 U. S. 11, 25, 49 L. Ed. 643.

**39. Conflict must be plain.**—*Plumley v. Massachusetts*, 155 U. S. 461, 479, 39 L. Ed. 223. See ante, "Conflict Must Be Actual; Presumption as to Intention of Con-

been restricted by the constitution of the United States.<sup>40</sup> The only question then is, to what trade or commerce the grant to the general government extends, and to what extent have the powers of the state been restricted thereby.<sup>41</sup>

**Police Power Not Surrendered.**—Generally speaking, it may be said that the grant to congress of authority to regulate foreign and interstate commerce does not involve a surrender of the police power of the states.<sup>42</sup>

**Distinct Powers; Must Stand Together.**—The sources and objects of these powers are exclusive, distinct, and independent, and are essential to both governments. They must stand together, and neither can be so exercised as to materially affect the other.<sup>43</sup>

**Here Is the Limit.**—Here is the limit between the sovereign power of the state and the federal power. That is to say, that which does not belong to commerce is within the jurisdiction of the police power of the state; and that which does belong to commerce is within the jurisdiction of the United States.<sup>44</sup> When-

gress," II, A, 5, b, (3). See, also, the title CONSTITUTIONAL LAW, vol. 4, p. 218.

**40. Police power as restricted by the interstate commerce clause.**—United States v. Bevens, 3 Wheat. 336, 389, 4 L. Ed. 404; New York City v. Miln, 11 Pet. 102, 153d, 9 L. Ed. 648; License Cases, 5 How. 504, 583, 12 L. Ed. 256.

Generally, as to the division of powers, conflict of jurisdiction, etc., of the state and national governments with respect to foreign and interstate commerce, see the titles CONSTITUTIONAL LAW, vol. 4, p. 179; INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 311, 321, 345, 350, et seq.

**41. Same.**—New York City v. Miln, 11 Pet. 102, 153d, 9 L. Ed. 648.

**42. Same; police power not surrendered.**—New York City v. Miln, 11 Pet. 102, 153n, 9 L. Ed. 648; License Cases, 5 How. 504, 12 L. Ed. 256; Passenger Cases, 7 How. 283, 12 L. Ed. 702; Gilman v. Philadelphia, 3 Wall. 713, 18 L. Ed. 96; Ex parte McNeil, 13 Wall. 236, 20 L. Ed. 624; Sherlock v. Alling, 93 U. S. 99, 23 L. Ed. 819; Foster v. Master, etc., of New Orleans, 94 U. S. 246, 24 L. Ed. 122; Railroad Co. v. Husen, 95 U. S. 465, 24 L. Ed. 527; Patterson v. Kentucky, 97 U. S. 501, 24 L. Ed. 1115; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. Ed. 158; New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 29 L. Ed. 516; Walling v. Michigan, 116 U. S. 446, 29 L. Ed. 691; Minnesota v. Barber, 136 U. S. 313, 34 L. Ed. 455; Brimmer v. Rebman, 138 U. S. 73, 34 L. Ed. 862; Voight v. Wright, 141 U. S. 62, 35 L. Ed. 638; Plumley v. Massachusetts, 155 U. S. 461, 39 L. Ed. 223; New York, etc., R. Co. v. New York, 165 U. S. 628, 41 L. Ed. 853. See, generally, the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 350.

"While the laws of the states must yield to acts of congress passed in execution of the powers conferred upon it by the constitution, Gibbons v. Ogden, 9 Wheat. 1, 211, 6 L. Ed. 23, the mere grant to congress of the power to regulate commerce with foreign nations and among the states did not, of itself and without legis-

lation by congress, impair the authority of the states to establish such reasonable regulations as were appropriate for the protection of the health, the lives and the safety of their people." New York, etc., R. Co. v. New York, 165 U. S. 628, 631, 41 L. Ed. 853.

"This court has never hesitated, by the most rigid rules of construction, to guard the commercial power of congress against encroachment in the form or under the guise of state regulation, established for the purpose and with the effect of destroying or impairing rights secured by the constitution. It has, nevertheless, with marked distinctness and uniformity, recognized the necessity, growing out of the fundamental conditions of civil society, of upholding state police regulations which were enacted in good faith, and had appropriate and direct connection with that protection to life, health, and property, which each state owes to her citizens." Patterson v. Kentucky, 97 U. S. 501, 506, 24 L. Ed. 1115.

"This court has held that it does not extend to the internal commerce of a state, to its system of police, to the subjects of inspection, quarantine, health, roads, ferries, etc., which is a direct negation of any power in congress. They have also held, that, 'consequently, they remain subject to state legislation,' which is a direct affirmation that those subjects are within the powers reserved, and not those granted or prohibited." (Opinion of Baldwin, J.) New York City v. Miln, 11 Pet. 102, 153d, 9 L. Ed. 648.

It was not intended by the grant to congress to regulate interstate commerce to supersede or interfere with the power of the states to establish police regulations for the better protection and enjoyment of property. Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 215, 29 L. Ed. 158.

**43. Distinct powers; must stand together.**—License Cases, 5 How. 504, 592, 12 L. Ed. 256.

**44. Here is the limit.**—Gibbons v. Ogden, 9 Wheat. 1, 189, 210, 6 L. Ed. 23; Brown v. Maryland, 12 Wheat. 419, 448, 6



ever a thing, from character or condition, is of a description to be regulated by that power in the state, then the regulation may be made by the state, and congress cannot interfere. But this must always depend on the facts, subject to legal ascertainment, so that the injured may have redress.<sup>45</sup>

**When the Commercial Power Ceases.**—The commercial power of congress ceases when the foreign product becomes commingled with the other property in the state; at this point the local law attaches and regulates it as it does other property.<sup>46</sup> Likewise, the commercial power ceases and the police power of the state attaches when the vessel reaches that point in its voyage at which it must submit to the inspection, quarantine, and health laws of the state.<sup>47</sup>

**2. EXCLUSION OF DANGEROUS AND INFECTED ARTICLES, DISEASED PERSONS AND ANIMALS, PAUPERS, CRIMINALS, ETC.**—In granting the commercial power to congress the states did not part with that power of self-preservation which must be inherent in every organized community. There are undoubtedly many things which in their nature are so deleterious or injurious to the lives, health and morals of the people as to lose all benefit of protection as articles of interstate commerce, or to be able to claim it only in a modified way. Such things are properly subject to the police power of the states, and they may guard against the introduction of anything which may corrupt the morals or endanger the health or lives of their citizens.<sup>48</sup> Under this power a state may exclude from its limits, or prohibit the sale therein, dangerous, infected, impure, unwholesome and adulterated articles;<sup>49</sup> literature and pictures of obscene or immoral tendency;<sup>50</sup> lottery tickets, gambling apparatus, and articles designed or intended to be used in violation of law;<sup>51</sup> diseased persons and animals;<sup>52</sup> and paupers, criminals, luna-

L. Ed. 678; License Cases, 5 How. 504, 599, 12 L. Ed. 256; County of Mobile v. Kimball, 102 U. S. 691, 26 L. Ed. 238; Bowman v. Chicago, etc., R. Co., 125 U. S. 465, 31 L. Ed. 700; Leisy v. Hardin, 135 U. S. 100, 34 L. Ed. 128; In re Rahrer, 140 U. S. 545, 35 L. Ed. 572; United States v. Knight Co., 156 U. S. 1, 39 L. Ed. 325.

**45. Same.**—License Cases, 5 How. 504, 12 L. Ed. 256.

**46. When commercial power ceases.**—Brown v. Maryland, 12 Wheat. 419, 437, 6 L. Ed. 678; License Cases, 5 How. 504, 592, 12 L. Ed. 256. See, generally, the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 297, 298.

**47. Same.**—New York City v. Miln, 11 Pet. 102, 153e, 9 L. Ed. 648.

**48. Exclusion of dangerous and infected articles, diseased persons and animals, paupers, criminals, etc.**—Brown v. Maryland, 12 Wheat. 419, 443, 6 L. Ed. 678; License Cases, 5 How. 504, 576, 12 L. Ed. 256; Passenger Cases, 7 How. 283, 400, 12 L. Ed. 702; Crutcher v. Kentucky, 141 U. S. 47, 35 L. Ed. 649; Plumley v. Massachusetts, 155 U. S. 461, 39 L. Ed. 223; Reid v. Colorado, 187 U. S. 137, 47 L. Ed. 108. See, generally, the titles ANIMALS, vol. 1, pp. 324, 326, et seq.; INTERSTATE AND FOREIGN LAWS, vol. 7, pp. 353, 360, 363, 405, 408.

**49. Dangerous, infected and impure articles.**—Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678; New York City v. Miln, 11 Pet. 102, 9 L. Ed. 648; License Cases, 5 How. 504, 12 L. Ed. 256; Passenger Cases, 7 How. 283, 12 L. Ed. 702; Gilman v. Philadelphia, 3 Wall. 713, 18 L. Ed. 96; Railroad Co. v. Husen, 95 U. S. 465, 24 L. Ed.

527; Patterson v. Kentucky, 97 U. S. 501, 24 L. Ed. 1115; Guy v. Baltimore, 100 U. S. 434, 25 L. Ed. 743; Plumley v. Massachusetts, 155 U. S. 461, 39 L. Ed. 223; Missouri, etc., R. Co. v. Haber, 169 U. S. 613, 42 L. Ed. 878; Rasmussen v. Idaho, 181 U. S. 198, 45 L. Ed. 820; Reid v. Colorado, 187 U. S. 137, 47 L. Ed. 108. See, generally, the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 361, et seq., 398.

**Gunpowder.**—From the explosive nature of gunpowder a city may exclude it. This is an article of commerce, and is not known to carry infectious disease; yet, to guard against a contingent injury a city may prohibit its introduction. License Cases, 5 How. 504, 12 L. Ed. 256; New York City v. Miln, 11 Pet. 102, 9 L. Ed. 648; Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678.

The power to direct the removal of gunpowder is a branch of the police power which unquestionably remains, and ought to remain with the states. Marshall, C. J., delivering the opinion in Brown v. Maryland, 12 Wheat. 419, 443, 6 L. Ed. 678.

**50. Obscene literature, pictures, etc.**—License Cases, 5 How. 504, 628, 12 L. Ed. 256.

**51. Lottery tickets, gambling apparatus, etc.**—License Cases, 5 How. 504, 628, 12 L. Ed. 256.

**52. Diseased persons and animals.**—New York City v. Miln, 11 Pet. 102, 9 L. Ed. 648; License Cases, 5 How. 504, 12 L. Ed. 256; Passenger Cases, 7 How. 283, 12 L. Ed. 702; Railroad Co. v. Husen, 95 U. S. 465, 24 L. Ed. 527; Patterson v. Ken-



tics, and all other persons who are liable to become a public charge, or whose presence may be dangerous to the peace, good order and welfare of society.<sup>53</sup>

**Limitation of Doctrine.**—It does not follow, however, that everything which the legislature of a state may deem essential for the good order of society and the well being of its citizens can be set up against the exclusive power of congress to regulate the operation of foreign and interstate commerce. It is only such things as are clearly injurious to the lives and health of the people that are placed beyond the protection of the commercial power of congress.<sup>54</sup>

tucky, 97 U. S. 501, 24 L. Ed. 1115; Kim-mish v. Ball, 129 U. S. 217, 32 L. Ed. 695; Plumley v. Massachusetts, 155 U. S. 461, 39 L. Ed. 223; Missouri, etc., R. Co. v. Haber, 169 U. S. 613, 42 L. Ed. 878; Rasmussen v. Idaho, 181 U. S. 198, 45 L. Ed. 820; Reid v. Colorado, 187 U. S. 137, 47 L. Ed. 108. See, generally, the titles ANIMALS, vol. 1, pp. 324, 327; INTER-STATE AND FOREIGN COMMERCE, vol. 7, pp. 361, 363, 405, 408.

**53. Paupers, criminals, and lunatics.**—Gibbons v. Ogden, 9 Wheat. 1, 203, 6 L. Ed. 23; New York City v. Miln, 11 Pet. 102, 103, 9 L. Ed. 648; Holmes v. Jennison, 14 Pet. 540, 568, 10 L. Ed. 579; Prigg v. Pennsylvania, 16 Pet. 539, 540, 10 L. Ed. 1060; License Cases, 5 How. 504, 12 L. Ed. 256; Passenger Cases, 7 How. 283, 12 L. Ed. 702; Moore v. Illinois, 14 How. 13, 14 L. Ed. 306; Railroad Co. v. Husen, 95 U. S. 465, 24 L. Ed. 527; Patterson v. Kentucky, 97 U. S. 501, 24 L. Ed. 1115; Plumley v. Massachusetts, 155 U. S. 461, 39 L. Ed. 223; Missouri, etc., R. Co. v. Haber, 169 U. S. 613, 42 L. Ed. 878. See, generally, the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 361, 363, 378, 405, 408, 463, 464.

Paupers, vagabonds and fugitives never have been subjects of rightful national intercourse, or of commercial regulations, except in the transportation of them to distant colonies to get rid of them, or as punishment as convicts. They have no rights of national intercourse; no one has a right to transport them, without authority of law, from where they are to any other place, and their only rights where they may be are such as the law gives to all men who have not altogether forfeited its protection. (Opinion of Wayne, J.) Passenger Cases, 7 How. 283, 426, 12 L. Ed. 702.

The New York statute of 1824, intended to prevent an influx of pauper immigrants who would likely become a charge upon the state, and requiring the master of every vessel entering the city of New York from any foreign port, or from the ports of any other state, to make a sworn report to the mayor of the city of every passenger arriving upon his vessel, or who, having been a passenger upon the voyage was put aboard some other vessel or landed at some other place with a view to proceeding to New York, was not in conflict with the provisions of the passenger laws of the United States of 1799 or 1819.

New York City v. Miln, 11 Pet. 102, 9 L. Ed. 648.

**Exclusion of slaves.**—The slave states had the power to prohibit slaves from being brought into them as merchandise. (Opinion of McLean, J.) Passenger Cases, 7 How. 283, 406, 12 L. Ed. 702; License Cases, 5 How. 504, 629, 12 L. Ed. 256.

The provisions of the Mississippi constitution, adopted on the 26th day of October, 1832, that "the introduction of slaves into this state, as merchandise, or for sale, shall be prohibited, from and after the first day of May, 1833," was a valid police regulation, and not an unconstitutional interference with interstate commerce. (Obiter.) Groves v. Slaughter, 15 Pet. 449, 504, 10 L. Ed. 800, et seq., Baldwin, J., dissenting.

The slave states had the right to exclude all persons from the same common ancestor and country as their slaves. (Opinion of Wayne, J.) Passenger Cases, 7 How. 283, 426, 12 L. Ed. 702.

A state, under its general and admitted power to define and punish offenses against its own peace and policy, may repel from its borders an unacceptable population, whether paupers, criminals, fugitives or liberated slaves; and, consequently, may punish her citizens and others who thwart this policy by harboring, secreting or in any way assisting such fugitives. Moore v. Illinois, 14 How. 13, 14 L. Ed. 306, distinguishing Prigg v. Pennsylvania, 16 Pet. 539, 540, 10 L. Ed. 1060. See, also, License Cases, 5 How. 504, 629, 12 L. Ed. 256.

**54. Limitation of power of state to exclude.**—License Cases, 5 How. 504, 593, 12 L. Ed. 256; Crutcher v. Kentucky, 141 U. S. 47, 59, 35 L. Ed. 649. See, generally, the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 354, 364.

When, in the appropriate exercise of these federal and state powers, contingently and incidentally, their lines of action run into each other, if the state power be necessary to the preservation of the morals, the health, or safety of the community, it must be maintained. But this exigency is not to be founded upon any notions of commercial policy, or sustained by a course of reasoning about that which may be supposed to affect, in some degree, the public welfare. The import must be of such a character as to produce, by its admission or use, a great physical or moral evil. (Opinion of McLean, J.)

3. REGULATIONS INCIDENTALLY, INDIRECTLY, OR REMOTELY AFFECTING COMMERCE—*a. Generally.*—Again, in conferring upon congress the power to regulate commerce, it was never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the constitution. And it may be said generally, that the legislation of a state, not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit.<sup>55</sup>

*b. Police Power as to the Instruments of Commerce.*—It has never been supposed that the dominant power of congress over interstate commerce took from the states the power of legislation with respect to the instruments of such commerce, so far as the legislation was within its ordinary police powers.<sup>56</sup>

*c. Quarantine and Health Laws.*—Again, the grant of the commercial power to congress does not prevent the states from enacting quarantine and health regulations which will be upheld, in the absence of federal regulations of that character, notwithstanding they may in some measure regulate foreign and interstate commerce. It is no objection to the former that both operate upon the same subject.<sup>57</sup>

*d. Limitation as to Regulations of This Character.*—See, generally, the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 354, 364, 407.

**Must Be a Bona Fide Police Regulation.**—Regulations of this character must represent a bona fide exercise of the police power. Under the pretense of a police regulation, a state cannot counteract or encroach upon the commercial power of congress, nor can the police power be invoked to justify acts of the legislature which were dictated by local interests and which have the effect of unduly burdening or interfering with foreign or interstate commerce. In whatever language the statute may be framed, its purpose and validity must be determined by its natural and reasonable effect.<sup>58</sup>

License Cases, 5 How. 504, 593, 12 L. Ed. 256.

**55. Regulations indirectly or remotely affecting commerce.**—*Sherlock v. Alling*, 93 U. S. 99, 23 L. Ed. 819; *Smith v. Alabama*, 124 U. S. 465, 31 L. Ed. 508; *Nashville, etc., Railway v. Alabama*, 128 U. S. 96, 32 L. Ed. 352; *Brennan v. Titusville*, 153 U. S. 289, 38 L. Ed. 719; *Pittsburg, etc., Coal Co. v. Louisiana*, 156 U. S. 590, 39 L. Ed. 544; *Missouri, etc., R. Co. v. Haber*, 169 U. S. 613, 42 L. Ed. 878; *Austin v. Tennessee*, 179 U. S. 343, 45 L. Ed. 224. See, generally, the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 351.

General legislation prescribing the liabilities or duties of citizens of a state, without distinction as to pursuit or calling, is not open to any valid objection, because it may affect persons engaged in foreign or interstate commerce. *Missouri, etc., R. Co. v. Haber*, 169 U. S. 613, 632, 42 L. Ed. 878; *Sherlock v. Alling*, 93 U. S. 99, 103, 23 L. Ed. 819.

**56. Police power as to instruments of commerce.**—*Northern Securities Co. v. United States*, 193 U. S. 197, 348, 48 L. Ed. 679; *Foppiano v. Speed*, 199 U. S. 501, 50 L. Ed. 288. See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 453.

**57. Quarantine and health laws.**—*Gibbons v. Ogden*, 9 Wheat. 1, 203, 6 L. Ed. 23; *New York City v. Miln*, 11 Pet. 102, 9 L. Ed. 648; *Passenger Cases*, 7 How. 283, 12 L. Ed. 702; *Gilman v. Philadelphia*, 3 Wall. 713, 730, 18 L. Ed. 96; *Ex parte Mc-Niel*, 13 Wall. 236, 20 L. Ed. 624; *Peete v. Morgan*, 19 Wall. 581, 22 L. Ed. 201; *Foster v. Master, etc., of New Orleans*, 94 U. S. 246, 24 L. Ed. 122; *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455, 30 L. Ed. 237; *Reid v. Colorado*, 187 U. S. 137, 47 L. Ed. 108. See, generally, the titles ANIMALS, vol. 1, pp. 324, 326, et seq.; INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 405, 408.

**58. Limitation of regulations affecting commerce.**—*License Cases*, 5 How. 504, 12 L. Ed. 256; *Passenger Cases*, 7 How. 283, 12 L. Ed. 702; *Ward v. Maryland*, 12 Wall. 418, 20 L. Ed. 449; *Welton v. Missouri*, 91 U. S. 275, 23 L. Ed. 347; *Henderson v. Mayor*, 92 U. S. 259, 23 L. Ed. 543; *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. Ed. 550; *Railroad Co. v. Husen*, 95 U. S. 465, 24 L. Ed. 527; *Guy v. Baltimore*, 100 U. S. 434, 25 L. Ed. 743; *People v. Compagnie Generale Transatlantique*, 107 U. S. 59, 27 L. Ed. 383; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 29 L. Ed. 516; *Walling v. Michigan*, 116 U. S. 446, 29 L. Ed. 691; *Yick Wo v. Hon-*



**Must Not Go Beyond Necessities of the Case.**—Again, regulations of this character must not go beyond the necessities of the case, nor unreasonably burden the exercise of privileges secured by the constitution of the United States.<sup>54</sup>

**Must Not Directly Burden or Regulate Commerce.**—These laws must not be so extended as to come in conflict with powers expressly given to the federal government, or so as to impose a direct burden upon foreign or interstate com-

kins, 118 U. S. 356, 30 L. Ed. 220; *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455, 30 L. Ed. 237; *Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205; *Minnesota v. Barber*, 136 U. S. 313, 34 L. Ed. 455; *Brimmer v. Rebman*, 138 U. S. 78, 34 L. Ed. 862; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. Ed. 649; *Brennan v. Titusville*, 153 U. S. 289, 38 L. Ed. 719; *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, 40 L. Ed. 849; *Collins v. New Hampshire*, 171 U. S. 30, 43 L. Ed. 60; *Austin v. Tennessee*, 179 U. S. 343, 45 L. Ed. 224; *Lochner v. New York*, 198 U. S. 45, 49 L. Ed. 937. And see the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 354, 355, 356, 364.

Hence, a statute which imposes a burdensome and almost impossible condition on the shipmaster as a prerequisite to his landing his passengers, with an alternative payment of a small sum of money for each one of them, is a tax on the shipowner for the right to land such passengers, and, in effect, on the passenger himself, since the shipmaster makes him pay it in advance as part of his fare. Such a statute of a state is a regulation of commerce, and, when applied to passengers from foreign countries, is a regulation of commerce with foreign nations. *Henderson v. Mayor*, 92 U. S. 259, 23 L. Ed. 543.

"In the exercise of its police powers, a state may exclude from its territory, or prohibit the sale therein of any articles which in its judgment, fairly exercised, are prejudicial to the health or which would endanger the lives or property of its people. But if the state, under the guise of exerting its police powers, should make such exclusion or prohibition applicable solely to articles of that kind that may be produced or manufactured in other states, the courts would find no difficulty in holding such legislation to be in conflict with the constitution of the United States." *Guy v. Baltimore*, 100 U. S. 434, 443, 25 L. Ed. 743.

**59. Same; must not go beyond the necessities of the case.**—*License Cases*, 5 How. 504, 12 L. Ed. 256; *Passenger Cases*, 7 How. 283, 12 L. Ed. 702; *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. Ed. 550; *Railroad Co. v. Husen*, 95 U. S. 465, 24 L. Ed. 527; *Guy v. Baltimore*, 100 U. S. 434, 25 L. Ed. 743; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 29 L. Ed. 516; *Kimmish v. Ball*, 129 U. S. 217, 32 L. Ed. 695; *Brennan v. Titusville*, 153 U. S. 289, 38 L. Ed. 719; *Reid v. Colorado*, 187 U. S. 137, 47 L. Ed. 108. See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 354, 364.

**Limitation of power to destroy infected merchandise.**—The power to destroy infected merchandise is limited to existing exigencies, and even then it is to be exercised with caution and only in clearly justifiable emergencies. *License Cases*, 5 How. 504, 12 L. Ed. 256.

**Limitation of power to quarantine and exclude diseased persons and animals, criminals, paupers, etc.**—While a State may enact sanitary laws, and, for the purpose of self-protection, establish quarantine and reasonable inspection regulations, and prevent persons and animals having contagious or infectious diseases from entering the state, it cannot, beyond what is absolutely necessary for self-protection, interfere with transportation into or through its territory. *Railroad Co. v. Husen*, 95 U. S. 465, 24 L. Ed. 527.

The right of the states to pass statutes to protect themselves in regard to the criminal, the pauper, and the diseased foreigner, landing within their borders, is limited to such laws as are absolutely necessary for that purpose; and mere police regulations cannot extend so far as to prevent or obstruct other classes of persons from the right to hold personal and commercial intercourse with the people of the United States. *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. Ed. 550; *Passenger Cases*, 7 How. 283, 12 L. Ed. 702.

**Same; interference with commerce must be clear.**—But state laws touching the importation of pauper immigrants or convicts ought not to be declared unconstitutional as an unwarranted interference with foreign or interstate commerce, unless demanded by the most clear and unquestioned construction of the constitution. *New York City v. Miln*, 11 Pet. 102, 9 L. Ed. 648.

**Same; California act.**—The statute of California, which is the subject of consideration in this case, does not require a bond for every passenger, or commutation in money, as the statutes of New York and Louisiana do, but only for certain enumerated classes, among which are "lewd and debauched women." But the features of the statute are such as to show very clearly that the purpose is to extort money from a large class of passengers, or to prevent their immigration to California altogether. The statute of California, in this respect, extends far beyond the necessity in which the right, if it exists, is founded, and invades the right of congress to regulate commerce with foreign nations, and is therefore void. *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. Ed. 550.



merce, or amount to a direct regulation thereof.<sup>60</sup>

**Same—No Well-Defined Line.**—To draw the line of interference between the two fields of jurisdiction and to declare and define the instances of unconstitutional encroachment, is a judicial question often of much difficulty. No precise rule applicable to the circumstances of each case has ever been stated and perhaps will never be. Each case must be decided upon its own facts as it arises.<sup>61</sup>

**Supremacy in Case of Conflict.**—If in their operation regulations of this character conflict with the regulation of the same subject by congress, either as expressed in positive laws or implied from the absence of legislation, such legislation on the part of the state, to the extent of that conflict, must be regarded as annulled.<sup>62</sup>

4. MATTERS REQUIRING ONE UNIFORM SYSTEM OF REGULATION.—The jurisdiction of congress with reference to matters of this character is of an essentially exclusive nature, and what has been said with reference to the power of the states to enact police regulations affecting foreign and interstate commerce has no application.<sup>63</sup>

**D. As to Contract and Vested Rights**—1. AS TO VESTED RIGHTS.—See, generally, the title CONSTITUTIONAL LAW, vol. 4, p. 412, et seq.

2. NOT LOST BY NONUSER.—The police power, being governmental in its nature, is not lost by non-user; that is to say, the failure of the state for any considerable period of time to exercise its undoubted power to enact police regulations upon this subject or that does not give the persons affected thereby any vested right to a continuance of the policy of nonaction. The fact that they have entered into contracts, or built up great property interests upon the assumption, or in the hope, or belief, that the state would permit its powers to continue dormant, can in no way limit or affect the right of the state to call those powers into activity whenever it may see fit to do so.<sup>64</sup>

60. Regulations must not directly burden or regulate commerce.—*Groves v. Slaughter*, 15 Pet. 449, 10 L. Ed. 800; *Railroad Co. v. Husen*, 95 U. S. 465, 24 L. Ed. 527; *Brennan v. Titusville*, 153 U. S. 289, 38 L. Ed. 719. See, also, the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 320, 354, 364.

61. No well-defined line.—*Passenger Cases*, 7 How. 283, 12 L. Ed. 702; *Smith v. Alabama*, 124 U. S. 465, 31 L. Ed. 508; *Pittsburg, etc., Coal Co. v. Louisiana*, 156 U. S. 590, 39 L. Ed. 544. See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 319.

62. Supremacy in case of conflict.—*Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23; *Peete v. Morgan*, 19 Wall. 581, 591, 22 L. Ed. 201; *Henderson v. Mayor*, 92 U. S. 259, 23 L. Ed. 543; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 29 L. Ed. 516; *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455, 30 L. Ed. 237; *Smith v. Alabama*, 124 U. S. 465, 31 L. Ed. 508; *Pittsburg, etc., Coal Co. v. Louisiana*, 156 U. S. 590, 39 L. Ed. 544; *Hennington v. Georgia*, 163 U. S. 299, 41 L. Ed. 166. See, also, the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 346.

63. Matters requiring one uniform regulation.—*Henderson v. Mayor*, 92 U. S. 259, 23 L. Ed. 543. See, generally, the titles CONSTITUTIONAL LAW, vol. 4, p. 179; INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 311, 321, 347.

64. Police power not lost by nonuser.—*Boston v. Lecraw*, 17 How. 426, 15 L. Ed. 118; *Richardson v. Boston*, 19 How. 263, 15 L. Ed. 639; *Richardson v. Boston*, 24 How. 188, 16 L. Ed. 625; *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155, 24 L. Ed. 94; *Budd v. New York*, 143 U. S. 517, 36 L. Ed. 247; *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, 40 L. Ed. 849.

It matters not that the warehouse or other business was established before the regulations complained of were adopted. *Budd v. New York*, 143 U. S. 517, 536, 36 L. Ed. 247; *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77.

The power of the legislature to regulate fares and freights is not lost through its failure to exercise the same for more than twenty years. *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155, 24 L. Ed. 94.

So the failure of a municipal corporation for a number of years to use or reclaim the terminus of one of its streets extending into the waters of the bay does not give to persons who have been using such water-covered strip as a dock any vested right as against the right of the city to use it for the purpose of constructing a sewer therein. *Richardson v. Boston*, 19 How. 263, 15 L. Ed. 639; *Boston v. Lecraw*, 17 How. 426, 15 L. Ed. 118; *Richardson v. Boston*, 24 How. 188, 192, 16 L. Ed. 625.

**Manufacture and sale of intoxicants.**—This principle finds its most frequent ap-

3. A CONTINUING POWER; CANNOT BE BARGAINED AWAY—*a. Generally.*—The police power being governmental in its character, is a continuing power, and is not exhausted as to any given subject by a single exercise with respect thereto, but is to be exercised again and again as public exigencies may require.<sup>65</sup> Not only so, but the contracts which the constitution protects are those that relate to property rights, not governmental.<sup>66</sup> It is thoroughly established, therefore, that the inhibition upon the impairment of the obligation of contracts by the states is not violated by the legitimate exercise of legislative power in securing the public safety, health and morals. The governmental power of self-protection cannot be contracted away, nor can the legislature, or even the people themselves, give away or sell the discretion either of themselves or their successors with respect to matters the government of which, from the very nature of things, must vary with varying circumstances.<sup>67</sup>

plication perhaps in the case of statutes prohibiting the manufacture and sale of intoxicating liquors. Persons investing money and property therein do so subject to the right of the state to enact prohibitory laws whenever it may see fit, thereby rendering such investments wholly worthless. *Mugler v. Kansas*, 123 U. S. 623, 673, 31 L. Ed. 205; *Kidd v. Pearson*, 128 U. S. 1, 32 L. Ed. 346. See, generally, the title INTOXICATING LIQUORS, vol. 7, p. 518.

**65. A continuing power; not exhausted by a single exercise thereof.**—*Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036; *Stone v. Mississippi*, 101 U. S. 814, 25 L. Ed. 1079; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 29 L. Ed. 516; *Railroad Commission Cases*, 116 U. S. 307, 29 L. Ed. 636; *Dent v. West Virginia*, 129 U. S. 114, 32 L. Ed. 623; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 36 L. Ed. 1018; *Gray v. Connecticut*, 159 U. S. 74, 40 L. Ed. 80; *Wabash R. Co. v. Defiance*, 167 U. S. 88, 42 L. Ed. 87; *Hawker v. New York*, 170 U. S. 189, 42 L. Ed. 1002; *Walla Walla City v. Walla Walla Water Co.*, 172 U. S. 1, 43 L. Ed. 341; *Reetz v. Michigan*, 188 U. S. 505, 47 L. Ed. 563; *Dobbins v. Los Angeles*, 195 U. S. 223, 49 L. Ed. 169; *Daly v. Elton*, 195 U. S. 242, 49 L. Ed. 177; *New Orleans Gas Light Co. v. Drainage Commission*, 197 U. S. 453, 49 L. Ed. 831.

"The right to exercise the police power is a continuing one, and a business lawful to-day may in the future because of the changed situation, the growth of population or other causes, become a menace to the public health and welfare and be required to yield to the public good." *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 672, 29 L. Ed. 516; *Daly v. Elton*, 195 U. S. 242, 49 L. Ed. 177; *Dobbins v. Los Angeles*, 195 U. S. 223, 238, 49 L. Ed. 169.

**66. Contract clause refers to contracts relating to property.**—*New Orleans v. Houston*, 119 U. S. 265, 674, 30 L. Ed. 411; *Stone v. Mississippi*, 101 U. S. 814, 820, 25 L. Ed. 1079; *Douglas v. Kentucky*, 168 U.

S. 488, 42 L. Ed. 553. See, also, the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, pp. 812, 827.

**67. Police power cannot be bargained away.**—*Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. Ed. 773; *Boyd v. Alabama*, 94 U. S. 645, 24 L. Ed. 302; *Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036; *Stone v. Mississippi*, 101 U. S. 814, 25 L. Ed. 1079; *Butchers' Union Slaughter-House, etc., Co. v. Crescent City, etc., Slaughter-House Co.*, 111 U. S. 746, 28 L. Ed. 585; *Barbier v. Connolly*, 113 U. S. 27, 28 L. Ed. 923; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 29 L. Ed. 516; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. Ed. 525; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683, 29 L. Ed. 510; *Railroad Commission Cases*, 116 U. S. 307, 29 L. Ed. 636; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220; *Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. Ed. 253; *Dent v. West Virginia*, 129 U. S. 114, 32 L. Ed. 623; *Budd v. New York*, 143 U. S. 517, 36 L. Ed. 247; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 36 L. Ed. 1018; *New York, etc., R. Co. v. Bristol*, 151 U. S. 556, 38 L. Ed. 269; *Connecticut, etc., R. Co. v. Woodruff*, 153 U. S. 689, 38 L. Ed. 869; *Gray v. Connecticut*, 159 U. S. 74, 40 L. Ed. 80; *Pearshall v. Great Northern R. Co.*, 161 U. S. 646, 40 L. Ed. 838; *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, 40 L. Ed. 849; *Chicago, etc., R. Co. v. Chicago*, 166 U. S. 226, 41 L. Ed. 979; *Wabash R. Co. v. Defiance*, 167 U. S. 88, 42 L. Ed. 87; *Holden v. Hardy*, 169 U. S. 366, 42 L. Ed. 780; *Chicago, etc., R. Co. v. Nebraska*, 170 U. S. 57, 42 L. Ed. 948; *Hawker v. New York*, 170 U. S. 189, 42 L. Ed. 1002; *Walla Walla City v. Walla Walla Water Co.*, 172 U. S. 1, 43 L. Ed. 341; *New York, etc., R. Co. v. McKeon*, 189 U. S. 508, 47 L. Ed. 922; *New York, etc., R. Co. v. Plymouth*, 193 U. S. 668, 48 L. Ed. 839; *Daly v. Elton*, 195 U. S. 242, 49 L. Ed. 177; *Dobbins v. Los Angeles*, 195 U. S. 223, 49 L. Ed. 169; *New Orleans Gas Light Co. v. Drainage Commission*, 197 U. S. 453.



**That the alleged contract is in the form of a corporate charter** is wholly

49 L. Ed. 831; *Manigault v. Springs*, 199 U. S. 473, 50 L. Ed. 274.

"But the power of governing is a trust committed by the people to the government, no part of which can be granted away." *Stone v. Mississippi*, 101 U. S. 814, 25 L. Ed. 1079.

"Every legislature must, at the time of its existence, exercise the power of the state in the execution of the trust devolved upon it." *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 36 L. Ed. 1018.

"No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them." *Stone v. Mississippi*, 101 U. S. 814, 819, 25 L. Ed. 1079.

"The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must 'vary with varying circumstances.'" *Stone v. Mississippi*, 101 U. S. 814, 25 L. Ed. 1079.

"The leading case upon this point is that of *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. Ed. 773, in which a franchise to maintain a ferry between Cambridge and Boston, under which a bridge was subsequently erected, was held to be subject to the power of the legislature to establish a parallel bridge between the same points." *Manigault v. Springs*, 199 U. S. 473, 481, 50 L. Ed. 274.

**As to business, occupation or profession.**—This power to regulate business, property and employments legitimately exercised can neither be limited by contract nor bartered away by legislation. *Holden v. Hardy*, 169 U. S. 366, 42 L. Ed. 780.

The responsibility of the legal authorities, municipal or state, so far as it relates to the power and duty to enact proper police regulations for the regulation of trades, business, and professions, and to prescribe from time to time new and additional requirements and qualifications for those seeking to enter or for those desiring to continue in any particular business, trade, occupation or profession, cannot be stipulated or bargained away.

*Dent v. West Virginia*, 129 U. S. 114, 32 L. Ed. 623; *Gray v. Connecticut*, 159 U. S. 74, 77, 40 L. Ed. 80; *Hawker v. New York*, 170 U. S. 189, 42 L. Ed. 1002.

The power to prescribe qualifications for those desiring to enter the learned or skilled professions, or to prescribe further tests for persons already engaged in the practice of such professions, is in its nature a continuing power, and persons engaging in such professions acquire no vested right to continue therein as against the power of the legislature to prescribe new qualifications as the growth of knowledge, march of progress, etc., may require. *Dent v. West Virginia*, 129 U. S. 114, 32 L. Ed. 623; *Gray v. Connecticut*, 159 U. S. 74, 40 L. Ed. 80; *Hawker v. New York*, 170 U. S. 189, 42 L. Ed. 1002; *Reetz v. Michigan*, 188 U. S. 505, 47 L. Ed. 563. See, generally, upon this subject, the title **CONSTITUTIONAL LAW**, vol. 4, pp. 377, 430, 431.

**As to slaughter house monopoly.**—So far as the Louisiana act of 1869, conferring upon one company the exclusive privilege of maintaining a stock landing and slaughter house, and requiring all animals intended for food in the city of New Orleans to be inspected and slaughtered thereat, partakes of the nature of an irrepealable contract, the legislature exceeded its authority; it had no power to tie the hands of the legislature in the future from legislating on that subject without being bound by the terms of the statute then enacted. *Butchers' Union Slaughter-House, etc., Co. v. Crescent City, etc., Slaughter-House Co.*, 111 U. S. 746, 749, 28 L. Ed. 585.

This does not deny the power of the legislature to create a corporation, with power to do the business of landing live stock and providing a place for slaughtering them in the city. It does not deny the power to locate the place where this shall be done exclusively. It does not deny even the power to give an exclusive right, for the time being, to particular persons or to a corporation to provide this stock landing and to establish this slaughter house. But it does deny the power of that legislature to continue this right so that no future legislature nor even the same body can repeal or modify it, or grant similar privileges to others. It concedes that such a law, so long as it remains on the statute book as the latest expression of the legislative will, is a valid law, and must be obeyed, which is all that was decided by the court in the *Slaughter House Cases*. But it asserts the right of the legislature to repeal such a statute, or to make a new one inconsistent with it, whenever, in the wisdom of such legislature, it is for the good of the public it should be done. *Butchers' Union Slaughter-House, etc., Co. v. Crescent*



immaterial. In such cases a charter amounts to no more than a mere license, and

City, etc., Slaughter-House Co., 111 U. S. 746, 750, 28 L. Ed. 585.

**As to lotteries.**—The right to suppress lotteries is governmental, to be exercised at all times by those in power, at their discretion. Any one, therefore, who accepts a lottery charter, does not obtain a contract, but does so with the implied understanding that the people in their sovereign capacity and through their properly constituted agencies, may resume it at any time when the public good shall require, whether it be paid for or not. All that one can get by such a charter is a suspension of certain governmental rights in his favor, subject to withdrawal at will. He has in legal effect nothing more than a license to enjoy the privilege on the terms named for the specified time, unless it be sooner abrogated by the sovereign power of the state. It is a permit, good as against existing laws, but subject to future legislative and constitutional control or withdrawal. *Stone v. Mississippi*, 101 U. S. 814, 25 L. Ed. 1079; *New Orleans v. Houston*, 119 U. S. 265, 30 L. Ed. 411; *Douglas v. Kentucky*, 168 U. S. 488, 42 L. Ed. 553; *Lottery Case*, 188 U. S. 321, 47 L. Ed. 492.

**Rights acquired on faith of lottery grant.**—All rights acquired on the faith of a lottery grant must be deemed to have been acquired subject to the power of the state to the extent just indicated; nevertheless, rights acquired under such a grant consistently with the law as it was when they were so acquired, and which rights may be exercised and enjoyed without conducting a lottery forbidden by the state, are, of course, not affected, and could not be affected, by the revocation of such grant. That the rights were acquired or the contracts entered into on the faith of a decision of the supreme court of the state does not tie the hands of the legislature in the particulars mentioned. *Douglas v. Kentucky*, 168 U. S. 488, 42 L. Ed. 553.

**Where business is, or becomes, a nuisance.**—The state has no power to barter away its police powers as to license, beyond its power to revoke, what is or may become a nuisance. *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036. Accord: *Butchers' Union Slaughter-House, etc., Co. v. Crescent City, etc., Slaughter-House Co.*, 111 U. S. 746, 28 L. Ed. 585; *Walla Walla City v. Walla Walla Water Co.*, 172 U. S. 1, 43 L. Ed. 341.

That such license is in the form of a corporate charter does not constitute it an irrevocable contract within the protection of the constitutional provision forbidding the impairment of the obligation of contracts. *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036.

Thus the general assembly of Illinois incorporated a fertilizer company for the term of fifty years, and authorized it to

do business, operate its plant, etc., within the limits of a prescribed locality. Subsequently, an incorporated village having grown up in proximity to the works of the fertilizer company, the general assembly conferred upon such village the necessary police powers to abate the nuisance arising from the operation of the factory and the transportation of offensive materials through the village. That the village enacted and proceeded to enforce ordinances impaired the obligation of no contract. *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036.

"The charter was a sufficient license until revoked; but we cannot regard it as a contract guaranteeing, in the locality originally selected, exemption for fifty years from the exercise of the police power of the state, however serious the nuisance might become in the future, by reason of the growth of population around it. The owners had no such exemption before they were incorporated, and we think the charter did not give it to them." *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 670, 24 L. Ed. 1036.

**As to irrevocable grants of soil under navigable waters, public harbors, etc.**—As applied to the right of the state to dispose of soil under navigable waters, public harbors, etc., see the titles CONSTITUTIONAL LAW, vol. 4, pp. 321, 323; NAVIGABLE WATERS, vol. 8, p. 805.

**As to the continuing power over streets and highways.**—The power to regulate streets is a continuing power; it is not exhausted by being once exercised, and so long as the object is plainly one of regulation, the power may be exercised as often as and whenever the common council may think proper; the use of the street may be subjected to one condition to-day and to another and additional one to-morrow, provided the power is exercised in good faith and the condition imposed is appropriate and reasonable and is not imposed arbitrarily or capriciously. *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 672, 29 L. Ed. 516; *New York, etc., R. Co. v. Bristol*, 151 U. S. 556, 567, 38 L. Ed. 269; *St. Louis v. Western Union Tel. Co.*, 149 U. S. 465, 469, 37 L. Ed. 810; *Baltimore v. Baltimore Trust, etc., Co.*, 166 U. S. 673, 684, 41 L. Ed. 1160; *Detroit, etc., Railway Co. v. Osborn*, 189 U. S. 383, 388, 47 L. Ed. 860.

It is a general principle that the legislative power of a city may control and improve its streets, and that such power, when duly exercised by ordinances, will override any license previously given by which the control of a certain street has been surrendered to any individual or corporation. This is well established both by the cases in the federal courts and in the courts of the several states. Indeed the right of a city to improve its streets

if inconsistent with a due regard for the public health or public morals may be

by regarding or otherwise is something so essential to its growth and prosperity that the common council can no more denude itself of that right than it can of its power to legislate for the health, safety and morals of its inhabitants. Such matters cannot from their public nature be made the subject of final and irrevocable contract. *Goszler v. Georgetown*, 6 Wheat. 593, 5 L. Ed. 339; *Transportation Co. v. Chicago*, 99 U. S. 635, 25 L. Ed. 336; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 29 L. Ed. 516; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. Ed. 525; *New York, etc., R. Co. v. Bristol*, 151 U. S. 556, 38 L. Ed. 269; *Baltimore v. Baltimore Trust, etc., Co.*, 166 U. S. 673, 41 L. Ed. 1160; *City R. Co. v. Citizens' St. R. Co.*, 166 U. S. 557, 41 L. Ed. 1114; *Wabash R. Co. v. Defiance*, 167 U. S. 88, 42 L. Ed. 87; *Chicago, etc., R. Co. v. Nebraska*, 170 U. S. 57, 42 L. Ed. 948. See, generally, the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, p. 820.

**Same; transferring control from one functionary to another.**—The expressly reserved power of the state or municipality to regulate the use of the streets and highways includes the right to transfer the power to regulate and control from one public functionary to another. Such a statute or ordinance is a valid exercise of the general police power of the state, independently of any alleged contract or charter rights of any company proposing to place electrical subways to have its plans and specifications passed upon by any particular functionary. The right to transfer such control from one functionary to another is a police power and cannot be bargained away. *New York v. Squire*, 145 U. S. 175, 191, 36 L. Ed. 666.

**Same; as to the subsurface.**—The right to control public streets is a continuing power both as to the surface and the subsurface of the streets. The need of occupation of the soil beneath the streets in cities is constantly increasing for the supply of water and of light, and the construction of systems of sewerage and drainage, etc.; and every reason of public policy requires that grants of rights in such subsurface shall be held subject to the continuing right to enact such reasonable regulations as the public health and safety may require; and the grants of charter and franchise rights in the streets must be deemed to have been acquired subject to this limitation. *New Orleans Gas Light Co. v. Drainage Commission*, 197 U. S. 453, 461, 49 L. Ed. 831.

**Same; railways in streets.**—The control over steam and electric railroads in streets is a continuing power. The mere failure, in prescribing conditions upon which the streets may be occupied, to guard against unforeseen dangers incident to the increase of population, traffic, congested condi-

tions, etc., cannot limit or control the police power of the state or city to enact subsequent regulations for the protection of passengers and the public generally when the increase of traffic, business, use of the streets, growth of the city, etc., shall have made additional regulations necessary. *Detroit, etc., Railway v. Osborn*, 189 U. S. 383, 388, 47 L. Ed. 860.

Any contract entered into between a municipal corporation and a street railway company with reference to the occupancy of the streets with the tracks of the company is subject to the right of the municipality to regulate such use, so long as it does not materially modify or impair the rights granted by the contract. *Baltimore v. Baltimore Trust, etc., Co.*, 166 U. S. 673, 681, 41 L. Ed. 1160.

Where an ordinance provides generally for double tracks through the streets mentioned therein, the reduction of the right to use two tracks and the granting of the right to use but one for a comparatively short distance in one particularly crowded and narrow thoroughfare is not a regulation inconsistent with the terms of the original ordinance. It would be unreasonable to hold that the least limitation of the power to operate double tracks was an infringement and impairment of the contract as set forth in the ordinance. The ordinance does not give any such cast-iron right or one which shall be beyond any reasonable limitation and supervision by the city. *Baltimore v. Baltimore Trust, etc., Co.*, 166 U. S. 673, 682, 41 L. Ed. 1160.

**Compelling the removal of tracks, pipes, bridges, and tunnels; the erection of guards, and barriers; the paving of the right of way, etc.**—See, generally, the titles **CONSTITUTIONAL LAW**, vol. 4, p. 405, et seq.; **DUE PROCESS OF LAW**, vol. 5, p. 583, et seq.

Contracts of this description are within the police power of the legislature, and a municipal corporation cannot, by entering into a contract of this nature, withdraw such subjects from the police power of the state. *Chicago, etc., R. Co. v. Nebraska*, 170 U. S. 57, 42 L. Ed. 948.

An ordinance authorizing a railway company to erect new bridges of a certain construction, provided the company shall also build sufficient approaches and grade to each bridge and keep them in good repair, is, properly construed, simply a license to the company to build the bridges and to continue them until the city council shall conclude that the public interests require the bridges to be removed and the streets again reduced to a grade crossing. *Wabash R. Co. v. Defiance*, 167 U. S. 88, 91, 42 L. Ed. 87.

The effect of the ordinance is not changed by a section which provides: "Sec. 2. The entering upon the work of constructing said bridges by said com-

abrogated in the interests of a more enlightened public opinion.<sup>68</sup>

**Doctrine Extends to Legislative Discretion as Well.**—These objects belong to that class which demands the application of the maxim "salus populi suprema lex;" and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself.<sup>69</sup>

**As to Powers Exercised by Municipal and Other Public Corporations.**—In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the state the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes.<sup>70</sup> The police power remains constantly under the control of the legislative authority, and a city council can neither bind itself, nor its successors, to contracts prejudicial to the peace, good order, health or morals of its inhabitants.<sup>71</sup> If a contract be objectionable in itself upon these grounds, or if it become so in its execution, the municipality may, in the exercise of its police power, regulate the manner in which it may be carried out, or may abrogate it entirely. In such case an appeal to the contract clause of the constitution is ineffectual.<sup>72</sup>

pany shall be taken as an acceptance of the terms thereof by said company, and shall be regarded as superseding any contract or agreement heretofore existing between said company and said city as to either of said bridges." *Wabash R. Co. v. Defiance*, 167 U. S. 88, 96, 42 L. Ed. 87.

**68. Immaterial that alleged contract is in form of corporate charter.**—*Phalen v. Virginia*, 8 How. 163, 12 L. Ed. 1030; *Stone v. Mississippi*, 101 U. S. 814, 25 L. Ed. 1079; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036; *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 40 L. Ed. 838.

**69. Doctrine extends to legislative discretion as well.**—*Boyd v. Alabama*, 94 U. S. 645, 24 L. Ed. 302; *Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989; *Stone v. Mississippi*, 101 U. S. 814, 25 L. Ed. 1079; *Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205.

"The supervision of the public health and the public morals is a governmental power, 'continuing in its nature,' and 'to be dealt with as the special exigencies of the moment may require;' and \* \* \* 'for this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself.'" *Mugler v. Kansas*, 123 U. S. 623, 669, 31 L. Ed. 205; *Stone v. Mississippi*, 101 U. S. 814, 25 L. Ed. 1079.

**70. As to powers exercised by municipal and other public corporations.**—*Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 453, 36 L. Ed. 1018. See, generally, the titles CONSTITUTIONAL LAW, vol. 4, p. 412; IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, pp. 810, 843.

**71. Same; city cannot bargain powers away.**—*Walla Walla City v. Walla Walla Water Co.*, 172 U. S. 1, 15, 43 L. Ed. 341.

**72. Same.**—*Walla Walla City v. Walla Walla Water Co.*, 172 U. S. 1, 15, 43 L. Ed. 341; *Chicago, etc., R. Co. v. Nebraska*, 170 U. S. 57, 72, 42 L. Ed. 948.

"While municipalities, when authorized

so to do, doubtless have the power to make certain contracts with respect to the use of their streets, which are obligatory upon them, *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 29 L. Ed. 516; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. Ed. 525; *City R. Co. v. Citizens' St. R. Co.*, 166 U. S. 557, 41 L. Ed. 1114; *Indianapolis v. Indianapolis Gas Light Co.*, 66 Indiana 336; *Indianapolis v. Consumers' Co.*, 140 Indiana 107, the general rule to be extracted from the authorities is that the legislative power vested in municipal bodies is something which cannot be bartered away in such manner as to disable them from the performance of their public functions. These bodies exercise only such powers as are delegated to them by the sovereign legislative body of the state. Such powers, however, are personal to the municipalities themselves, and, being conferred for the benefit of the whole people, in the absence of authority to that effect, cannot be bestowed by contract or otherwise upon individuals or corporations in such manner as to be beyond revocation." *Wabash R. Co. v. Defiance*, 167 U. S. 88, 100, 42 L. Ed. 87.

"Usually where a contract, not contrary to public policy, has been entered into between parties competent to contract, it is not within the power of either party to withdraw from its terms without the consent of the other; and the obligation of such a contract is constitutionally protected from hostile legislation." *Chicago, etc., R. Co. v. Nebraska*, 170 U. S. 57, 72, 42 L. Ed. 948.

"Where, however, the respective parties are not private persons, dealing with matters and things in which the public has no concern, but are persons or corporations whose rights and powers were created for public purposes, by legislative acts, and where the subject matter of the contract is one which affects the safety and welfare of the public, other principles apply."



**As to Contracts between Private Persons.**—Neither can private individuals and corporations, by entering into contracts among themselves, invoke the contract clause of the federal constitution for the protection of those contracts to the extent of withdrawing the exercise of rights granted, or the use of property involved, from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury.<sup>73</sup>

Chicago, etc., *R. Co. v. Nebraska*, 170 U. S. 57, 72, 42 L. Ed. 948.

"Contracts of the latter description are held to be within the supervising power and control of the legislature when exercised to protect the public safety, health and morals, and that clause of the federal constitution which protects contracts from legislative action cannot in every case be successfully invoked." *Chicago, etc., R. Co. v. Nebraska*, 170 U. S. 57, 72, 42 L. Ed. 948.

"The presumption is that when such contracts are entered into it is with the knowledge that parties cannot, by making agreements on subjects involving the rights of the public, withdraw such subjects from the police power of the legislature." *Chicago, etc., R. Co. v. Nebraska*, 170 U. S. 57, 72, 42 L. Ed. 948.

**Same; agreement with regard to tracks, crossings, etc.**—"In view of the paramount duty of the legislature to secure the safety of the community at an important crossing within a populous city, it was and is within its power to supervise, control and change such agreements as may be, from time to time, entered into between the city and the railroad company, in respect to such crossing, saving any rights previously vested." *Chicago, etc., R. Co. v. Nebraska*, 170 U. S. 57, 73, 42 L. Ed. 948.

"Any other view involves the proposition that it is competent for the city and the railroad company, by entering into an agreement between themselves, to withdraw the subject from the reach of the police power, and to substitute their views of the public necessities for those of the legislature." *Chicago, etc., R. Co. v. Nebraska*, 170 U. S. 57, 74, 42 L. Ed. 948.

In 1886 an agreement was made between a city and a railway company, regarding the building and keeping in repair a viaduct over a street crossing. In 1894 an act was passed imposing additional burdens on the railway. Held: "In view of the paramount duty of the legislature to secure the safety of the community at an important crossing within a populous city, it was and is within its power to supervise, control and change such agreements as may be, from time to time, entered into between the city and the railroad company, in respect to such crossing, saving any rights previously vested." *Chicago, etc., R. Co. v. Nebraska*, 170 U. S. 57, 73, 42 L. Ed. 948, following *New York, etc., R. Co. v. Bristol*, 151 U. S. 556, 38 L. Ed. 269, and *Wabash R. Co. v. Defiance*, 167 U. S. 88, 42 L. Ed. 87.

**73. Contracts between private persons, subject to the police power.**—*New York,*

*etc., R. Co. v. Bristol*, 151 U. S. 556, 38 L. Ed. 269; *Connecticut, etc., R. Co. v. Woodruff*, 153 U. S. 689, 38 L. Ed. 869; *Chicago, etc., R. Co. v. Chicago*, 166 U. S. 226, 41 L. Ed. 979; *Douglas v. Kentucky*, 168 U. S. 488, 42 L. Ed. 553; *Holden v. Hardy*, 169 U. S. 366, 42 L. Ed. 780; *Chicago, etc., R. Co. v. Nebraska*, 170 U. S. 57, 42 L. Ed. 948; *New York, etc., R. Co. v. McKeon*, 189 U. S. 508, 47 L. Ed. 922; *New York, etc., R. Co. v. Plymouth*, 193 U. S. 668, 48 L. Ed. 839; *Manigault v. Springs*, 199 U. S. 473, 50 L. Ed. 274.

"It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals." *Manigault v. Springs*, 199 U. S. 473, 480, 50 L. Ed. 274.

"Familiar instances of this are, where parties enter into contracts, perfectly lawful at the time, to sell liquor, operate a brewery or distillery, or carry on a lottery, all of which are subject to impairment by a change of policy on the part of the state, prohibiting the establishment or continuance of such traffic; in other words, that parties by entering into contract may not estop the legislature from enacting laws intended for the public good." *Manigault v. Springs*, 199 U. S. 473, 50 L. Ed. 274.

A statute which places the entire costs of the abolition of a grade crossing upon a railroad company and in so doing places upon it a burden beyond its financial ability to meet, thereby lessening the value of its securities to the detriment of its creditors, is not invalid as impairing the obligation of contracts. *New York, etc., R. Co. v. Bristol*, 151 U. S. 556, 38 L. Ed. 269; *Connecticut, etc., R. Co. v. Woodruff*, 153 U. S. 689, 38 L. Ed. 869.

**Contracts entered into on faith of lottery grant.**—No right acquired during the life of a grant of the privilege of conducting a lottery on the faith of or by agreement with the grantee, can be exercised after the revocation of such grant and the forbidding of the lottery, if its exercise involves a continuance of the

b. *Limitations of Doctrine*—(1) *Where Grant Is Contained in the State Constitution*.—Where the grant of the privilege of conducting a lottery is contained in, or is protected by, the state constitution such privilege is removed beyond the reach of the police power of the state legislature and cannot be abrogated by an ordinary act of legislation.<sup>74</sup> But no rights of contract are or can be vested under such a constitutional provision which a subsequent constitution might not destroy without impairing the obligation of a contract within the sense of the constitution of the United States. In other words, as to subsequent amendment or adoption, the principles stated in *Stone v. Mississippi*, 101 U. S. 814, 25 L. Ed. 1079, still apply.<sup>75</sup>

(2) *Doctrine Not Universally True as to Matters Embraced within the Largest Definition of the Police Power*.—The statement previously made, that the police power cannot be bargained away, while true as to matters affecting the public health and the public morals, is not universally true as to matters embraced within the police power in its broadest sense.<sup>76</sup> According to its largest definition, as we have previously seen, the police power includes all legislation and almost every function of civil government.<sup>77</sup> If, therefore, the statement that the police power

lottery as originally authorized. *Douglas v. Kentucky*, 168 U. S. 488, 502, 42 L. Ed. 553.

**Same; where contract entered into on faith of supreme court decision.**—The fact that the state court of last resort has held that the power of the state to revoke the lottery grant is restricted in so far as it affects the rights of third persons acquired on the faith of the privilege granted to the lottery company is wholly immaterial, even though the rights of such third persons were acquired on the faith of such decision. Such rights do not, as against the power of the state, in the exercise of its police power to revoke, become contract or vested rights. *Douglas v. Kentucky*, 168 U. S. 488, 502, 42 L. Ed. 553.

"All rights acquired on the faith of a lottery grant must be deemed to have been acquired subject to the power of the state to the extent just indicated; nevertheless, rights acquired under such a grant consistently with the law as it was when they were so acquired, and which rights may be exercised and enjoyed without conducting a lottery forbidden by the state, are of course not affected, and could not be affected, by the revocation of such grant." *Douglas v. Kentucky*, 168 U. S. 488, 503, 42 L. Ed. 553.

**74. Limitations of doctrine; where grant is contained in or protected by state constitution.**—*New Orleans v. Houston*, 119 U. S. 265, 675, 30 L. Ed. 411. See, also, *Douglas v. Kentucky*, 168 U. S. 488, 498, 42 L. Ed. 553.

Where the charter privilege of conducting a lottery is revived and confirmed by constitutional amendment and by such amendment recognized as a contract between the state and the company for a specified number of years, it is thereby placed beyond the legislative power to revoke or repeal; for while lotteries are ordinarily proper subjects of police regulations, such a constitutional provision removes the company out of the police jurisdiction of the state legislature. *New*

*Orleans v. Houston*, 119 U. S. 265, 30 L. Ed. 411, distinguishing *Stone v. Mississippi*, 101 U. S. 814, 25 L. Ed. 1079.

**75. Same.**—*New Orleans v. Houston*, 119 U. S. 265, 30 L. Ed. 411.

**76. As to matters embraced within largest definition of police power.**—*Butchers' Union Slaughter-House, etc., Co. v. Crescent City, etc., Slaughter-House Co.*, 111 U. S. 746, 28 L. Ed. 585; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 29 L. Ed. 516; *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, 40 L. Ed. 849; *Walla Walla City v. Walla Walla Water Co.*, 172 U. S. 1, 43 L. Ed. 341.

So far from the court saying in *Butchers' Union Slaughter-House, etc., Co. v. Crescent City, etc., Slaughter-House Co.*, 111 U. S. 746, 28 L. Ed. 585, that the state could not make a valid contract in reference to any matter whatever within the reach of the police power, according to its largest definition, its language was: "While we are not prepared to say that the legislature can make valid contracts on no subject embraced in the largest definition of the police power, we think that, in regard to two subjects so embraced, it cannot, by contract, limit the exercise of those powers to the prejudice of the general welfare. They are the public health and the public morals." See *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 660, 29 L. Ed. 516.

"A railroad company, although a quasi public corporation, and although it operates a public highway, *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641, 34 L. Ed. 295; *Lake Shore, etc., R. Co. v. Ohio*, 173 U. S. 285, 301, 43 L. Ed. 702, has nevertheless rights which the legislature cannot take away without a violation of the federal constitution, as stated in *Smyth v. Ames*, 169 U. S. 466, 544, 42 L. Ed. 819." *Lake Shore, etc., R. Co. v. Smith*, 173 U. S. 684, 690, 43 L. Ed. 858.

**77. Same.**—See ante, "Police Power Defined," I.

cannot be bargained away were universally true, the contract clause of the federal constitution would impose little or no restraint upon the states and their municipal subdivisions so far as their own contracts were concerned; whereas the law is thoroughly settled to the contrary.<sup>78</sup>

**Grants of Exclusive Privileges.**—This principle of the limitation of the police power in its broad sense is well illustrated by grants of exclusive privileges to corporations respecting the construction and maintenance of highways and bridges and the exaction of tolls for the use thereof;<sup>79</sup> also by laws granting to corporations exclusive privileges to supply municipalities with the comforts of life for a certain number of years.<sup>80</sup> Laws granting corporations exclusive privileges to supply municipalities with the comforts of life for a certain number of years are exceptional, and rest upon the theory of an authority expressly vested in the corporation for a limited time, in consideration of benefits likely to accrue to the public from the establishment of a particular industry. Even in such cases, however, it has been held that the monopoly may be modified or abrogated, if it proved to be prejudicial to the public health or public morals.<sup>81</sup>

**78. Same.**—See the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, p. 784.

**79. As to grants of exclusive privileges; highways and bridges.**—*Bridge Proprietors v. The Hoboken Co.*, 1 Wall. 116, 17 L. Ed. 571; *The Binghamton Bridge*, 3 Wall. 51, 18 L. Ed. 137; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 29 L. Ed. 516.

**80. Same; exclusive rights of companies supplying municipal comforts and necessities.**—*New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 29 L. Ed. 516; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. Ed. 525; *St. Tammany Waterworks v. New Orleans Waterworks*, 120 U. S. 64, 30 L. Ed. 563; *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, 40 L. Ed. 849; *Walla Walla City v. Walla Walla Water Co.*, 172 U. S. 1, 43 L. Ed. 341. See, also, the titles **CONSTITUTIONAL LAW**, vol. 4, p. 423; **DUE PROCESS OF LAW**, vol. 5, p. 567; **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, pp. 797, 813, 815, 817.

The principle upon which the decisions in *Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036; *Stone v. Mississippi*, 101 U. S. 814, 25 L. Ed. 1079, and *Butcher's Union Slaughter-House, etc., Co. v. Crescent City, etc., Slaughter-House Co.*, 111 U. S. 746, 28 L. Ed. 585, rest is, that one legislature cannot so limit the discretion of its successors that they may not enact such laws as are necessary to protect the public health, or the public morals. That principle, it may be observed was announced with reference to particular kinds of private business which, in whatever manner conducted, were detrimental to the public health or the public morals. It is fairly the result of those cases that statutory authority given by the state to corporations or individuals to engage in a particular private business attended by such results, while it protects them for the time against

public prosecutions, does not constitute a contract preventing the withdrawal of such authority, or the granting of it to others. *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 669, 29 L. Ed. 516.

But the manufacture of gas, and its distribution for public and private use by means of pipes laid, under legislative authority, in the streets and ways of a city, involves no such considerations. It is not an ordinary business in which every one may engage, but is a franchise belonging to the government, to be granted, for the accomplishment of public objects, to whomsoever, and upon what terms, it pleases, and when so granted, upon sufficient consideration, becomes an irrevocable contract. *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683, 29 L. Ed. 510; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 669, 29 L. Ed. 516.

"Where a contract for a supply of water is innocuous in itself and is carried out with due regard to the good order of the city and the health of its inhabitants, the aid of the police power cannot be invoked to abrogate or impair it." *Walla Walla City v. Walla Walla Water Co.*, 172 U. S. 1, 17, 43 L. Ed. 341.

**81. Same; laws of this character exceptional.**—*Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, 699, 40 L. Ed. 849; *Butchers' Union Slaughter-House, etc., Co. v. Crescent City, etc., Slaughter-House Co.*, 111 U. S. 746, 28 L. Ed. 585.

The grant of a right to supply gas or water to a municipality and its inhabitants through pipes and mains laid in the streets, upon condition of the performance of its service by the grantee, is the grant of a franchise vested in the state, in consideration of the performance of a public service, and, after performance by the grantee, is a contract protected by the constitution of the United States against state legislation to impair it. *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 660, 29 L. Ed. 516; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L.



**Grants Must Be Clearly Given.**—Grants of this character, however, and grants of exemption from legitimate governmental control, made to corporations and persons engaged in business affected with a public use, must be clearly made out. They are never to be presumed. On the contrary, the presumptions are all the other way, and unless an exemption is clearly established, the legislature is free to act on all subjects within its general jurisdiction as the public interests may seem to require. It can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created. This is an elementary principle.<sup>82</sup>

(3) *But Even Charter and Contract Rights Subject to Police Regulation.*—But notwithstanding the existence of a valid contract or charter right, enjoying the full protection of the contract clause of the constitution, may be conceded, it is still subject to reasonable police regulation in so far as may be necessary for the protection of the public health, morals, or safety, or in so far as the business or property involved is devoted to or affected with a public use. In other words, such rights are mere property rights, the use and enjoyment of which are subject to reasonable police regulation and restraint in common with all other property. So long as such regulations do not interfere substantially with the enjoyment of the main object of the grant, they are not open to objection as impairing the obligation of the contract.<sup>83</sup>

Ed. 525; *St. Tammany Waterworks v. New Orleans Waterworks*, 120 U. S. 64, 30 L. Ed. 563; *Walla Walla City v. Walla Walla Water Co.*, 172 U. S. 1, 9, 43 L. Ed. 341.

**82. Grant must be clearly given.**—*Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. Ed. 773; *Ruggles v. Illinois*, 108 U. S. 526, 27 L. Ed. 812; *Illinois Cent. R. Co. v. Illinois*, 108 U. S. 541, 27 L. Ed. 818; *Railroad Commission Cases*, 116 U. S. 307, 29 L. Ed. 636. See, also, the titles CONSTITUTIONAL LAW, vol. 4, p. 425; CORPORATIONS, vol. 4, p. 636; IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, pp. 784, 824.

**83. But even charter and contract rights subject to police regulation.**—*Slaughter-House Cases*, 16 Wall. 36, 21 L. Ed. 394; *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155, 24 L. Ed. 94; *Patterson v. Kentucky*, 97 U. S. 501, 24 L. Ed. 1115; *Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989; *Sinking-Fund Cases*, 99 U. S. 700, 25 L. Ed. 496; *Stone v. Mississippi*, 101 U. S. 814, 25 L. Ed. 1079; *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574, 28 L. Ed. 1084; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 29 L. Ed. 516; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683, 29 L. Ed. 510; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. Ed. 525; *Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205; *Pennsylvania R. Co. v. Miller*, 132 U. S. 75, 33 L. Ed. 267; *Stein v. Bienville Water Supply Co.*, 141 U. S. 67, 35 L. Ed. 622; *New York v. Squire*, 145 U. S. 175, 36 L. Ed. 666; *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92, 37 L. Ed. 380; *St. Louis v. Western Union Tel. Co.*, 149 U. S. 465, 37 L. Ed. 810; *Minneapolis, etc., R. Co. v. Emmons*, 149 U. S. 364, 37 L. Ed. 769; *New York, etc., R. Co. v. Bristol*, 151 U. S. 556, 38 L. Ed. 269; *Connecticut, etc., R. Co. v. Wood-*

*ruff*, 153 U. S. 689, 38 L. Ed. 869; *New York, etc., R. Co. v. Pennsylvania*, 153 U. S. 628, 38 L. Ed. 846; *Sweet v. Rechel*, 159 U. S. 380, 40 L. Ed. 188; *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, 40 L. Ed. 849; *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 40 L. Ed. 838; *St. Louis, etc., R. Co. v. Mathews*, 165 U. S. 1, 41 L. Ed. 611; *Chicago, etc., R. Co. v. Chicago*, 166 U. S. 226, 41 L. Ed. 979; *Laclede Gas Light Co. v. Murphy*, 170 U. S. 78, 42 L. Ed. 955; *Walla Walla City v. Walla Walla Water Co.*, 172 U. S. 1, 43 L. Ed. 341; *Atchison, etc., R. Co. v. Matthews*, 174 U. S. 96, 43 L. Ed. 909; *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 46 L. Ed. 55; *Louisville, etc., R. Co. v. Kentucky*, 183 U. S. 503, 46 L. Ed. 298; *Dayton, etc., Iron Co. v. Barton*, 183 U. S. 23, 46 L. Ed. 61; *New Orleans Gas Light Co. v. Drainage Commission*, 197 U. S. 453, 49 L. Ed. 831; *Chicago, etc., R. Co. v. Drainage Comm'rs*, 200 U. S. 561, 50 L. Ed. 596. See, generally, as to the regulation of charter and contract rights, the titles CONSTITUTIONAL LAW, vol. 4, p. 420, et seq.; CORPORATIONS, vol. 4, pp. 621, 633, 636, 676, 693, 704, 707, 709, 710, 711; DUE PROCESS OF LAW, vol. 5, pp. 560, 567, 584, and references there given.

The legislature may create corporations, and give them, so to speak, a limited citizenship; but as citizens, limited in their privileges, or otherwise, these creatures of the government's creation are subject to such rules and regulations as may from time to time be ordained and established for the preservation of health and morality. *Stone v. Mississippi*, 101 U. S. 814, 25 L. Ed. 1079.

"Inasmuch as the right to contract is not absolute in respect to every matter, but may be subjected to the restraints demanded by the safety and welfare of the

**Where the Power Is Reserved.**—Where the power to amend or control is

state and its inhabitants, the police power of the state may, within defined limitations, extend over corporations outside of and regardless of the power to amend charters." *Atchison, etc., R. Co. v. Matthews*, 174 U. S. 96, 43 L. Ed. 909; *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 22, 46 L. Ed. 55, followed in *Dayton, etc., Iron Co. v. Barton*, 183 U. S. 23, 46 L. Ed. 61.

The constitutional prohibition upon state laws impairing the obligation of contracts does not restrict the power of the state to protect the public health, the public morals, or the public safety as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with a state are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense, and to the same extent as are all contracts and all property, whether owned by natural persons or corporations. *Slaughter-House Cases*, 16 Wall. 36, 21 L. Ed. 394; *Patterson v. Kentucky*, 97 U. S. 501, 24 L. Ed. 1115; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 29 L. Ed. 516; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. Ed. 525; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683, 29 L. Ed. 510; *Mugier v. Kansas*, 123 U. S. 623, 31 L. Ed. 205; *Sweet v. Rechel*, 159 U. S. 380, 398, 40 L. Ed. 188; *St. Louis, etc., R. Co. v. Mathews*, 165 U. S. 1, 41 L. Ed. 611.

**Abuse of corporate privileges.**—"The grant of a corporate franchise is necessarily subject to the condition that the privileges and franchises conferred shall not be abused, or employed to defeat the ends for which they were conferred; and that, when abused or misemployed, they may be withdrawn by proceedings consistent with law." *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574, 28 L. Ed. 1084, quoted with approval in *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, 697, 40 L. Ed. 849.

"It would be extraordinary, \* \* \* if the legislative department of a government, charged with the duty of enacting such laws as may promote the health, the morals and the prosperity of the people, might not, when unrestrained by constitutional limitations upon its authority, provide, by reasonable regulations, against the misuse of special corporate privileges which it has granted, and which could not, except by its sanction, express or implied, have been exercised at all." *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574, 28 L. Ed. 1084, quoted with approval in *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, 697, 40 L. Ed. 849.

**Quasi public corporations; property or business affected with public use.**—"While the police power has been most frequently exercised with respect to matters

which concern the public health, safety, or morals, we have frequently held that corporations engaged in a public service are subject to legislative control, so far as it becomes necessary for the protection of the public interests." *Pennsylvania R. Co. v. Miller*, 132 U. S. 75, 33 L. Ed. 267; *Louisville Water Co. v. Clark*, 143 U. S. 1, 36 L. Ed. 55; *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, 40 L. Ed. 849; *Louisville, etc., R. Co. v. Kentucky*, 183 U. S. 503, 46 L. Ed. 298. See the title *DUE PROCESS OF LAW*, vol. 5, p. 560. See, also, post, "Business Affected with a Public Interest," VI, K, 3, b, (2).

Statutes which operate only to regulate the manner in which the franchises are to be exercised, and which do not interfere substantially with the enjoyment of the main object of the grant, are not open to the objection of impairing the contract. *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 665, 40 L. Ed. 838.

A private corporation, created by the United States for public purposes, and whose property is to a large extent devoted to public uses, is subject to the legislative control of congress so far as its business affects public interests. *Sinking-Fund Cases*, 99 U. S. 700, 719, 25 L. Ed. 496; *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155, 24 L. Ed. 94.

There is no impairment of the obligation of contract in the imposition upon railroad companies in particular instances of the entire expense of the performance of acts required in the public interest, in the exercise of legislative discretion. *New York, etc., R. Co. v. Bristol*, 151 U. S. 556, 571, 38 L. Ed. 269; *Connecticut, etc., R. Co. v. Woodruff*, 153 U. S. 689, 38 L. Ed. 869.

**Insurance companies.**—The charter right of an insurance company to exist as a corporation and its authority in that capacity to conduct the particular business for which it is created is granted subject to an implied reservation on the part of the state to enact reasonable police regulations governing the conduct of its business. *Eagle Ins. Co. v. Ohio*, 153 U. S. 446, 38 L. Ed. 778; *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574, 28 L. Ed. 1084. See, also, *Terrett v. Taylor*, 9 Cranch 43, 51, 3 L. Ed. 650; *Sinking-Fund Cases*, 99 U. S. 700, 25 L. Ed. 496. See, generally, the title *INSURANCE*, vol. 7, pp. 78, 79.

**Railroads.**—"The extent of the obligations and duties required of railway corporations or companies by their charters does not create any limitation upon the state against imposing all such further duties as may be deemed essential or important for the safety of the public, the security of passengers and employees, or the protection of the property of adjoining owners. The imposing of proper penalties for the enforcement of such additional duties is unquestionably within



expressly reserved to the state, the corporation cannot, of course, exempt itself therefrom.<sup>84</sup>

**Limitation of Power over Such Charter and Contract Rights.**—This power of control over contract and charter rights, whether expressly reserved or merely implied, is subject to the limitation that it shall not be so exercised

the police powers of the states. No contract with any person, individual or corporate, can impose restrictions upon the power of the states in this respect." *Minneapolis, etc., R. Co. v. Emmons*, 149 U. S. 364, 367, 37 L. Ed. 769. See, generally, the title RAILROADS. And see post, "Regulation of Railroads," VI, K, 5, c, and references there given.

Whatever may be the contract or charter rights of railroads or other quasi public corporations, they hold their property and rights, like that of individuals, subject to the legitimate exercise of the police powers of the states. If in the exercise of those powers their rights or property sustain injury or inconvenience or expense, the state is not bound to make compensation unless such injury amounts to an actual taking and appropriation of their property to the public use. *Chicago, etc., R. Co. v. Drainage Comm'rs*, 200 U. S. 561, 50 L. Ed. 596.

Under its police power the people, in their sovereign capacity, or the legislature, as their representatives, may deal with the charter of a railway corporation, so far as is necessary for the protection of the lives, health and safety of its passengers or the public, or for the security of property or the conservation of the public interests, provided of course, that no vested rights are thereby impaired. The company lays its tracks subject to the condition necessarily implied that their use can be so regulated by competent authority as to insure the public safety. *New York, etc., R. Co. v. Pennsylvania*, 153 U. S. 628, 38 L. Ed. 846; *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, 40 L. Ed. 849; *Chicago, etc., R. Co. v. Chicago*, 166 U. S. 226, 41 L. Ed. 979.

In virtue of this power the state may prescribe regulations contributing to the comfort, safety and health of passengers, the protection of the public at highway crossings or elsewhere, the security of owners of adjacent property, by requiring the track to be fenced, and such appliances to be annexed to the engines as shall prevent the communication of fire to neighboring buildings. *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 665, 40 L. Ed. 838.

**Public utility companies in streets.**—A public utility company having a contract or charter right to construct pipes, conduits, tracks, etc., in the streets of a city, is not, by reason of such charter or contract right, relieved of the obligation of complying with such reasonable regulations as the city, in the exercise of its police powers, may enact for the regulation

of the necessary excavation, guarding, etc., attendant upon the construction of such structures or the position in which they shall be placed. *New York v. Squire*, 145 U. S. 175, 36 L. Ed. 666; *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92, 37 L. Ed. 380; *S. C.*, 149 U. S. 465, 37 L. Ed. 810; *Laclede Gas Light Co. v. Murphy*, 170 U. S. 78, 42 L. Ed. 955; *Walla Walla City v. Walla Walla Water Co.*, 172 U. S. 1, 43 L. Ed. 341.

**Gas.**—The grant of exclusive privileges to a gas company does not restrict the power of the state, or of the municipality acting under authority for that purpose, to establish and enforce regulations which are not inconsistent with the essential rights granted by the company's charter, and which may be necessary for the protection of the public against injury whether arising from the want of due care in the conduct of its business, or from an improper use of the streets in laying gas pipes, or from the failure of the grantee to furnish gas of the required quality and amount. *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 29 L. Ed. 516.

Whatever, therefore, in the manufacture or distribution of gas proves to be injurious to the public health, the public comfort, or the public safety, may, notwithstanding the exclusive grant to plaintiff company, be prohibited by legislation, or by municipal ordinance passed under legislative authority. *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 29 L. Ed. 516; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683, 29 L. Ed. 510; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. Ed. 525; *New Orleans Gas Light Co. v. Drainage Commission*, 197 U. S. 453, 49 L. Ed. 831.

**Water.**—Notwithstanding the exclusive privileges granted to a water company to supply the city with water, the power remains with the state, or with the municipal government acting under legislative authority, to make such regulations as will secure to the public the uninterrupted use of the streets, as well as prevent the distribution of water unfit for use, and provide for such a continuous supply, in quantity, as protection to property, public and private, may require. *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. Ed. 525; *Walla Walla City v. Walla Walla Water Co.*, 172 U. S. 1, 43 L. Ed. 341.

**84. Regulation where power is reserved.**—*Louisville, etc., R. Co. v. Kentucky*, 183 U. S. 503, 513, 46 L. Ed. 298; *Beer Co. v. Massachusetts*, 97 U. S. 25,



as to impair vested rights or substantially interfere with the main object of the grant.<sup>85</sup>

**E. As Restricted by the Fourteenth Amendment**—1. **FOURTEENTH AMENDMENT NOT DESIGNED TO INTERFERE WITH LEGITIMATE EXERCISE OF THE POLICE POWER.**—It is the settled law that the inhibitions of the fourteenth amendment, which forbid that any state shall abridge the privileges or immunities of citizens of the United States, deprive any person of life, liberty or property without due process of law, or, by implication, without compensation, or deny to any person within its jurisdiction the equal protection of the laws, were not designed to interfere with the power of the state to promote the health, peace, morals, education, good order and general welfare of its people, or to so legislate as to develop its resources increase its industries, and add to its wealth and prosperity.<sup>86</sup> The possession and enjoyment of all rights are still subject to reasonable regulations essential to the safety, health, peace, good order and morals of the community, and so far as the due process clause is concerned, the state is not hampered by the obligation to make compensation for property injured, depreciated or destroyed in the legitimate exercise of the police power, provided that which is done does not amount to an actual taking thereof, but the use and enjoyment of all property, real and personal, tangible and intangible, is liable to depreciation, injury, and even destruction, through the operation of police enactments, without the owner being entitled to any redress whatsoever.<sup>87</sup> Even the liberty protected by the fourteenth amendment

24 L. Ed. 989. See, generally, the title **CORPORATIONS**, vol. 4, pp. 637, 695, et seq.

**85. Limitation of power over charter and contract rights.**—*Greenwood v. Freight Co.*, 105 U. S. 13, 26 L. Ed. 961; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 29 L. Ed. 516; *Stein v. Bienville Water Supply Co.*, 141 U. S. 67, 35 L. Ed. 622; *New York v. Squire*, 145 U. S. 175, 36 L. Ed. 666; *New York, etc., R. Co. v. Pennsylvania*, 153 U. S. 628, 38 L. Ed. 846; *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, 40 L. Ed. 849; *Pearshall v. Great Northern R. Co.*, 161 U. S. 646, 40 L. Ed. 838; *Lake Shore, etc., R. Co. v. Smith*, 173 U. S. 684, 43 L. Ed. 858. See, generally, the title **CORPORATIONS**, vol. 4, pp. 636, 693, 704.

**86. Police power as restricted by the fourteenth amendment.**—*Slaughter-House Cases*, 16 Wall. 36, 21 L. Ed. 394; *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036; *Transportation Co. v. Chicago*, 99 U. S. 635, 25 L. Ed. 336; *Bowditch v. Boston*, 101 U. S. 16, 25 L. Ed. 980; *Butchers' Union Slaughter-House, etc., Co. v. Crescent City, etc., Slaughter-House Co.*, 111 U. S. 746, 28 L. Ed. 585; *Barbier v. Connolly*, 113 U. S. 27, 28 L. Ed. 923; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 29 L. Ed. 516; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220; *Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. Ed. 253; *Minneapolis, etc., R. Co. v. Beckwith*, 129 U. S. 26, 32 L. Ed. 585; *In re Kemmler*, 136 U. S. 436, 34 L. Ed. 519; *Crowley v. Christensen*, 137 U. S. 86, 34 L. Ed. 620; *In re Converse*, 137 U. S. 624, 34 L. Ed.

796; *In re Rahrer*, 140 U. S. 545, 35 L. Ed. 572; *Budd v. New York*, 143 U. S. 517, 36 L. Ed. 247; *New York, etc., R. Co. v. Bristol*, 151 U. S. 556, 38 L. Ed. 269 (reaffirmed in *New York, etc., R. Co. v. Plymouth*, 193 U. S. 668, 48 L. Ed. 839; *New York, etc., R. Co. v. McKeon*, 189 U. S. 508, 47 L. Ed. 922); *Lawton v. Steele*, 152 U. S. 133, 38 L. Ed. 385; *Connecticut, etc., R. Co. v. Woodruff*, 153 U. S. 689, 38 L. Ed. 869; *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. Ed. 832; *St. Louis, etc., R. Co. v. Mathews*, 165 U. S. 1, 41 L. Ed. 611; *Sentell v. New Orleans, etc., R. Co.*, 166 U. S. 698, 41 L. Ed. 1169; *Chicago, etc., R. Co. v. Chicago*, 166 U. S. 226, 41 L. Ed. 979; *Hodgson v. Vermont*, 168 U. S. 262, 42 L. Ed. 461; *Holden v. Hardy*, 169 U. S. 366, 42 L. Ed. 780; *L'Hote v. New Orleans*, 177 U. S. 587, 44 L. Ed. 899; *Austin v. Tennessee*, 179 U. S. 343, 45 L. Ed. 224; *Compagnie Francaise v. Louisiana State Board of Health*, 186 U. S. 380, 386, 46 L. Ed. 1209; *Jacobson v. Massachusetts*, 197 U. S. 11, 49 L. Ed. 643; *New Orleans Gas Light Co. v. Drainage Commission*, 197 U. S. 453, 49 L. Ed. 831; *Lochner v. New York*, 198 U. S. 45, 49 L. Ed. 937; *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 50 L. Ed. 204; *Gardner v. Michigan*, 199 U. S. 325, 50 L. Ed. 212; *Manigault v. Springs*, 199 U. S. 473, 50 L. Ed. 274; *Moeschen v. Tenement House Department*, 203 U. S. 583, 51 L. Ed. 328; *Union Bridge Co. v. United States*, 204 U. S. 364, 51 L. Ed. 523. See, also, the titles **CONSTITUTIONAL LAW**, vol. 4, pp. 356, 481; **DUE PROCESS OF LAW**, vol. 5, pp. 540, 555, 578.

**87. Possession and enjoyment of all rights subject to reasonable regulation; not hampered by obligation to make compensation.**—*Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Beer Co. v. Massachusetts*,

and the rights inhering therein do not imply unrestricted license to act according to one's own will, but are subject to such reasonable restraints as may be required for the general good.<sup>88</sup> And the equal protection of the laws is secured when such regulations, not in themselves arbitrary, oppressive or discriminatory, are made to apply alike to all persons brought within the purview of their operation.<sup>89</sup>

2. RESPECTS WHEREIN POLICE POWER IS RESTRICTED BY FOURTEENTH AMENDMENT—*a. Generally.*—Notwithstanding the statements contained in the foregoing paragraph, it must be conceded that there is a limit to the valid exercise of

97 U. S. 25, 24 L. Ed. 989; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036; *Transportation Co. v. Chicago*, 99 U. S. 635, 25 L. Ed. 336; *Bowditch v. Boston*, 101 U. S. 16, 25 L. Ed. 980; *Barbier v. Connolly*, 113 U. S. 27, 28 L. Ed. 923; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 29 L. Ed. 516; *Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205; *In re Kemmler*, 136 U. S. 436, 34 L. Ed. 519; *Crowley v. Christensen*, 137 U. S. 86, 34 L. Ed. 620; *In re Converse*, 137 U. S. 624, 34 L. Ed. 796; *Budd v. New York*, 143 U. S. 517, 36 L. Ed. 247; *New York, etc., R. Co. v. Bristol*, 151 U. S. 556, 38 L. Ed. 260 (reaffirmed in *New York, etc., R. Co. v. McKeon*, 189 U. S. 508, 47 L. Ed. 922; *New York, etc., R. Co. v. Plymouth*, 193 U. S. 668, 48 L. Ed. 839); *Lawton v. Steele*, 152 U. S. 133, 38 L. Ed. 385; *Connecticut, etc., R. Co. v. Woodruff*, 153 U. S. 689, 38 L. Ed. 869; *St. Louis, etc., R. Co. v. Mathews*, 165 U. S. 1, 41 L. Ed. 611; *Chicago, etc., R. Co. v. Chicago*, 166 U. S. 226, 41 L. Ed. 979; *Sentell v. New Orleans, etc., R. Co.*, 166 U. S. 698, 41 L. Ed. 1169; *Holden v. Hardy*, 169 U. S. 366, 42 L. Ed. 780; *New Orleans Gas Light Co. v. Drainage Commission*, 197 U. S. 453, 49 L. Ed. 831; *Lochner v. New York*, 198 U. S. 45, 49 L. Ed. 937; *Manigault v. Springs*, 199 U. S. 473, 50 L. Ed. 274; *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 50 L. Ed. 204; *Gardner v. Michigan*, 199 U. S. 325, 50 L. Ed. 212; *Chicago, etc., R. Co. v. Drainage Comm'rs*, 200 U. S. 561, 50 L. Ed. 596; *Moeschen v. Tenement House Department*, 203 U. S. 583, 51 L. Ed. 328; *Union Bridge Co. v. United States*, 204 U. S. 364, 51 L. Ed. 523. See, also, the titles CONSTITUTIONAL LAW, vol. 4, pp. 356, 481; DUE PROCESS OF LAW, vol. 5, pp. 540, 555, 575, 578, 579, 598.

"There are, unquestionably, limitations upon the exercise of the police power which cannot, under any circumstances, be ignored. But the clause prohibiting the taking of private property without compensation is not intended as a limitation of the exercise of those police powers which are necessary to the tranquility of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments. It has always been held that the legislature may make police regulations, although they may in-

terfere with the full enjoyment of private property and though no compensation is given." *Chicago, etc., R. Co. v. Drainage Comm'rs*, 200 U. S. 561, 594, 50 L. Ed. 596.

88. **Liberty subject to reasonable restraint.**—*Slaughter-House Cases*, 16 Wall. 36, 21 L. Ed. 394; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. Ed. 1145; *Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205; *In re Kemmler*, 136 U. S. 436, 34 L. Ed. 519; *Crowley v. Christensen*, 137 U. S. 86, 34 L. Ed. 620; *In re Converse*, 137 U. S. 624, 34 L. Ed. 796; *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. Ed. 832; *Addyston Pipe, etc., Co. v. United States*, 175 U. S. 211, 44 L. Ed. 136; *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. Ed. 679; *Lochner v. New York*, 198 U. S. 45, 49 L. Ed. 937; *Jacobson v. Massachusetts*, 197 U. S. 11, 49 L. Ed. 643; *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 50 L. Ed. 204; *Gardner v. Michigan*, 199 U. S. 325, 50 L. Ed. 212. See the title DUE PROCESS OF LAW, vol. 5, pp. 540, 555.

"In every well ordered society charged with the duty of conserving the safety of its members, the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand." *Jacobson v. Massachusetts*, 197 U. S. 11, 29, 49 L. Ed. 643.

When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. Upon entering the body politic, each citizen covenants with the whole people, and the whole people covenants with each citizen, that all shall be governed by certain laws for the common good. This compact authorizes the establishment of laws requiring each citizen to so conduct himself, and to so use his own property as not unnecessarily to injure another. This is the very essence of government and is the source from which come the police powers of the state. *Munn v. Illinois*, 94 U. S. 113, 124, 24 L. Ed. 77, quoted with approval in *Mugler v. Kansas*, 123 U. S. 623, 660, 31 L. Ed. 205.

89. **Effect of equal protection clause.**—*Barbier v. Connolly*, 113 U. S. 27, 28 L.



the police power by the state. There is no dispute concerning this general proposition. Otherwise the fourteenth amendment would have no efficacy and the legislatures of the states would have unbounded power.<sup>90</sup> In *Connolly v. Union Sewer Pipe Co.*,<sup>91</sup> Mr. Justice Harlan, delivering the opinion of the court, said: "The question of constitutional law to which we have referred (the equal protection of the laws) cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the state, which, as often stated by this court, were not included in the grants of power to the general government, and therefore reserved to the states when the constitution was ordained. But as the constitution of the United States is the supreme law of the land, anything in the constitution or statutes of the states to the contrary notwithstanding, a statute of a state, even when avowedly enacted in the exercise of its police powers, must yield to that law. No right granted or secured by the constitution of the United States can be impaired or destroyed by a state enactment, whatever may be the source from which the power to pass such enactment may have been derived. 'The nullity of any act inconsistent with the constitution is produced by the declaration that the constitution is the supreme law.' The state has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health and the public safety, but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void."<sup>92</sup>

b. *Certain Rights Not Subject to Invasion.*—There is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to interfere with the exercise of that will,<sup>93</sup> and if the state legislature, under the pretense of guarding the public health, the public morals, or the public safety, should invade the rights of life, liberty or property or other rights secured by the supreme law of the land, it would be the duty of the courts to declare such statute unconstitutional.<sup>94</sup>

c. *Regulations Must Be Reasonable and Bona Fide, Having Some Substantial Relation to Ostensible Object, etc.*—Government, it is said, is a moral, not an exact science. In the nature of things, therefore, it is impossible to frame with mathematical precision a rule which will embrace every permissible exercise of the police power under the fourteenth amendment, and exclude all that are forbidden.<sup>95</sup> In general, however, it may be said that the fourteenth amendment does require that every exercise of the police power shall be reasonable and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class; that there must be no arbitrary deprivation of life, liberty or property, no arbitrary or un-

Ed. 923; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220; *In re Kemmler*, 136 U. S. 436, 34 L. Ed. 519; *In re Converse*, 137 U. S. 624, 34 L. Ed. 796; *Giozza v. Tierman*, 148 U. S. 657, 37 L. Ed. 599; *Hodgson v. Vermont*, 168 U. S. 262, 42 L. Ed. 461; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. Ed. 679. See the title CONSTITUTIONAL LAW, vol. 4, pp. 356, 357, 361, 366, 367.

90. *Respects in which fourteenth amendment is restrictive.*—*Lochner v. New York*, 198 U. S. 45, 56, 49 L. Ed. 937.

91. *Same.*—*Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 558, 46 L. Ed. 679.

92. *Same.*—*Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. Ed. 679, citing *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23; *Sinnot v. Davenport*, 22 How. 227, 16 L. Ed. 243; *Missouri, etc., R. Co.*

*v. Haber*, 169 U. S. 613, 42 L. Ed. 878. See, also, *Dobbins v. Los Angeles*, 195 U. S. 223, 236, 49 L. Ed. 169.

93. *Certain rights not subject to invasion.*—*Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205; *Jacobson v. Massachusetts*, 197 U. S. 11, 49 L. Ed. 643. See, also, the title CONSTITUTIONAL LAW, vol. 4, p. 459, et seq.

The police power does not confer upon the whole people power to control rights which are purely and exclusively private. *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205.

94. *Same.*—*Powell v. Pennsylvania*, 127 U. S. 678, 686, 32 L. Ed. 253.

95. *No precise rule.*—See the title DUE PROCESS OF LAW, vol. 5, p. 508.



necessary interference with private rights of person, property or business; that the means employed must have some real, bona fide, and substantial relation to the public purpose, lawful in itself, which they are designed to accomplish, and that they must not unreasonably burden the exercise of privileges secured by the constitution of the United States, nor interfere with the liberties of the citizen, or with his private rights of property or business, beyond the necessities of the case.<sup>96</sup>

**Reasonableness and Validity May Depend upon Peculiar Conditions and Needs of Community.**—The laws and policy of a state may be framed and shaped to suit its conditions of climate and soil, and the exercise of the

**96. Regulations must be reasonable; not to go beyond necessities of the case, etc.**—

*Railroad Co. v. Husen*, 95 U. S. 465, 24 L. Ed. 527; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *Barbier v. Connolly*, 113 U. S. 27, 28 L. Ed. 923; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. Ed. 1145; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 29 L. Ed. 516; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220; *Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. Ed. 253; *Minnesota v. Barber*, 136 U. S. 313, 34 L. Ed. 455; *In re Kemmler*, 136 U. S. 436, 34 L. Ed. 519; *In re Converse*, 137 U. S. 624, 34 L. Ed. 796; *Yesler v. Washington, etc., Comm'rs*, 146 U. S. 646, 36 L. Ed. 1119; *Giozza v. Tiernan*, 148 U. S. 657, 37 L. Ed. 599; *Lawton v. Steele*, 152 U. S. 133, 38 L. Ed. 385; *Brennan v. Titusville*, 153 U. S. 289, 38 L. Ed. 719; *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, 40 L. Ed. 849; *Gibson v. Mississippi*, 162 U. S. 565, 40 L. Ed. 1075; *Hennington v. Georgia*, 163 U. S. 299, 41 L. Ed. 166; *Plessy v. Ferguson*, 163 U. S. 537, 41 L. Ed. 256; *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. Ed. 832; *Scott v. Donald*, 165 U. S. 58, 41 L. Ed. 632; *Jones v. Brim*, 165 U. S. 180, 41 L. Ed. 677; *Hodgson v. Vermont*, 168 U. S. 262, 42 L. Ed. 461; *Missouri, etc., R. Co. v. Haber*, 169 U. S. 613, 42 L. Ed. 878; *Holden v. Hardy*, 169 U. S. 366, 42 L. Ed. 780; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. Ed. 552; *Lake Shore, etc., R. Co. v. Ohio*, 173 U. S. 285, 43 L. Ed. 702; *Gundling v. Chicago*, 177 U. S. 183, 44 L. Ed. 725; *Austin v. Tennessee*, 179 U. S. 343, 45 L. Ed. 224; *Wisconsin, etc., Railroad v. Jacobson*, 179 U. S. 287, 45 L. Ed. 194; *Minder v. Georgia*, 183 U. S. 559, 46 L. Ed. 328; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. Ed. 679; *Reid v. Colorado*, 187 U. S. 137, 47 L. Ed. 108; *Otis v. Parker*, 187 U. S. 606, 47 L. Ed. 323; *Dobbins v. Los Angeles*, 195 U. S. 223, 49 L. Ed. 169; *Daly v. Elton*, 195 U. S. 242, 49 L. Ed. 177; *Jacobson v. Massachusetts*, 197 U. S. 11, 49 L. Ed. 643; *Lochner v. New York*, 198 U. S. 45, 49 L. Ed. 937; *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 50 L. Ed. 204; *Gardner v. Michigan*, 199 U. S. 325, 50 L. Ed. 212; *Chicago, etc.,*

*R. Co. v. Drainage Comm'rs*, 200 U. S. 561, 50 L. Ed. 596. See, also, the titles **CONSTITUTIONAL LAW**, vol. 4, pp. 357, 372; **DUE PROCESS OF LAW**, vol. 5, pp. 541, 556, 585.

"The reasonableness or unreasonableness of a state enactment is always an element in the general inquiry by the court whether such legislation encroaches upon national authority, or is to be deemed a legitimate exertion of the power of the state to protect the public interests or promote the public convenience." *Lake Shore, etc., R. Co. v. Ohio*, 173 U. S. 285, 43 L. Ed. 702.

The police power cannot be put forward as an excuse for oppressive and unjust legislation. *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220; *Holden v. Hardy*, 169 U. S. 366, 42 L. Ed. 780; *Austin v. Tennessee*, 179 U. S. 343, 45 L. Ed. 224.

"The fourteenth amendment, in declaring that no state 'shall deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses." *Barbier v. Connolly*, 113 U. S. 27, 28 L. Ed. 923; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220; *In re Kemmler*, 136 U. S. 436, 34 L. Ed. 519;

police power may and should have reference to the peculiar situation and needs of the community.<sup>97</sup>

d. *Judicial Review*.—The mere statement of the limitations contained in the preceding paragraph implies that the determination of the legislature as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.<sup>98</sup>

**Courts Not Concluded by Declaration as to Purpose of Act.**—The purpose of a statute must be determined from the natural and legal effect of the language employed, and whether it is or is not repugnant to the constitution of the United States must be determined from its natural effect when put into operation, and not from its proclaimed purpose. The mere fact that an enactment purports to be for the protection of the public safety, health, or morals is not conclusive upon the courts, and if a statute purporting to have been enacted to protect the public safety, health, or morals has no real or substantial relation to those objects, or if it is a palpable invasion of rights secured by the fundamental law, it is the duty of the court to look beyond its mere letter and so adjudge, and thereby give effect to the constitution.<sup>99</sup>

In *re* Converse, 137 U. S. 624, 34 L. Ed. 796; *Giozza v. Tiernan*, 148 U. S. 657, 37 L. Ed. 599; *Hodgson v. Vermont*, 168 U. S. 262, 42 L. Ed. 461; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. Ed. 679.

**Rule as to reasonableness permits of selection, classification, separation, etc.**—See, generally, the titles CIVIL RIGHTS, vol. 3, p. 814, et seq; CONSTITUTIONAL LAW, vol. 4, pp. 354, 358, et seq.

**97. Regulations may be framed to meet peculiar needs of community.**—*Ohio Oil Co. v. Indiana*, No. 1, 177 U. S. 190, 44 L. Ed. 729; *Clark v. Nash*, 198 U. S. 361, 49 L. Ed. 1085; *Strickley v. Highland Boy Gold Min. Co.*, 200 U. S. 527, 50 L. Ed. 581; *Offield v. New York, etc., R. Co.*, 203 U. S. 372, 51 L. Ed. 231; *McLean & Co. v. Denver, etc., R. Co.*, 203 U. S. 38, 51 L. Ed. 78; *Bown v. Walling*, 204 U. S. 320, 51 L. Ed. 503; *Bacon v. Walker*, 204 U. S. 311, 51 L. Ed. 499. See, also, the title DUE PROCESS OF LAW, vol. 5, p. 609.

"In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order." *Plessy v. Ferguson*, 163 U. S. 537, 41 L. Ed. 256.

**98. Judicial review.**—*Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205; *Lawton v. Steele*, 152 U. S. 133, 38 L. Ed. 385; *Otis v. Parker*, 187 U. S. 606, 47 L. Ed. 323; *Dobbins v. Los Angeles*, 195 U. S. 223, 49 L. Ed. 169; *Daly v. Elton*, 195 U. S. 242, 49 L. Ed. 177. See, also, the title DUE PROCESS OF LAW, vol. 5, pp. 541, 557, 585.

The observations of Mr. Chief Justice Waite in the case of *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77, to the effect that the legislature is the exclusive judge of the propriety of police regulation when the matter is within the scope of its

power, had reference to the facts of the particular case and were not intended to declare the right of either the legislature or a city council to arbitrarily deprive the citizen of rights protected by the constitution under the guise of exercising the police powers reserved to the states. *Dobbins v. Los Angeles*, 195 U. S. 223, 235, 49 L. Ed. 169; *Daly v. Elton*, 195 U. S. 242, 49 L. Ed. 177.

**99. How constitutionality determined; courts not concluded by declaration as to purpose of act.**—*Passenger Cases*, 7 How. 283, 12 L. Ed. 702; *Henderson v. Mayor*, 92 U. S. 259, 23 L. Ed. 543; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220; *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455, 30 L. Ed. 237; *Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. Ed. 253; *Minnesota v. Barber*, 136 U. S. 313, 34 L. Ed. 455; *Brimmer v. Rebman*, 138 U. S. 78, 34 L. Ed. 862; *Lawton v. Steele*, 152 U. S. 133, 38 L. Ed. 385; *Hennington v. Georgia*, 163 U. S. 299, 41 L. Ed. 166; *Scott v. Donald*, 165 U. S. 58, 41 L. Ed. 632; *Missouri, etc., R. Co. v. Haber*, 169 U. S. 613, 42 L. Ed. 878; *Collins v. New Hampshire*, 171 U. S. 30, 43 L. Ed. 60; *Austin v. Tennessee*, 179 U. S. 343, 45 L. Ed. 224; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. Ed. 679; *Otis v. Parker*, 187 U. S. 606, 47 L. Ed. 323; *Dobbins v. Los Angeles*, 195 U. S. 223, 235, 49 L. Ed. 169; *Daly v. Elton*, 195 U. S. 242, 49 L. Ed. 177; *Lochner v. New York*, 198 U. S. 45, 49 L. Ed. 937; *Chicago, etc., R. Co. v. Drainage Comm'rs*, 200 U. S. 561, 50 L. Ed. 596. See the titles CONSTITUTIONAL LAW, vol. 4, p. 273; DUE PROCESS OF LAW, vol. 5, pp. 517, 619; INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 355, 356.

"The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the

**Same; Motives of Legislature.**—Where the exercise of legislative or municipal power is clearly within constitutional limits, the courts will not inquire into the motives which may have actuated the legislative body in passing the law or ordinance in question. But where the facts as to the situation and conditions are such as to establish the exercise of the police power in such manner as to oppress or discriminate against a class or an individual the courts may consider and give weight to such purpose in considering the validity of the ordinance.<sup>1</sup>

**Powers to Be Exercised with Caution; Power to Select, Classify, etc., Rests Primarily with the Legislature.**—While it is always a judicial question whether any particular regulation is a valid exercise of the police power, the power of the courts to declare such regulations invalid is to be exercised with the utmost caution, since the power to regulate being legislative in its character, it rests with that branch to select and classify the business, trades, occupations, or other objects of regulation, and to determine, primarily, what regulations are reasonably necessary.<sup>2</sup>

substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution." *Mugler v. Kansas*, 123 U. S. 623, 661, 31 L. Ed. 205.

If the state legislature, under the pretense of guarding the public health, the public morals, or the public safety, should invade the rights of life, liberty, or property, or other rights, secured by the supreme law of the land, it would be the duty of the courts to declare such statute unconstitutional. *Powell v. Pennsylvania*, 127 U. S. 678, 686, 32 L. Ed. 253.

A statute which, in its nature and terms, is not a police regulation, cannot be made so by the phraseology of its title; nor can it be termed a police regulation because it is in the same act which contains police regulations. It is a just and well-established doctrine that the state cannot do that indirectly which by the constitution it is forbidden to do directly. (Opinion of Grier, J.) *Passenger Cases*, 7 How. 283, 458, 12 L. Ed. 702.

Thus the states cannot, under the guise of inspection or revenue laws, forbid or impede the introduction of products, and more particularly of food products, universally recognized as harmless, *Minnesota v. Barber*, 136 U. S. 313, 34 L. Ed. 455; *Brimmer v. Rebman*, 138 U. S. 78, 34 L. Ed. 862, or otherwise burden foreign or interstate commerce by regulations adopted under the assumed police power of the state, but obviously for the purpose of taxing such commerce or creating discriminations in favor of home producers or manufacturers. *Passenger Cases*, 7 How. 283, 12 L. Ed. 702; *Welton v. Missouri*, 91 U. S. 275, 23 L. Ed. 347; *Henderson v. Mayor*, 92 U. S. 259, 23

L. Ed. 543; *Railroad Co. v. Husen*, 95 U. S. 465, 24 L. Ed. 527; *Guy v. Baltimore*, 100 U. S. 434, 25 L. Ed. 743; *Ward v. Maryland*, 12 Wall. 418, 20 L. Ed. 449; *People v. Compagnie Generale Transatlantique*, 107 U. S. 59, 27 L. Ed. 383; *Austin v. Tennessee*, 179 U. S. 343, 344, 45 L. Ed. 224.

**1. Motives of legislature.**—*Dobbins v. Los Angeles*, 195 U. S. 223, 240, 49 L. Ed. 169; *Daly v. Elton*, 195 U. S. 242, 49 L. Ed. 177. See, generally, the title CONSTITUTIONAL LAW, vol. 4, p. 269.

In this case it was held that the allegations of the bill disclosed such character of territory, such sudden and unexplained change of its limits after the plaintiff in error had purchased the property and gone forward with the erection of its gas works, pursuant to permission given by the city, as to bring it within that class of cases wherein the court may restrain the arbitrary and discriminatory exercise of the police power which amounts to a taking of property without due process of law and an impairment of property rights protected by the fourteenth amendment of the federal constitution. *Dobbins v. Los Angeles*, 195 U. S. 223, 241, 49 L. Ed. 169; *Daly v. Elton*, 195 U. S. 242, 49 L. Ed. 177.

"The purpose was not police regulation in the interest of the public but the destruction of the plaintiff's rights and the building up of another company still within the privileged district after the passage of the amendment. Being the owner of the land and having partially erected the works, the plaintiff in error had acquired property rights and was entitled to protection against unconstitutional encroachments which would have the effect to deprive her of her property without due process of law." *Dobbins v. Los Angeles*, 195 U. S. 223, 239, 49 L. Ed. 169; *Daly v. Elton*, 195 U. S. 242, 49 L. Ed. 177.

**2. Power of court to be exercised with caution.**—*Orient Ins. Co. v. Daggs*, 173 U. S. 557, 43 L. Ed. 552; *Gundling v. Chicago*, 177 U. S. 183, 44 L. Ed. 725;



**Legislature Permitted a Wide Discretion; Presumption Is in Favor of Validity.**—It may be stated in this connection that the legislature is invested with a wide discretion to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests; that every possible presumption is to be indulged in favor of the legislation called in question, and that unless it is utterly unreasonable and extravagant in its nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, it does not extend beyond the power of the state to enact, and forms no subject for federal interference.<sup>3</sup> If a regulation enacted by competent public authority, avowedly for the protection of the public health, has a real, substantial relation to that object, the courts will not strike it down upon grounds merely of public policy or expediency.<sup>4</sup>

**Statutes to Receive Sensible Construction; Implied Exceptions.**—The police power of the state, whether exercised by the legislature or by a local body acting under its authority, may be exerted in such circumstances or by regulations so arbitrary and oppressive in particular cases as to justify the interference of the courts to prevent wrong and oppression. All laws, therefore, should receive a sensible construction, and general terms should be so limited in their application as not to lead to injustice, oppression or absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its

*Petit v. Minnesota*, 177 U. S. 164, 44 L. Ed. 716; *Dobbins v. Los Angeles*, 195 U. S. 223, 49 L. Ed. 169; *Daly v. Elton*, 195 U. S. 242, 49 L. Ed. 177.

"No right is absolute. Sic utere tuo ut alienum non laedas is of universal and pervading obligation. It is a condition upon which all property is held. Its application to particular conditions must necessarily be within the reasonable discretion of the legislative power. When such discretion is exercised in a given case by means appropriate and which are reasonable, not oppressive or discriminatory, it is not subject to constitutional objection." *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 566, 43 L. Ed. 552; *Jacobson v. Massachusetts*, 197 U. S. 11, 25, 49 L. Ed. 643.

**3. Legislature permitted a wide discretion; presumption in favor of validity.**—*License Cases*, 5 How. 504, 12 L. Ed. 256; *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Railroad Co. v. Husen*, 95 U. S. 465, 24 L. Ed. 527; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *Sinking-Fund Cases*, 99 U. S. 700, 25 L. Ed. 496; *Barbier v. Connolly*, 113 U. S. 27, 28 L. Ed. 923; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220; *Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205; *Kidd v. Pearson*, 128 U. S. 1, 32 L. Ed. 346; *Budd v. New York*, 143 U. S. 517, 36 L. Ed. 247; *Lawton v. Steele*, 152 U. S. 133, 38 L. Ed. 385; *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, 40 L. Ed. 849; *Plessy v. Ferguson*, 163 U. S. 537, 41 L. Ed. 256; *Holden v. Hardy*, 169 U. S. 366, 42 L. Ed. 780; *Petit v. Minnesota*, 177 U. S. 164, 44 L. Ed. 716; *Gundling v. Chicago*, 177 U. S. 183, 44 L. Ed. 725; *Wisconsin, etc., Railroad v. Jacobson*, 179 U. S. 287, 45 L. Ed. 194; *Austin v. Tennessee*, 179 U. S. 343, 45

L. Ed. 224; *Reid v. Colorado*, 187 U. S. 137, 47 L. Ed. 108; *Otis v. Parker*, 187 U. S. 606, 47 L. Ed. 323; *Dobbins v. Los Angeles*, 195 U. S. 223, 49 L. Ed. 169; *Daly v. Elton*, 195 U. S. 242, 49 L. Ed. 177; *Jacobson v. Massachusetts*, 197 U. S. 11, 49 L. Ed. 643; *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 326, 50 L. Ed. 204; *Gardner v. Michigan*, 199 U. S. 325, 50 L. Ed. 212; *Manigault v. Springs*, 199 U. S. 473, 50 L. Ed. 274. See, generally, the titles CONSTITUTIONAL LAW, vol. 4, pp. 251, 255, 256; STATUTES.

Where the methods have been devised by the state under the power to protect the property of its people from injury and do not appear upon their face to be unreasonable, we must, in the absence of evidence showing the contrary, assume that they are appropriate to the object which the state is entitled to accomplish. *Reid v. Colorado*, 187 U. S. 137, 152, 47 L. Ed. 108.

**4. Courts not to pass upon mere policy or expediency.**—*Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Railroad Co. v. Husen*, 95 U. S. 465, 24 L. Ed. 527; *Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205; *Lawton v. Steele*, 152 U. S. 133, 38 L. Ed. 385; *Otis v. Parker*, 187 U. S. 606, 47 L. Ed. 323; *Atkin v. Kansas*, 191 U. S. 207, 48 L. Ed. 148; *Jacobson v. Massachusetts*, 197 U. S. 11, 49 L. Ed. 643; *Dobbins v. Los Angeles*, 195 U. S. 223, 49 L. Ed. 169; *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 326, 50 L. Ed. 204; *Gardner v. Michigan*, 199 U. S. 325, 50 L. Ed. 212. See, generally, the title CONSTITUTIONAL LAW, vol. 4, p. 255, et seq.

"While the courts must exercise a judgment of their own, it by no means is true

language which would avoid results of that character. The reason of the law in such cases should prevail over its letter.<sup>5</sup>

**No Universal Rule; Question in Each Case.**—As previously stated, there is no one precise rule of all-pervading operation, but each case must be decided as it arises, the question in each case being: Is this a fair, reasonable and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, arbitrary and oppressive interference with the rights of the individual?<sup>6</sup>

## VI. Application of the Police Power to Particular Subjects.

**A. Regulations Affecting Property**—1. **GENERALLY.**—See, generally, the title *DUE PROCESS OF LAW*, vol. 5, p. 578, et seq.

2. **REGULATION OF THE USE AND ENJOYMENT OF PROPERTY.**—It is a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that its use may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property is held subject to those general regulations which are necessary to the com-

that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view as well as for possible peculiar conditions which this court can know but imperfectly, if at all." *Otis v. Parker*, 187 U. S. 606, 608, 47 L. Ed. 323.

In the case of *Munn v. Illinois*, 94 U. S. 113, 132, 24 L. Ed. 77, the court said: "For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void because in excess of the legislative power of the state. But if it could we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge."

5. **Statutes to receive sensible construction; implied exceptions.**—*Jacobson v. Massachusetts*, 197 U. S. 11, 39, 49 L. Ed. 643. See, also, *United States v. Kirby*, 7 Wall. 482, 19 L. Ed. 278; *Lau Ow Bew v. United States*, 144 U. S. 47, 58, 36 L. Ed. 340. See, generally, the title *STATUTES*.

**Same; exceptions to law requiring vaccination.**—The acknowledged power of a local community to protect itself against an epidemic threatening the safety of all might be exercised in particular circumstances and in reference to particular persons in such an arbitrary and unreasonable manner, or might do so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons. *Jacobson v. Mas-*

*sachusetts*, 197 U. S. 11, 28, 49 L. Ed. 643. See, also, *Wisconsin, etc., Railroad v. Jacobson*, 179 U. S. 287, 45 L. Ed. 194; *Railroad Co. v. Husen*, 95 U. S. 465, 24 L. Ed. 527.

In the absence of anything in the statute or in the decisions of the state court to the contrary, the supreme court of the United States will not presume that a general statute or ordinance requiring compulsory vaccination of all adult persons was intended to apply to the case of a person whose condition of bodily health is such as to render him an unfit subject for vaccination, and to vaccinate whom would seriously impair his health or probably cause his death. The presumption is that, notwithstanding the statute may be general in its terms, it is not intended to apply in such exceptional cases. *Jacobson v. Massachusetts*, 197 U. S. 11, 39, 49 L. Ed. 643.

In order to escape vaccination, however, the person setting up that his is such an exceptional case must prove such defense as of the time it was proposed to vaccinate him; it is not sufficient to show that he suffered serious illness from vaccination at some other time. *Jacobson v. Massachusetts*, 197 U. S. 11, 39, 49 L. Ed. 643.

**Implied exception of law prohibiting contracts in restraint of trade.**—So it has been held with respect to a statute forbidding contracts in restraint of trade, that if transactions were presented in which there was an absolute freedom of contract beyond the power of the legislature to restrain, but which came within the letter of any of the clauses of the statute, the court would exclude them from its operation. *Smiley v. Kansas*, 196 U. S. 447, 457, 49 L. Ed. 546.

6. **No universal rule; question in each case.**—*Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. Ed. 832; *Holden v. Hardy*, 169

mon good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.<sup>7</sup>

3. EXERCISE OF POWER NOT HAMPERED BY OBLIGATION TO MAKE COMPENSATION FOR INJURIES SUSTAINED.—The principle embodied in the fourteenth amendment, that no person shall be deprived of life, liberty or property without due process of law, and, by implication, that private property shall not be taken for public use without compensation, does not require the state to make compensation for property rendered wholly useless and worthless by reason of police regulations prohibiting its use for certain purposes, or for property suffering injury, physical or otherwise, through the legitimate exercise of the police power, provided that which is done does not amount to an actual taking of the property.<sup>8</sup>

U. S. 366, 42 L. Ed. 780; *Dobbins v. Los Angeles*, 195 U. S. 223, 49 L. Ed. 169; *Lochner v. New York*, 198 U. S. 45, 49 L. Ed. 937; *Chicago, etc., R. Co. v. Drainage Comm'rs*, 200 U. S. 561, 50 L. Ed. 596.

7. Regulation of the use and enjoyment of property.—*Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036; *Transportation Co. v. Chicago*, 99 U. S. 635, 25 L. Ed. 336; *Stone v. Mississippi*, 101 U. S. 814, 25 L. Ed. 1079; *Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205; *Crowley v. Christensen*, 137 U. S. 86, 34 L. Ed. 620; *Budd v. New York*, 143 U. S. 517, 36 L. Ed. 247; *St. Louis, etc., R. Co. v. Mathews*, 165 U. S. 1, 41 L. Ed. 611; *Chicago, etc., R. Co. v. Chicago*, 166 U. S. 226, 41 L. Ed. 979; *Holden v. Hardy*, 169 U. S. 366, 42 L. Ed. 780; *New Orleans Gas Light Co. v. Drainage Commission*, 197 U. S. 453, 49 L. Ed. 831; *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 50 L. Ed. 204; *Manigault v. Springs*, 199 U. S. 473, 50 L. Ed. 274; *Gardner v. Michigan*, 199 U. S. 325, 50 L. Ed. 212; *Chicago, etc., R. Co. v. Drainage Comm'rs*, 200 U. S. 561, 50 L. Ed. 596; *Moeschen v. Tenement House Department*, 203 U. S. 583, 51 L. Ed. 328; *Union Bridge Co. v. United States*, 204 U. S. 364, 51 L. Ed. 523. See, generally, the title DUE PROCESS OF LAW, vol. 5, p. 579.

"The right to acquire, enjoy and dispose of property is declared in the constitutions of several states to be one of the inalienable rights of man. But this declaration is not held to preclude the legislature of any state from passing laws respecting the acquisition, enjoyment and disposition of property." *Crowley v. Christensen*, 137 U. S. 86, 34 L. Ed. 620.

"Thus estates held in joint tenancy and in common may be divided among the tenants, even by conversion and sale; life estates and remainders may be separated

from each other; qualified inheritances expanded into absolute fee, and contingent and executory interests extinguished." *Wilson v. Iseminger*, 185 U. S. 55, 61, 46 L. Ed. 804.

8. Not hampered by obligation to make compensation for injuries sustained.—*Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036; *Transportation Co. v. Chicago*, 99 U. S. 635, 25 L. Ed. 336; *Stone v. Mississippi*, 101 U. S. 814, 25 L. Ed. 1079; *Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. Ed. 253; *Budd v. New York*, 143 U. S. 517, 36 L. Ed. 247; *Chicago, etc., R. Co. v. Chicago*, 166 U. S. 226, 41 L. Ed. 979; *Austin v. Tennessee*, 179 U. S. 343, 45 L. Ed. 224; *New Orleans Gas Light Co. v. Drainage Commission*, 197 U. S. 453, 49 L. Ed. 831; *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 50 L. Ed. 204; *Manigault v. Springs*, 199 U. S. 473, 50 L. Ed. 274; *Gardner v. Michigan*, 199 U. S. 325, 50 L. Ed. 212; *Chicago, etc., R. Co. v. Drainage Comm'rs*, 200 U. S. 561, 50 L. Ed. 596; *Moeschen v. Tenement House Department*, 203 U. S. 583, 51 L. Ed. 328; *Union Bridge Co. v. United States*, 204 U. S. 364, 51 L. Ed. 523. See, generally, the title DUE PROCESS OF LAW, vol. 5, pp. 578, 585, 586, 593, 595, 596. See, also, ante, "Fourteenth Amendment Not Designed to Interfere with Legitimate Exercise of the Police Power," V, E, 1.

All property, whether owned by private persons or by corporations, is held subject to the authority of the state to regulate its use in such manner as not to unnecessarily endanger the lives and the personal safety of the people. It is not, therefore, a condition of the exercise of that authority that the state shall indemnify the owners of property for the damage or injury resulting from its exercise. Property thus damaged or



4. AS TO THE REGULATION AND CONTROL OF CONTRACT AND CHARTER RIGHTS.—See ante, "But Even Charter and Contract Rights Subject to Police Regulation," V, D, 3, b, (3), and references there given.

**As to Corporations Clothed with Public Trust or Engaged in Business Affected with Public Use.**—See the title DUE PROCESS OF LAW, vol. 5, p. 560.

5. AS TO CONTRACTS BETWEEN INDIVIDUALS.—See ante, "A Continuing Power; Cannot Be Bargained Away," V, D, 3, et seq.

6. LIMITING HEIGHT OF BUILDINGS.—As to the validity of legislation limiting the height of buildings fronting on public parks, squares, etc., see the title EMINENT DOMAIN, vol. 5, pp. 770, 779.

7. UNCOMPENSATED REMOVAL OF TRACKS, PIPES, BRIDGES, TUNNELS, PAVING OF TRACKS, ETC.—See the titles CONSTITUTIONAL LAW, vol. 4, p. 405, et seq.; DUE PROCESS OF LAW, vol. 5, pp. 583, 584. And see ante, "A Continuing Power; Cannot Be Bargained Away," V, D, 3.

8. DESTRUCTION OF PROPERTY IN THE INTEREST OF PUBLIC SAFETY, OR PROPERTY KEPT, SOLD OR USED IN VIOLATION OF LAW.—That a state, in the bona fide exercise of its police power, may interfere with private property, and even order its destruction, is as well settled as any legislative power can be which has for its objects the welfare and comfort of the citizen.<sup>9</sup> For instance, meats, fruits, and vegetables do not cease to become private property by their decay; but it is clearly within the power of the state to order their destruction in times of epidemic, or whenever they are so exposed as to be deleterious to the public health. There is also property in rags and clothing; but that does not stand in the way of their destruction in case they become infected and dangerous to the public health.<sup>10</sup>

injured is not, within the meaning of the constitution, taken for public use, nor is the owner deprived of it without due process of law. *Chicago, etc., R. Co. v. Chicago*, 166 U. S. 226, 252, 41 L. Ed. 979.

"There are, unquestionably, limitations upon the exercise of the police power which cannot, under any circumstances, be ignored. But the clause prohibiting the taking of private property without compensation is not intended as a limitation of the exercise of those police powers which are necessary to the tranquility of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments. It has always been held that the legislature may make police regulations, although they may interfere with the full enjoyment of private property and though no compensation is given." *Chicago, etc., R. Co. v. Drainage Comm'rs*, 200 U. S. 561, 50 L. Ed. 596.

"The power which the states have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon 'the community.'" *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 324, 50 L. Ed. 204.

**9. Destruction of property in the interest of public safety; property kept, sold or used in violation of law.**—*Lawton v. Steele*, 152 U. S. 133, 38 L. Ed. 385; *Mugler v. Kansas*, 123 U. S. 623, 672, 31 L. Ed. 205; *Sentell v. New Orleans, etc., R. Co.*, 166 U. S. 698, 704, 41 L. Ed. 1169.

**10. Same.**—*Sentell v. New Orleans, etc., R. Co.*, 166 U. S. 698, 704, 41 L. Ed. 1169. See, generally, the title DUE PROCESS OF LAW, vol. 5, pp. 580, 581, 582.

"A bale of goods, upon which the duties have or have not been paid, laden with infection, may be seized under 'health laws,' and if it cannot be purged of its poison, may be committed to the flames." *Gilman v. Philadelphia*, 3 Wall. 713, 730, 18 L. Ed. 96; *License Cases*, 5 How. 504, 12 L. Ed. 256; *Patterson v. Kentucky*, 97 U. S. 561, 24 L. Ed. 1115.

"No property is more sacred than one's home, and yet a house may be pulled down or blown up by the public authorities, if necessary to avert or stay a general conflagration, and that, too, without recourse against such authorities for the trespass." *Bowditch v. Boston*, 101 U. S. 16, 25 L. Ed. 980; *Sentell v. New Orleans, etc., R. Co.*, 166 U. S. 698, 41 L. Ed. 1169.

"Other instances of this are found in the power to kill diseased cattle, to destroy obscene books or pictures, or gambling instruments; and, in *Lawton v. Steele*, 152 U. S. 133, 38 L. Ed. 385, it was held to be within the power of a state to order the summary destruction of fishing nets, the use of which was likely to result in the extinction of valuable

**B. Regulation of Courts; Jurisdiction, Forms of Procedure, Remedies, Defenses, Measure of Damages, etc.**—1. **IN GENERAL.**—As to the exclusive right of the states to constitute courts, prescribe the jurisdiction, mode of procedure, etc., see the titles *CONSTITUTIONAL LAW*, vol. 4, p. 467, et seq.; *DUE PROCESS OF LAW*, vol. 5, p. 538. As to change of procedure, remedies, etc., affecting vested rights, see the titles *CONSTITUTIONAL LAW*, vol. 4, p. 442; *DUE PROCESS OF LAW*, vol. 5, p. 588, et seq. As to the equal protection of the law clause requiring a uniform system of procedure, etc., see the title *CONSTITUTIONAL LAW*, vol. 4, p. 359. As to power of states to constitute their own courts, form of procedure, etc., as affected by the due process clause, see the title *DUE PROCESS OF LAW*, vol. 5, pp. 532, 536, 616. As to procedure on insurance contracts, proof of loss, defenses, etc., see the titles *CONSTITUTIONAL LAW*, vol. 4, pp. 377, 378, and references there found; *INSURANCE*, vol. 7, pp. 186, 203. As to requirement of acceptance of service of process upon state officer by foreign insurance company, see the titles *INSURANCE*, vol. 7, p. 84; *FOREIGN CORPORATIONS*, vol. 6, p. 317.

2. **TORTS, ACTIONS, DAMAGES, ETC.**—See, generally, the references in the preceding paragraph. As to constitutionality of statutes providing what shall constitute actionable wrong and damages recoverable, see the titles *CONSTITUTIONAL LAW*, vol. 4, pp. 172, 180, 181; *DUE PROCESS OF LAW*, vol. 5, p. 539. As to constitutionality of statutes subjecting members of a class to particular damages, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 386. As to constitutionality of law taxing attorney's fees against certain class of defendants, see the titles *ANIMALS*, vol. 1, p. 323; *CONSTITUTIONAL LAW*, vol. 4, p. 386. As to validity of statute forbidding a railroad to allow Johnson grass to go to seed upon its right of way, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 364. As to actions against railroads for damage done by fire, see the titles *CONSTITUTIONAL LAW*, vol. 4, p. 381; *RAILROADS*. As to validity of legislation with respect to torts which affect interstate commerce, see the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 345. As to the extent of police power of a state over vested rights and the power to enact retrospective laws, see the titles *CONSTITUTIONAL LAW*, vol. 4, pp. 446, 448; *DUE PROCESS OF LAW*, vol. 5, pp. 589, 590; *LIMITATION OF ACTIONS AND ADVERSE POSSESSION*, vol. 7, p. 910.

**C. Militia; Bearing of Arms, etc.; Power to Regulate.**—A state may prohibit bodies of men, other than the organized militia of the state and the troops of the United States, from associating as a military company and drilling with arms in cities or towns.<sup>11</sup>

**D. Prevention and Punishment of Crime; Ex Post Facto Laws.**—The power to make municipal regulations for the restraint and punishment of crime, for the preservation of the health and morals of citizens, and of the public peace, has never been surrendered by the states, or restrained by the constitution of the United States.<sup>12</sup>

fisheries within the waters of the state." *Sentell v. New Orleans, etc., R. Co.*, 166 U. S. 698, 705, 41 L. Ed. 1169.

**Statute providing for summary destruction of dogs.**—See the title *ANIMALS*, vol. 1, pp. 318, 319.

**Destruction of garbage.**—See the title *DUE PROCESS OF LAW*, vol. 5, pp. 580, 581.

**Confiscation of property used for gambling.**—See the title *DUE PROCESS OF LAW*, vol. 5, p. 616.

**Unlawful devices for taking fish.**—See the title *DUE PROCESS OF LAW*, vol. 5, p. 582.

11. **Militia, bearing of arms, etc.**—

*United States v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588; *Presser v. Illinois*, 116 U. S. 252, 29 L. Ed. 615. See the titles *CONSTITUTIONAL LAW*, vol. 4, p. 489; *MILITARY LAW*, vol. 8, p. 342.

12. **Power of states to prevent and punish crime.**—*New York City v. Miln*, 11 Pet. 102, 140, 9 L. Ed. 648; *Prigg v. Pennsylvania*, 16 Pet. 539, 540, 10 L. Ed. 1060; *Moore v. Illinois*, 14 How. 13, 14 L. Ed. 306; *New York v. Dibble*, 21 How. 366, 16 L. Ed. 149.

As to the exclusive power of the states to prevent and punish crime, see the titles *CONSTITUTIONAL LAW*, vol. 4, p. 170; *CRIMINAL LAW*, vol. 5, p. 52. As



**E. Public Morals, etc.**—1. **GAMBLING; OPTION AND MARGIN CONTRACTS, ETC.**—As to the general power to protect the public morals, see ante, "General Nature and Extent of Police Power," III. As to the suppression of certain forms of gambling being a denial of the equal protection of the law, see the title **CONSTITUTIONAL LAW**, vol. 4, p. 378. As a deprivation of liberty, see the title **DUE PROCESS OF LAW**, vol. 5, p. 563. As to the validity of acts suppressing option contracts, dealing in futures, etc., see the titles **CONSTITUTIONAL LAW**, vol. 4, pp. 378, 379; **DUE PROCESS OF LAW**, vol. 5, pp. 563, 616; **GAMBLING CONTRACTS**, vol. 6, p. 537; **INFORMERS**, vol. 6, p. 1020.

2. **DISORDERLY HOUSES, ETC.**—As to regulations prescribing city limits for disorderly houses, see the titles **ADULTERY, FORNICATION AND LEWDNESS**, vol. 1, p. 197; **DUE PROCESS OF LAW**, vol. 5, p. 584.

**F. Highways; Establishment, Care, Maintenance, etc.; Ferries, Canals, etc.**—The establishment, maintenance and care of its highways is embraced within the local police power of a state.<sup>13</sup>

The authority to regulate ferries has never been claimed by the general government: it has always been exercised by the states, never by congress, and is undoubtedly a part of the immense mass of undelegated powers reserved to the states respectively.<sup>14</sup>

**G. Waters and Watercourses; Navigable Waters**—1. **IN GENERAL.**—The soil under navigable waters being held by the people of the state in trust for the common use and as a portion of their inherent sovereignty, any act of legislation concerning their use affects the public welfare. It is, therefore, appropriately

to protection of persons accused of crime, see the titles **CONSTITUTIONAL LAW**, vol. 4, p. 491, et seq.; **DUE PROCESS OF LAW**, vol. 5, p. 665, et seq. As to validity of ex post facto laws, see the title **CONSTITUTIONAL LAW**, vol. 4, p. 515.

The states may legislate to prevent the spread of crime. *Plumley v. Massachusetts*, 155 U. S. 461, 478, 39 L. Ed. 223.

Every law for the restraint and punishment of crime for the preservation of public peace, health and morals, must come within the police power of a state. *License Tax Cases*, 5 How. 462, 504, 631, 18 L. Ed. 497.

13. **Regulation of highways.**—*New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 29 L. Ed. 516; *Jones v. Brim*, 165 U. S. 180, 41 L. Ed. 677; *Fair Haven, etc., R. Co. v. New Haven*, 203 U. S. 379, 51 L. Ed. 237. As to the power of state or city over streets and highways being a continuing power, see ante, "Generally," V, D, 3, a. And see the titles **COUNTIES**, vol. 4, p. 825; **MUNICIPAL CORPORATIONS**, vol. 8, p. 546; **RAILROADS; STREET RAILWAYS; STREETS AND HIGHWAYS**. As a public purpose, see the title **EMINENT DOMAIN**, vol. 5, p. 763. As to removal of bridges, pipes, tunnels, railway tracks, etc., see ante, "Uncompensated Removal of Tracks, Pipes, Bridges, Tunnels, Paving of Tracks, etc.," VI, A, 7, and references there given.

The local police power of a state embraces the construction of roads, canals, and bridges, and the establishment of ferries, and it can generally be exercised more wisely by the states than by a distant authority. They are the first to see

the importance of such means of internal communication, and are more deeply concerned than others in their wise management. *Cummings v. Chicago*, 188 U. S. 410, 427, 47 L. Ed. 525. See, also, *Escanaba Co. v. Chicago*, 107 U. S. 678, 683, 27 L. Ed. 442.

**Animals driven on highway.**—A state law which makes the owners of herds of cattle, horses, sheep, swine, etc., liable for all damages done by such animals while being driven over highways constructed along or upon hillsides by reason of their destroying the banks or rolling rocks into or upon such highways, is a valid exercise of the police power to maintain and control highways and does not deprive the owners of such herds of the equal protection of the laws. *Jones v. Brim*, 165 U. S. 180, 41 L. Ed. 677.

14. **Regulation of ferries.**—See the titles **FERRIES**, vol. 6, p. 274; **INTERSTATE AND FOREIGN COMMERCE**, vol. 7, pp. 365, 366.

The laws of Kentucky relating to ferries on the Ohio and Mississippi rivers are like the laws of most, if not all, the other states bordering on those rivers; they do not leave the rights of the public unprotected, and are not unconstitutional. The franchises which the state grants are confined to the transit from her own shores, and she leaves other states to regulate the same rights on their side. *Conway v. Taylor*, 1 Black 603, 17 L. Ed. 191.

An injunction issuing from the state court of Kentucky to protect the exclusive privileges of the ferry held not to conflict or interfere with the right of a boat to carry passengers or goods in the ordinary prosecution of commerce with-



within the exercise of the police power of the state.<sup>15</sup> It has long been held that navigable rivers wholly within a state are not outside of state jurisdiction so long as congress does not interfere. An abridgment of the rights of those who have been accustomed to use them, unless it comes in conflict with the constitution or a law of the United States, is an affair between the government of the state and its citizens, of which the federal supreme court can take no cognizance.<sup>16</sup>

2. DRAINAGE.—See, generally, the titles DRAINS AND SEWERS, vol. 5, p. 492; DUE PROCESS OF LAW, vol. 5, pp. 596, 611, 612. As to whether drainage is a public purpose, see the titles DUE PROCESS OF LAW, vol. 5, p. 611, et seq.; EMINENT DOMAIN, vol. 5, p. 769. As to whether a drainage project constitutes a deprivation of property without due process of law, see the title DUE PROCESS OF LAW, vol. 5, pp. 596, 611, 612, et seq.

In the absence of legislation by congress, a state has power to improve its lands by drainage, and promote the general health of its people by authorizing a dam to be built across its interior streams, though they were previously navigable to the sea by vessels engaged in the coastwise trade.<sup>17</sup>

out the regularity or purpose of ferry trips; the remedy by injunction applies only to one which is run openly and avowedly as a ferry boat. *Conway v. Taylor*, 1 Black 603, 17 L. Ed. 191.

15. Regulation of navigable waters is within the police power.—*Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 459, 36 L. Ed. 1018. See, generally, the titles BRIDGES, vol. 3, p. 518; INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 386; NAVIGABLE WATERS, vol. 8, p. 805. As to rights of riparian owners, see the title DUE PROCESS OF LAW, vol. 5, pp. 564, 596, et seq.

"As a general rule, the power of a state over all matters not granted away must be as full in the bays, ports, and harbours within her territory, intra fauces terræ, as on wharves and shores, or interior soil. And there can be little check on such legislation, beyond the discretion of each state, if we consider the great conservative reserved powers of the states, in their quarantine or health systems, in the regulation of their internal commerce, in their authority over taxation, and, in short, every local measure necessary to protect themselves against persons or things dangerous to their peace and their morals." (Opinion of Woodbury, J.) *License Cases*, 5 How. 504, 628, 12 L. Ed. 256.

16. Same; state adjusts rights of its own citizens.—*Willson v. The Black-Bird Creek Marsh Co.*, 2 Pet. 245, 250, 7 L. Ed. 412; *Transportation Co. v. Chicago*, 99 U. S. 635, 643, 25 L. Ed. 336. See, generally, the title NAVIGABLE WATERS, vol. 8, p. 863.

17. Drainage.—*Manigault v. Springs*, 199 U. S. 473, 478, 50 L. Ed. 274; *Willson v. The Black-Bird Creek Marsh Co.*, 2 Pet. 245, 7 L. Ed. 412.

The act of the assembly of the state of Delaware, by which the construction of the dam erected by the plaintiffs was authorized, shows plainly that this is one

of those many creeks passing through a deep level marsh, adjoining the Delaware, up which the tide flows for some distance. The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved; measures calculated to produce these objects, provided they do not come in collision with the powers of the general government, are, undoubtedly, within those which are reserved to the state. But the measure authorized by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it; this abridgment, however, unless it comes in conflict with the constitution, or a law of the United States, is an affair between the government of Delaware and her citizens of which the federal supreme court can take no cognizance. *Willson v. The Black-Bird Creek Marsh Co.*, 2 Pet. 245, 7 L. Ed. 412.

"If congress had passed any act in execution of the power to regulate commerce, the object of which was to control state legislation over these small navigable creeks, into which the tide ebbs and flows, and which abound throughout the lower country of the middle and southern states, we should feel not much difficulty in saying, that a state law coming in conflict with such act would be void. But congress has passed no such act; the repugnancy of the law of Delaware is placed entirely on its repugnancy to the law to regulate commerce with foreign nations, and among the several states; a power which has not been so exercised as to affect this question." *Willson v. The Black-Bird Creek Marsh Co.*, 2 Pet. 245, 7 L. Ed. 412.

"Swamps and stagnant waters are the cause of malarial and malignant fevers, and \* \* \* the police power is never more legitimately exercised than in removing such nuisances." *Manigault v. Springs*, 199 U. S. 473, 483, 50 L. Ed. 274;

**H. Animals.**—As to quarantine regulations, see the titles *ANIMALS*, vol. 1, pp. 324, 326; *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, pp. 405, 408. As to police regulation of dogs, see the title *ANIMALS*, vol. 1, pp. 318, 319.

**Diseased Cattle Running at Large.**—The state may provide that whoever permits diseased cattle in his possession to run at large within its limits shall be liable for any damages caused by the spread of the disease occasioned thereby.<sup>18</sup>

**I. Fish and Game.**—The preservation of game and fish has always been treated as within the proper domain of the police power, and laws limiting the season within which birds and wild animals may be killed or exposed for sale, and prescribing the time and manner in which fish may be caught, have been repeatedly upheld by the courts.<sup>19</sup> The right to preserve game flows from the undoubted existence in the state of a police power to that end, which may be none the less efficiently called into play because by doing so interstate commerce may be remotely and indirectly affected.<sup>20</sup>

**J. Public Health.**—1. *IN GENERAL.*—The care of the public health is something confessedly belonging to the domain of the police power of a state.<sup>21</sup> Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which

*Leovy v. United States*, 177 U. S. 621, 636, 44 L. Ed. 914.

The act of the general assembly of South Carolina of 1903 was a proper exercise of the police power of the state. Although it was not an exercise of that power in its ordinarily accepted sense of protecting the health, lives and morals of the community, it is defensible in its broader meaning of providing for the general welfare of the people, by the reclamation of swampy, overflowed and infertile lands, and the erection of dams, levees and dikes for that purpose. *Manigault v. Springs*, 199 U. S. 473, 481, 50 L. Ed. 274.

18. Section 4059 of the Code of Iowa, which provides that any person who has in his possession in the state of Iowa any Texas cattle which have not been wintered north, shall be liable for any damages that may accrue from allowing such cattle to run at large and thereby spread the disease known as Texas fever, is a valid police regulation, not in conflict with the commerce clause of the federal constitution, or with the provisions of subdivision 1 of § 2 of art. 4 of the constitution, declaring that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states. *Kimmish v. Ball*, 129 U. S. 217, 222, 32 L. Ed. 595. See, also, *Missouri*, etc., *R. Co. v. Haber*, 169 U. S. 613, 42 L. Ed. 878.

19. **Fish and game.**—*Smith v. Maryland*, 18 How. 71, 15 L. Ed. 269; *Lawton v. Steele*, 152 U. S. 133, 138, 38 L. Ed. 385. See, generally, the titles *FISH AND FISHERIES*, vol. 5, p. 291; *GAME AND GAME LAWS*, vol. 6, p. 543. And see *OYSTERS*, vol. 8, p. 1018. As to whether the right to fish in the waters of another state is a privilege of citizenship, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 473.

20. **Same.**—*Geer v. Connecticut*, 161 U. S. 519, 534, 40 L. Ed. 793.

Indeed the source of the police power as to game birds (like those covered by the statute here called in question) flows from the duty of the state to preserve for its people a valuable food supply. The exercise by the state of such power therefore comes directly within the principles of *Plumley v. Massachusetts*, 155 U. S. 461, 473, 39 L. Ed. 223. The power of a state to protect by adequate police regulation its people against the adulteration of articles of food (which was in that case maintained), although in doing so commerce might be remotely affected, necessarily carries with it the existence of a like power to preserve a food supply which belongs in common to all the people of the state, which can only become the subject of ownership in a qualified way, and which can never be the object of commerce except with the consent of the state, and subject to the conditions which it may deem best to impose for the public good. *Geer v. Connecticut*, 161 U. S. 519, 534, 40 L. Ed. 793.

21. **The public health.**—*Hawker v. New York*, 170 U. S. 189, 193, 42 L. Ed. 1002.

While the supreme court has refrained from any attempt to define the limits of the police power, yet it has distinctly recognized that the authority of the state under that power extends to the right to enact quarantine laws and health laws of every description. *Jacobson v. Massachusetts*, 197 U. S. 11, 25, 49 L. Ed. 643, reaffirmed in *Cantwell v. Missouri*, 199 U. S. 602, 50 L. Ed. 329; *Moeschen v. Tennessee House Department*, 203 U. S. 583, 51 L. Ed. 328. See, generally, ante, "General Nature and Extent of the Police Power," III; "Quarantine and Health Laws," V, C, 3, c. And see the titles *HEALTH*, vol. 6, p. 681; *QUARANTINE*.



threatens the safety of its members.<sup>22</sup> It is not an element in the liberty secured by the constitution of the United States that one person, or a minority of persons, residing in a community and enjoying the benefits of its local government, should have the powers of subordinating the welfare and safety of the entire population to their notions of what may be the best means of safe-guarding the health of that community.<sup>23</sup>

2. **QUARANTINE.**—For the purpose of protecting the individual himself and for the purpose of protecting the state by reducing to a minimum the number of people liable to be exposed to disease, the state, in framing a quarantine law, may not only forbid persons emerging from the quarantine area within which the disease exists, but it may prohibit persons admitted to be healthy and free from disease from going into such district; and that regardless of whether they are citizens of the state or of other states, or of foreign countries.<sup>24</sup>

3. **VACCINATION.**—As an infringement of the liberty guaranteed by the fourteenth amendment, see the title *DUE PROCESS OF LAW*, vol. 5, p. 562. As a denial of equal protection of the law, see the title *CONSTITUTIONAL LAW*, vol. 4, pp. 364, 370. As to implied exceptions of particular persons, see ante, "Judicial Review," V, E. 2, d.

**For the purpose of preventing an epidemic of smallpox** the legislature, or a municipal corporation duly authorized thereby, may order the compulsory vaccination of all persons within the infected area.<sup>25</sup>

4. **SUPPRESSION OF NUISANCES, DANGEROUS AND NOXIOUS TRADES, OCCUPATIONS AND PLACES.**—The police power is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance.<sup>26</sup>

**Unwholesome trades, slaughter houses,** operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials and the burial of the dead, may all be interdicted by law, in the midst of dense masses of population, on the general and rational principle that every person ought to so use his property as not to injure his neighbors, and that private interests must be made subservient to the general interests of the community. This is called the police power; and it is much easier to perceive and realize the existence and source of it than to mark its boundaries, or prescribe limits to its exercise.<sup>27</sup>

22. **Same.**—*Jacobson v. Massachusetts*, 197 U. S. 11, 27, 49 L. Ed. 643; *License Case*, 5 How. 504, 589, 12 L. Ed. 256.

23. **Same.**—*Jacobson v. Massachusetts*, 197 U. S. 11, 38, 49 L. Ed. 643.

24. **Quarantine.**—*Compagnie Francaise v. Louisiana State Board of Health*, 186 U. S. 380, 46 L. Ed. 1209. See the titles *HEALTH*, vol. 6, p. 681; *QUARANTINE*.

25. **Compulsory vaccination.**—*Jacobson v. Massachusetts*, 197 U. S. 11, 49 L. Ed. 643, reaffirmed in *Cantwell v. Missouri*, 199 U. S. 602, 50 L. Ed. 329; *Moeschen v. Tenement House Department*, 203 U. S. 583, 51 L. Ed. 328.

The fact that vaccination may sometimes cause serious and permanent injury to the health of the person vaccinated, or that it occasionally results in death, is no defense in a proceeding against an individual refusing to comply with a compulsory vaccination law, and offers of evidence to that effect are irrelevant and inadmissible, notwithstanding the defendant may also offer to show that when a child, he had been caused great

and extreme suffering for a long period by a disease produced by vaccination, and that he had witnessed a similar result of vaccination, not only in the case of his son, but in the cases of others. *Jacobson v. Massachusetts*, 197 U. S. 11, 36, 49 L. Ed. 643.

In order for evidence of this character to become material it must go further, and show that the state of the defendant's health or bodily condition at the time it was proposed to vaccinate him was such that it would have been cruel or dangerous or inhuman to compel him to submit to the requirements of the statute. *Jacobson v. Massachusetts*, 197 U. S. 11, 38, 49 L. Ed. 643.

26. **Suppression of nuisances, dangerous and noxious trades, etc.**—*Lawton v. Steele*, 152 U. S. 133, 136, 38 L. Ed. 385. See generally, the titles *DUE PROCESS OF LAW*, vol. 5, p. 580, et seq.; *NUISANCES*, vol. 8, pp. 933, 940.

27. **Same.**—*Slaughter-House Cases*, 16 Wall. 36, 21 L. Ed. 394; *Butchers' Union Slaughter-House, etc., Co. v. Crescent*



**Effect of Charter Right to Continue Nuisance.**—See ante, "A Continuing Power; Cannot Be Bargained Away," V, D, 3.

**Destruction of Property in Interest of Public Safety.**—See ante, "Destruction of Property in the Interest of Public Safety, or Property Kept, Sold or Used in Violation of Law," VI, A, 8. And see, on this point also, the title *DUE PROCESS OF LAW*, vol. 5, pp. 580, 581, 582.

5. **DRAINAGE OF SWAMPS AND MARSHES.**—See ante, "Drainage," VI, G, 2.

**K. Regulation of Business, Trade, Occupation or Profession—1. RIGHT OF CITIZENS TO PURSUE LAWFUL OCCUPATIONS, ENTER INTO CONTRACTS, ACQUIRE AND DISPOSE OF PROPERTY, UPON TERMS OF EQUALITY.**—The fourteenth amendment, in declaring that no state shall deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws, undoubtedly intended not only that there should be no arbitrary spoliation of property, but that equal protection should be given to all under like circumstances in the enjoyment of their personal and civil

City, etc., *Slaughter-House Co.*, 111 U. S. 746, 28 L. Ed. 585; *Walla Walla City v. Walla Walla Water Co.*, 172 U. S. 1, 16, 43 L. Ed. 341.

**Carrying offensive matters through streets.**—A city has the right to prohibit the carrying of dead animals or offensive matter through its streets. *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036; *Walla Walla City v. Walla Walla Water Co.*, 172 U. S. 1, 15, 43 L. Ed. 341; *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 322, 50 L. Ed. 204, followed in *Gardner v. Michigan*, 199 U. S. 325, 50 L. Ed. 212.

**"The keeping of swine and cattle within the city or designated limits of the city has been declared in a number of cases to be within the police power."** *Fischer v. St. Louis*, 194 U. S. 361, 370, 48 L. Ed. 1018, followed in *Scheff v. St. Louis*, 194 U. S. 373, 48 L. Ed. 1025.

The power of the legislature to authorize its municipalities to regulate and suppress all such places or occupations as in its judgment are likely to be injurious to the health of its inhabitants or to disturb people living in the immediate neighborhood by loud noises or offensive odors, is so clearly within the police power as to be no longer open to question. The keeping of swine and cattle within the city or designated limits of the city has been declared in a number of cases to be within the police power. The keeping of cow stables and dairies is not only likely to be offensive to neighbors, but it is too often made an excuse for the supply of impure milk from cows which are fed upon unhealthful food, such as the refuse from distilleries, etc. *Fischer v. St. Louis*, 194 U. S. 361, 370, 48 L. Ed. 1018, followed in *Scheff v. St. Louis*, 194 U. S. 373, 48 L. Ed. 1025. See the title *CONSTITUTIONAL LAW*, vol. 4, p. 367, et seq.

**Dangerous places, etc.**—"It is a principle fully recognized by decisions of state and federal courts, that wherever there is any business in which, either from the products created or the in-

strumentalities used, there is danger to life or property, it is not only within the power of the states, but it is among their plain duties, to make provision against accidents likely to follow in such business, so that the dangers attending it may be guarded against so far as is practicable." *Nashville, etc., Railway v. Alabama*, 128 U. S. 96, 100, 32 L. Ed. 352.

**Garbage and refuse material.**—"It is the duty, primarily, of a person on whose premises are garbage and refuse material to see to it, by proper diligence, that no nuisance arises therefrom which endangers the public health. The householder may be compelled to submit even to an inspection of his premises, at his own expense, and forbidden to keep them or allow them to be kept in such condition as to create disease. He might, therefore, have been required, at his own expense, to make, from time to time, such disposition of obnoxious substances originating on premises occupied by him as would be necessary in order to guard the public health." *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 321, 50 L. Ed. 204, followed in *Gardner v. Michigan*, 199 U. S. 325, 50 L. Ed. 212. See the title *DUE PROCESS OF LAW*, vol. 5, pp. 581, 582.

"If the requirement that the person conveying the material should pay a given price for having it cremated or destroyed, in effect put some expense on the householder, that gave him no ground for complaint; for it was his duty to see to the removal of garbage and house refuse, having its origin on his premises." *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 328, 50 L. Ed. 204, followed in *Gardner v. Michigan*, 199 U. S. 325, 50 L. Ed. 212.

"If in providing against such a nuisance, the owner of such material suffers some slight loss, the inconvenience or loss is presumed to be compensated in the common benefit secured by regulation." *Gardner v. Michigan*, 199 U. S. 325, 331, 50 L. Ed. 212.

rights, and that in the pursuit of happiness and a livelihood, all avocations, professions, honors and positions should be open to every one upon equal terms, and that all should be equally entitled to acquire and enjoy property.<sup>28</sup>

2. RIGHT TO BE EXERCISED IN SUBORDINATION TO LAW.—But, however broad the right of every one to enter into such contracts, follow such calling, and employ his time as he may judge most conducive to his interests, it must be exercised subject to such general rules as are adopted by society for the common welfare.<sup>29</sup>

3. AS TO POWER OF STATE TO REGULATE.—a. *Generally.*—The right of the state in the exercise of the police power, to regulate certain occupations which, when unrestrained, may become unsafe or dangerous to the public health and welfare, has been so often before the supreme court of the United States that it is only necessary to refer to some of the cases which sustain the proposition that the state has a right, by reasonable regulations, to protect the public health and safety.<sup>30</sup> While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous, or so far detrimental to the health of employees as to demand special precautions for their well-being and protection, or the safety of adjacent property.<sup>31</sup>

**No General Power Where Business Not Affected with a Public Interest.**—No general power resides in the legislature to regulate private business,

28. Right to pursue lawful occupation, acquire and dispose of property, etc.—*Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. Ed. 923; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220; *In re Kemmler*, 136 U. S. 436, 34 L. Ed. 519; *In re Converse*, 137 U. S. 624, 34 L. Ed. 796; *Giozza v. Tiernan*, 148 U. S. 657, 37 L. Ed. 599; *Hodgson v. Vermont*, 168 U. S. 262, 42 L. Ed. 461; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. Ed. 679. See, also, the titles CONSTITUTIONAL LAW, vol. 4, pp. 372, 430, 459, 487; DUE PROCESS OF LAW, vol. 5, pp. 553, 554, 555.

29. Rights exercised in subordination to law.—*Northern Securities Co. v. United States*, 193 U. S. 197, 351, 48 L. Ed. 679; *Soon Hing v. Crowley*, 113 U. S. 703, 709, 28 L. Ed. 1145. See, also, the title DUE PROCESS OF LAW, vol. 5, pp. 555, 557.

"We cannot so enlarge the scope of the language of the constitution regarding the liberty of the citizen as to hold that it includes or that it was intended to include a right to make a contract which in fact restrained and regulated interstate commerce, notwithstanding congress, proceeding under the constitutional provision giving to it the power to regulate that commerce, had prohibited such contracts." *Addyston Pipe, etc., Co. v. United States*, 175 U. S. 211, 229, 44 L. Ed. 136.

"The power to regulate interstate commerce is, as stated by Chief Justice Marshall, full and complete in congress, and there is no limitation in the grant of the power which excludes private contracts of the nature in question from the jurisdiction of that body. Nor is any such limitation contained in that other clause of the constitution which provides that no

person shall be deprived of life, liberty or property without due process of law." Again: "The provision in the constitution does not, as we believe, exclude congress from legislating with regard to contracts of the above nature while in the exercise of its constitutional right to regulate commerce among the states. On the contrary, we think the provision regarding the liberty of the citizen is, to some extent limited by the commerce clause of the constitution, and that the power of congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally and collaterally, regulate to a greater or less degree commerce among the states." *Lottery Cases*, 188 U. S. 321, 360, 47 L. Ed. 492. See the title DUE PROCESS OF LAW, vol. 5, pp. 553, 554, 555, 557, 558, 559, et seq.

30. Generally as to power of state to regulate business, trade, occupation, etc.—*Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 29 L. Ed. 516; *Crowley v. Christensen*, 137 U. S. 86, 34 L. Ed. 620; *Lawton v. Steele*, 152 U. S. 133, 38 L. Ed. 385; *Gundling v. Chicago*, 177 U. S. 183, 188, 44 L. Ed. 725; *Jacobson v. Massachusetts*, 197 U. S. 11, 49 L. Ed. 643; *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 50 L. Ed. 204; *Gardner v. Michigan*, 199 U. S. 325, 50 L. Ed. 212; *Lieberman v. Van De Carr*, 199 U. S. 552, 558, 50 L. Ed. 305. See, generally, the title CONSTITUTIONAL LAW, vol. 4, p. 375 et seq.

31. Same.—*Holden v. Hardy*, 169 U. S. 366, 391, 42 L. Ed. 780.



prescribe the conditions under which it shall be conducted, fix the price of commodities or services or interfere with freedom of contract, so long as the business is not affected with a public interest. The merchant, manufacturer, artisan and laborer, under our system of government, are left to pursue and provide for their own interest in their own way, untrammelled by burdensome and restrictive regulations, which, however common in rude and irregular times, are inconsistent with constitutional liberty.<sup>32</sup>

b. *Business Subject to Regulation; Regulations to Be Imposed*—(1) *State to Select*.—What such regulations shall be and to what particular trade, business or occupation they shall apply are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for federal interference.<sup>33</sup>

(2) *Business Affected with a Public Interest*.—Business of certain kinds holds such a peculiar relation to the public interest that there is superinduced upon it the right of public regulation.<sup>34</sup> When private property is "affected with a public interest, it ceases to be *juris privati* only." Property becomes clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but so long as he maintains the use he must submit to the control.<sup>35</sup>

(3) *Doubtful and Immoral Vocations*.—One of the difficult social problems of the day is what shall be done in respect to those vocations which minister to and feed upon human weaknesses, appetites and passions. The management of these vocations comes directly within the scope of what is known as the police power.

**32. No general power where business not affected with a public interest.**—*Budd v. New York*, 143 U. S. 517, 532, 36 L. Ed. 247.

**33. State may select business and determine regulations to be imposed.**—*Giozza v. Tiernan*, 148 U. S. 657, 662, 37 L. Ed. 599; *Gundling v. Chicago*, 177 U. S. 183, 188, 44 L. Ed. 725; *Rippey v. Texas*, 193 U. S. 504, 48 L. Ed. 767. See, also, the title CONSTITUTIONAL LAW, vol. 4, p. 372.

**34. Business affected with a public interest.**—*Budd v. New York*, 143 U. S. 517, 533, 36 L. Ed. 247.

**35. Same.**—*Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Georgia, etc., Banking Co. v. Smith*, 128 U. S. 174, 32 L. Ed. 377; *Budd v. New York*, 143 U. S. 517, 36 L. Ed. 247; *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, 695, 40 L. Ed. 849.

Down to the time of the adoption of the fourteenth amendment of the constitution of the United States, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment

does not change the law in this particular; it simply prevents the states from doing that which will operate as such deprivation. *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Budd v. New York*, 143 U. S. 517, 535, 36 L. Ed. 247.

"The incorporation of the company, by which numerous parties are permitted to act as a single body for the purposes of its creation, or as Chief Justice Marshal expresses it, by which 'the character and properties of individuality' are bestowed 'on a collective and changing body of men,' *Providence Bank v. Billings*, 4 Pet. 514, 562, 7 L. Ed. 939; the grant to it of special privileges to carry out the object of its incorporation, particularly the authority to exercise the state's right of eminent domain that it may appropriate needed property,—a right which can be exercised only for public purposes; and the obligation, assumed by the acceptance of its charter, to transport all persons and merchandise, upon like conditions and upon reasonable rates, affect the property and employment with a public use; and where property is thus affected the business in which it is used is subject to legislative control." *Georgia, etc., Banking Co. v. Smith*, 128 U. S. 174, 179, 32 L. Ed. 377.



They affect directly the public health and morals.<sup>36</sup>

c. *Grounds of Interference*.—To justify the state in interposing its authority, in behalf of the public, it must appear that the interests of the public generally, as distinguished from those of a particular class, require such interference.<sup>37</sup>

d. *Limitations of Power*—(1) *Must Be Reasonable; Arbitrary Interference Not Permissible*.—The means employed by the legislature must be such as are reasonable and necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, deny to any person the equal protection of the laws, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.<sup>38</sup>

**Presumption in Favor of Validity; Legislature Permitted a Wide Latitude.**—In all matters of government, and especially of police, a wide discretion is necessary. It is not susceptible of an exact limitation, but must be exercised under the changing exigencies of society. In the progress of population, of wealth, and of civilization, new and vicious indulgences spring up which require restraints that can only be imposed by the legislative power. When this power shall be exerted, how far it shall be carried, and when it shall cease, must mainly depend upon the evil to be remedied.<sup>39</sup> There is little reason under our system of

**36. Doubtful and immoral vocations.**—*L'Hote v. New Orleans*, 177 U. S. 587, 596, 44 L. Ed. 899.

**37. Grounds of interference.**—*Lawton v. Steele*, 152 U. S. 133, 137, 38 L. Ed. 385; *Dobbins v. Los Angeles*, 195 U. S. 223, 236, 49 L. Ed. 169. See, also, the title CONSTITUTIONAL LAW, vol. 4, p. 372.

**38. Regulation must be reasonable; arbitrary interference not permissible.**—*Mugler v. Kansas*, 123 U. S. 623, 661, 31 L. Ed. 205; *Lawton v. Steele*, 152 U. S. 133, 38 L. Ed. 385; *Otis v. Parker*, 187 U. S. 606, 608, 47 L. Ed. 323; *Dobbins v. Los Angeles*, 195 U. S. 223, 236, 49 L. Ed. 169. See, generally, the titles CONSTITUTIONAL LAW, vol. 4, p. 372, et seq.; DUE PROCESS OF LAW, vol. 5, pp. 556, 585. And see ante, "Regulations Must Be Reasonable and Bona Fide. Having Some Substantial Relation to Ostensible Object, etc." V, E, 2, c.

In this case it was held that the allegations of the bill disclosed such character of territory, such sudden and unexplained change of its limits after the plaintiff in error had purchased the property and gone forward with the erection of its gas works, pursuant to permission given by the city, as to bring it within that class of cases wherein the court may restrain the arbitrary and discriminatory exercise of the police power which amounts to a taking of property without due process of law and an impairment of property rights protected by the fourteenth amendment to the federal constitution. *Dobbins v. Los Angeles*, 195 U. S. 223, 241, 49 L. Ed. 169. See, also, *Daly v. Elton*, 195 U. S. 242, 49 L. Ed. 177.

"The purpose was not police regulation in the interest of the public but the destruction of the plaintiff's rights and the building up of another company still within

the privileged district after the passage of the amendment. Being the owner of the land and having partially erected the works, the plaintiff in error had acquired property rights and was entitled to protection against unconstitutional encroachments which would have the effect to deprive her of her property without due process of law." *Dobbins v. Los Angeles*, 195 U. S. 223, 239, 49 L. Ed. 169. See, also, *Daly v. Elton*, 195 U. S. 242, 49 L. Ed. 177.

"Thus in *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220 (Co. 220), it was held by this court that a municipal ordinance of the city of San Francisco to regulate the carrying on of public laundries within the limits of the municipality violated the provisions of the constitution of the United States if it conferred upon the municipal authorities arbitrary power, at their own will, and without regard to discretion, in the legal sense of the term, to give or withhold consent as to persons or places, without regard to the competency of the persons applying, or the propriety of the places selected for the carrying on of the business. It was held to be a covert attempt on the part of the municipality to make an arbitrary and unjust discrimination against the Chinese race. While this was the case of a municipal ordinance a like principle has been held to apply to acts of a state legislature passed in the exercise of the police power. *Railroad Co. v. Husen*, 95 U. S. 465, 24 L. Ed. 527; *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, 40 L. Ed. 849, and cases cited on page 700 (859)." *Plessy v. Ferguson*, 163 U. S. 537, 41 L. Ed. 256.

**39. Presumption in favor of validity; legislature permitted a wide discretion.**—*License Cases*, 5 How. 504, 592, 12 L. Ed. 256.

government for placing a close and narrow interpretation on the police power so as to hamper the legislative power in dealing with the varying necessities of society and the new circumstances as they arise calling for legislative intervention in the public interest.<sup>40</sup> It is well settled, therefore, that the power of the court to declare such statutes unconstitutional is to be exercised with caution, that the presumption is always in favor of the validity of the regulation, and that it is not to be stricken down unless it has no real and bona fide relation to the subject which it pretends to regulate, or clearly goes beyond the necessities of the case, and constitutes a palpable and unjustifiable invasion of the rights of the citizen.<sup>41</sup>

**No Universal Rule; Question in Each Case.**—See ante, "Judicial Review," V, E, 2, d.

(2) *Regulation May Extend to Suppression.*—Regulation may sometimes appropriately assume the form of prohibition. If the public safety or the public morals require the discontinuance of a manufacture, business or traffic, the legislature may provide for its discontinuance, notwithstanding individuals may thereby suffer loss and inconvenience. The exercise of such power is not hampered by the obligation to make compensation for the losses sustained.<sup>42</sup>

**40. Same.**—*Budd v. New York*, 143 U. S. 517, 534, 36 L. Ed. 247.

"An examination of cases under the fourteenth amendment will demonstrate that, in passing upon the validity of state legislation under that amendment, this court has not failed to recognize the fact that the law is, to a certain extent, a progressive science; that in some of the states methods of procedure, which, at the time the constitution was adopted, were deemed essential to the protection and safety of the people, or to the liberty of the citizen, have been found to be no longer necessary; that restrictions which had formerly been laid upon the conduct of individuals, or of classes of individuals, had proved detrimental to their interests; while, upon the other hand, certain other classes of persons, particularly those engaged in dangerous or unhealthful employments, have been found to be in need of additional protection." *Holden v. Hardy*, 169 U. S. 366, 385, 42 L. Ed. 780.

**41. Same.**—*Dobbins v. Los Angeles*, 195 U. S. 223, 237, 49 L. Ed. 169. See, also, *Daly v. Elton*, 195 U. S. 242, 49 L. Ed. 177; *Petit v. Minnesota*, 177 U. S. 164, 168, 44 L. Ed. 716. See ante, "Judicial Review," V, E, 2, d.

**42. Regulation may extend to prohibition or suppression.**—*License Cases*, 5 How. 504, 589, 12 L. Ed. 256; *Bartemeyer v. Iowa*, 18 Wall. 129, 21 L. Ed. 929; *Beer v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036; *Transportation Co. v. Chicago*, 99 U. S. 635, 25 L. Ed. 336; *Stone v. Mississippi*, 101 U. S. 814, 25 L. Ed. 1079; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 29 L. Ed. 516; *Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. Ed. 253; *In re Rahrer*, 140 U. S. 545, 35 L. Ed. 572; *Austin v. Tennessee*, 179 U. S. 343, 362, 45 L. Ed. 224; *Reid v. Colorado*, 187 U. S. 137, 47 L. Ed. 108;

*Lottery Case*, 188 U. S. 321, 47 L. Ed. 492; *Daly v. Elton*, 195 U. S. 242, 49 L. Ed. 177; *Dobbins v. Los Angeles*, 195 U. S. 223, 238, 49 L. Ed. 169. See, also, ante, "Fourteenth Amendment Not Designed to Interfere with Legitimate Exercise of the Police Power," V, E, 1; "Exercise of Power Not Hampered by Obligation to Make Compensation for Injuries Sustained," VI, A, 3.

"Where the police power is invoked in good faith for the prohibition of a practice which the legislature has declared to be detrimental to the public interests, it will be sustained, wherever it can be done without the impairment of vested rights." *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, 40 L. Ed. 849.

The principle embodied in the fourteenth amendment that no person shall be deprived of life, liberty or property without due process of law does not require the state to make compensation for property rendered wholly useless and worthless by reason of police regulations prohibiting its use for certain purposes, for example, the manufacture and sale of intoxicating liquors. This results from the principle that neither the legislature nor the state itself can barter away the police power of the state to enact laws for the protection of the public health, morals and safety, and from the further principle that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community. This is entirely different from the case where the state takes property under the power of eminent domain. In one case the state takes the property for a public use; in the other the property is rendered useless by the operation of a valid police regulation. In the one case the state is required to make a just compensation; in the other it is *damnum absque injuria*. *Mugler v. Kansas*, 123 U. S. 623, 664, 668, 31 L. Ed. 205,



**Where Business Not Necessarily Objectionable but Objectionable as Ordinarily Prosecuted.**—If the state thinks that an admitted evil cannot be prevented except by prohibiting a calling or transaction not in itself necessarily objectionable, the courts cannot interfere, unless, in looking at the substance of the matter, they can see that it is a clear, unmistakable infringement of rights secured by the fundamental law.<sup>43</sup>

distinguishing *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 20 L. Ed. 557. Accord: *Stone v. Mississippi*, 101 U. S. 814, 816, 25 L. Ed. 1079; *Beer Co. v. Massachusetts*, 97 U. S. 25, 32, 24 L. Ed. 989; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 667, 24 L. Ed. 1036; *Transportation Co. v. Chicago*, 99 U. S. 635, 642, 25 L. Ed. 336.

A statute prohibiting the manufacture and sale of oleomargarine, thereby destroying the value of stocks of the manufactured article already on hand, being a valid police regulation, is not unconstitutional as operating to deprive the owners of such stocks of their property without compensation or due process of law. *Powell v. Pennsylvania*, 127 U. S. 678, 687, 32 L. Ed. 253. Accord: *Mugler v. Kansas*, 123 U. S. 623, 663, 31 L. Ed. 205.

So the state may abolish the traffic in intoxicating liquors without making any compensation for the resulting depreciation in value of property previously used in connection with such business. *Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205; *In re Rahrer*, 140 U. S. 545, 35 L. Ed. 572. See the title INTOXICATING LIQUORS, vol. 7, p. 518.

"That regulation may sometimes appropriately assume the form of prohibition is also illustrated by the case of diseased cattle, transported from one state to another. Such cattle may have, notwithstanding their condition, a value in money for some purposes, and yet it cannot be doubted that congress, under its power to regulate commerce, may either provide for their being inspected before transportation begins, or, in its discretion, may prohibit their being transported from one state to another." *Lottery Case*, 188 U. S. 321, 358, 47 L. Ed. 492; *Reid v. Colorado*, 187 U. S. 137, 47 L. Ed. 108.

"The act of July 2, 1890, known as the Sherman Anti-Trust Act, and which is based upon the power of congress to regulate commerce among the states, is an illustration of the proposition that regulation may take the form of prohibition. The object of that act was to protect trade and commerce against unlawful restraints and monopolies. To accomplish that object congress declared certain contracts to be illegal. That act, in effect, prohibited the doing of certain things, and its prohibitory clauses have been sustained in several cases as valid under the power of congress to regulate interstate commerce. *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 41 L. Ed. 1007; *United States v. Joint Traffic Ass'n*, 171 U. S. 505, 43 L. Ed. 259; *Addys-*

*ton Pipe, etc., Co. v. United States*, 175 U. S. 211, 44 L. Ed. 136. In the case last named the court, referring to the power of congress to regulate commerce among the states, said: 'In *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23, the power was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the constitution. Under this grant of power to congress, that body, in our judgment, may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations where the natural and direct effect of such a contract will be, when carried out, to directly and not as a mere incident to other and innocent purposes, regulate to any substantial extent interstate commerce. (And when we speak of interstate we also include in our meaning foreign commerce.) We do not assent to the correctness of the proposition that the constitutional guaranty of liberty to the individual to enter into private contracts limits the power of congress and prevents it from legislating upon the subject of contracts of the class mentioned.'" *Lottery Case*, 188 U. S. 321, 359, 47 L. Ed. 492.

**43. Where business not necessarily objectionable, but objectionable as ordinarily prosecuted.**—*Booth v. Illinois*, 184 U. S. 425, 429, 46 L. Ed. 623; *Otis v. Parker*, 187 U. S. 606, 609, 47 L. Ed. 323. See, also, the titles CONSTITUTIONAL LAW, vol. 4, pp. 378, 379; DUE PROCESS OF LAW, vol. 5, p. 563.

"Is it true that the legislature is without power to forbid or suppress a particular kind of business, where such business, properly and honestly conducted, may not, in itself, be immoral? We think not. A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious. If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the state thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public moral, has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law." *Booth v. Illinois*, 184 U. S. 425, 429, 46 L. Ed.



**Where Company Incorporated for Purpose of Engaging in Prohibited Business.**—That the company engaged in the manufacture or traffic deemed injurious to the public morals or the public safety has been incorporated for the purpose of engaging therein is immaterial. The legislature cannot barter away the police powers of the state, and such company possesses no greater rights under its charter than individuals engaged in the same business.<sup>44</sup>

**As Affected by the Interstate Commerce Clause.**—See the title INTER-STATE AND FOREIGN COMMERCE, vol. 7, pp. 363, 386.

(3) *As to the Retrospective Operation of Regulations; Interest or Estate in Profession, Business, etc.*—See, generally, the title CONSTITUTIONAL LAW, vol. 4, pp. 377, 430, 431. And see ante, "A Continuing Power; Cannot Be Bargained Away," V, D, 3, et seq. As to the disbarment of attorneys at law, see the title ATTORNEY AND CLIENT, vol. 2, p. 732, et seq.

4. PARTICULAR REGULATIONS—*a. Power to Prescribe Qualifications for Persons Seeking to Enter the Learned Professions or Occupations Requiring Peculiar Knowledge or Skill.*—**Generally.**—The power of the state to provide for the general welfare of its people authorizes it to prescribe all such reasonable regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as deception and fraud.<sup>45</sup> Within the acknowledged reach of the police power, a state may prescribe the qualifications of any one engaged or desiring to engage in any business or profession directly affecting the lives and health of the people, and the successful prosecution of which requires skilled or technical knowledge or special qualifications and fitness of those engaging therein.<sup>46</sup> The nature and extent of the qualifications required must depend primarily upon the judgment of the state as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation.<sup>47</sup>

**Interest or Estate in Profession; Power to Make Regulations Applicable to Existing Practitioners.**—See the title CONSTITUTIONAL LAW, vol. 4, p. 430, et seq. See, also, ante, "A Continuing Power; Cannot Be Bargained Away," V, D, 3, et seq. As to the disbarment of attorneys, see the title ATTORNEY AND CLIENT, vol. 2, p. 732, et seq.

623, followed in *Otis v. Parker*, 187 U. S. 606, 609, 47 L. Ed. 323. See, also, *Mugler v. Kansas*, 123 U. S. 623, 661, 31 L. Ed. 205; *Minnesota v. Barber*, 136 U. S. 313, 34 L. Ed. 455; *Brimmer v. Rehman*, 138 U. S. 78, 34 L. Ed. 862; *Voight v. Wright*, 141 U. S. 62, 35 L. Ed. 638.

44. **Where company incorporated for engaging in prohibited business.**—*Beer Co. v. Massachusetts*, 97 U. S. 25, 32, 24 L. Ed. 989; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036; *Stone v. Mississippi*, 101 U. S. 814, 816, 25 L. Ed. 1079. See, also, ante, "Generally," V, D, 3, a.

"The right to exercise the police power is a continuing one and a business lawful to-day may in the future, because of the changed situation, the growth of population or other causes, become a menace to the public health and welfare, and be required to yield to the public good. *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 672, 29 L. Ed. 516." *Dobbins v. Los Angeles*, 195 U. S. 223, 238, 49 L. Ed. 169. See,

also, *Daly v. Elton*, 195 U. S. 242, 49 L. Ed. 177.

45. **Power to prescribe regulations for persons seeking to enter the learned professions or occupations requiring peculiar knowledge or skill.**—*Dent v. West Virginia*, 129 U. S. 114, 122, 32 L. Ed. 623; *Plumley v. Massachusetts*, 155 U. S. 461, 472, 39 L. Ed. 223; *Crossman v. Lurman*, 192 U. S. 189, 197, 48 L. Ed. 401. See, also, the titles CONSTITUTIONAL LAW, vol. 4, p. 431; LICENSES, vol. 7, p. 880.

46. **Same.**—*Smith v. Alabama*, 124 U. S. 465, 31 L. Ed. 508; *Dent v. West Virginia*, 129 U. S. 114, 122, 32 L. Ed. 623; *Hawker v. New York*, 170 U. S. 189, 191, 42 L. Ed. 1002; *Reetz v. Michigan*, 188 U. S. 505, 47 L. Ed. 563. See, generally, the title CONSTITUTIONAL LAW, vol. 4, pp. 430, 431.

47. **Same; nature and extent of requirements.**—*Dent v. West Virginia*, 129 U. S. 114, 122, 32 L. Ed. 623. See, generally, the title CONSTITUTIONAL LAW, vol. 4, pp. 431, 432.

**Qualifications and Admission of Attorneys at Law.**—See the titles ATTORNEY AND CLIENT, vol. 2, pp. 706, 707; CIVIL RIGHTS, vol. 3, p. 834; CONSTITUTIONAL LAW, vol. 4, p. 430.

**Practice of Medicine.—Generally.**—See, generally, the title CONSTITUTIONAL LAW, vol. 4, pp. 377, 430, 431.

**Requirements as to Character.**—The legislature has the same power to require, as a condition of the right to practice this profession, that the practitioner shall be possessed of the qualification of honor and good moral character, as it has to require that he shall be learned in the profession. It cannot be doubted that the legislature has authority, in the exercise of its general police power, to make such reasonable requirements as may be calculated to bar from admission to this profession dishonorable men, whose principles or practices are such as to render them unfit to be entrusted with the discharge of its duties.<sup>48</sup>

**Same; Evidence of Character.**—And if a state may require good character as a condition of the practice of medicine, it may rightfully determine what shall be the evidence of that character. "We do not mean to say that it has an arbitrary power in the matter, or that it can make a conclusive test of that which has no relation to character, but it may take whatever, according to the experience of mankind, reasonably tends to prove the fact and make it a test." Whatever is ordinarily connected with bad character, or indicative of it, may be prescribed by the legislature as conclusive evidence thereof.<sup>49</sup> It is not the province of the courts to say that other tests would be more satisfactory, or that the naming of other qualifications would be more conducive to the desired result. These are questions for the legislature to determine.<sup>50</sup>

**Pharmacy.**—See the title CONSTITUTIONAL LAW, vol. 4, p. 431.

**Locomotive Engineers.**—See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 416.

b. *Requiring Public Corporation to Bear Expense Incident to Its Regulation.*—See, generally, the title CONSTITUTIONAL LAW, vol. 4, pp. 373, 374.

**Mine Inspection.**—As to the constitutionality of statutes requiring mine owners to bear the cost of the inspection of their mines, see the title CONSTITUTIONAL LAW, vol. 4, pp. 371, 373, 374, 379, 380; MINES AND MINERALS, vol. 8, p. 407.

c. *Prohibiting Use of Flag for Advertising Purposes.*—See the title CONSTITUTIONAL LAW, vol. 4, pp. 184, 364, 487.

d. *Granting Exclusive Privileges to Pursue Particular Business or Profession.*—

**48. Requirements as to character.**—*Hawker v. New York*, 170 U. S. 189, 194, 42 L. Ed. 1002.

**49. Same; evidence of character.**—*Hawker v. New York*, 170 U. S. 189, 195, 42 L. Ed. 1002.

**50. Same; judicial review.**—*Dent v. West Virginia*, 129 U. S. 114, 122, 32 L. Ed. 623; *Hawker v. New York*, 170 U. S. 189, 195, 42 L. Ed. 1002.

**Same; proof of conviction of felony.**—It is not open to doubt that the violation of the criminal laws of the state—the commission of crime—has some relation to the question of character. The legislature may therefore make a violation of the criminal laws of the state a test of bad character. In so doing it does not lay down any arbitrary or fanciful rule. *Hawker v. New York*, 170 U. S. 189, 196, 42 L. Ed. 1002.

Such being the case, there can be no more conclusive evidence of the fact of such violation than a conviction duly had in one of the courts of the state, and a law which makes the record of such con-

victions conclusive evidence of the fact of violation is within the constitutional power of the legislature. *Hawker v. New York*, 170 U. S. 189, 196, 42 L. Ed. 1002.

It is no answer to say that this test of character is not in all cases absolutely certain, and that sometimes it works harshly; that one who has violated the criminal law may thereafter reform and become in fact possessed of a good moral character. The legislature has power in cases of this kind to make a rule of universal application, and no inquiry is permissible back of the rule to ascertain whether the fact of which the rule is made the absolute test does or does not exist. *Hawker v. New York*, 170 U. S. 189, 197, 42 L. Ed. 1002.

Such act is a reasonable regulation as to the qualifications and fitness of members of that profession even as applied to one who was not only licensed as a practitioner before the enactment of such act, but who committed a felony and was convicted thereof before it was enacted



**Generally.**—See, generally, the titles CONSTITUTIONAL LAW, vol. 4, pp. 409, 411; MONOPOLIES AND CORPORATE TRUSTS, vol. 8, p. 431.

**But where the business does not affect the public health or safety,** the legislature cannot arbitrarily grant exclusive privileges to a few and exclude all others from pursuing a lawful business, for, as we have seen, the right to engage in a lawful business, trade, occupation, or profession upon terms of equality with all others is one of the rights protected by the guarantees in favor of life, liberty, and the pursuit of happiness.<sup>51</sup>

e. *Suppression of Monopolies and Combinations in Restraint of Trade.*—See the titles DUE PROCESS OF LAW, vol. 5, pp. 559, 560; INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 332, 476, et seq.; MONOPOLIES AND CORPORATE TRUSTS, vol. 8, p. 431; RESTRAINT OF TRADE. As denying the equal protection of the laws, see the title CONSTITUTIONAL LAW, vol. 4, pp. 374, 377.

f. *Statute to Enforce Payment of Debts.*—A mere statute to compel the payment of indebtedness does not come within the scope of police regulations.<sup>52</sup>

g. *Mechanics' Liens.*—See, generally, the title MECHANICS' LIENS, vol. 8, p. 328. As abridging the liberty of contract or depriving the owner of his property without due process of law, see the title DUE PROCESS OF LAW, vol. 5, p. 560.

h. *Inspection Laws.*—The power of the state to pass inspection laws is a branch of the general power to regulate internal police.<sup>53</sup>

i. *Sunday Laws.*—The legislature having power to enact laws to promote the order and to secure the comfort, happiness and health of the people, it is within its discretion to fix the day when all labor, within the limits of the state, works of necessity and charity excepted, shall cease.<sup>54</sup> It is not for the judiciary to say that the wrong day was fixed, much less that the legislature erred when it assumed that the best interests of all required that one day in seven should be kept for the purposes of rest from ordinary labor. The fundamental law of the state committed these matters to the determination of the legislature. If the lawmaking power errs in such matters, its responsibility is to the electors, and not to the judicial branch of the government.<sup>55</sup>

j. *Licenses; Occupation Taxes.*—See, generally, the title LICENSES, vol. 7, p. 869.

Hawker v. New York, 170 U. S. 189, 42 L. Ed. 1002.

**51. Where business does not affect public health or safety.**—See ante, "Right of Citizens to Pursue Lawful Occupation, Enter into Contracts, Acquire and Dispose of Property upon Terms of Equality," VI, K, 1, and references there given.

If it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him (to a certain extent) of his liberty; for it takes from him the freedom of adopting and following the pursuit which he prefers; which is a material part of the liberty of the citizen. *Algeyer v. Louisiana*, 165 U. S. 578, 590, 41 L. Ed. 832; *Butchers' Union Slaughter-House, etc., Co. v. Crescent City, etc., Slaughter-House Co.*, 111 U. S. 746, 764, 28 L. Ed. 585.

**52. Statute to enforce payment of debts.**—*Gulf, etc., R. Co. v. Ellis*, 165 U. S. 150, 158, 41 L. Ed. 66. See further, on this point, the title CONSTITUTIONAL LAW, vol. 4, p. 387.

**53. Inspection laws.**—*New York City v.*

*Miln*, 11 Pet. 102, 142, 9 L. Ed. 648. See, generally, the titles INSPECTION LAWS, vol. 7, p. 16; INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 332.

**54. Sunday laws.**—*Soon Hing v. Crowley*, 113 U. S. 703, 710, 28 L. Ed. 1145; *Hennington v. Georgia*, 163 U. S. 299, 304, 41 L. Ed. 166; *Petit v. Minnesota*, 177 U. S. 164, 165, 44 L. Ed. 716. See, generally, the title SUNDAYS AND HOLIDAYS.

**55. Same.**—*Hennington v. Georgia*, 163 U. S. 299, 304, 41 L. Ed. 166.

**Legislative motives.**—See the title CONSTITUTIONAL LAW, vol. 4, p. 270.

**Operation of freight trains on Sunday.**—The statute of Georgia forbidding the operation of freight trains on Sunday is, in every substantial sense, a police regulation established under the general authority possessed by the legislature to provide by law, for the well being of the people, and it is not in conflict with the constitution of the United States. *Hennington v. Georgia*, 163 U. S. 299, 307, 41 L. Ed. 166.

"It is none the less a civil regulation because the day on which the running of freight trains is prohibited is kept by



**Vesting Discretion in Some Subordinate Board or Officer.**—See the title CONSTITUTIONAL LAW, vol. 4, p. 368, et seq.; LICENSES, vol. 7, p. 886.

**Express Companies and Other Carriers.**—See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 444, et seq.

**Intoxicating Liquors.**—See the titles CONSTITUTIONAL LAW, vol. 4, p. 377; INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 378, et seq.; INTOXICATING LIQUORS, vol. 7, p. 518.

k. *Regulation of the Relation of Master and Servant: Protection of Employees, etc.*—(1) *Generally.*—It is undoubtedly within the police power of the state to enact regulations compelling employers of labor to adopt rules, regulations and appliances tending to secure the safety of the lives and limbs of persons engaged in dangerous employments.<sup>56</sup>

(2) *Extends to Protection of Health and Morals.*—And if it be within the power of a legislature to adopt such means for the protection of the lives of its citizens, it is difficult to see why precautions may not also be adopted for the protection of their health and morals, since it is as much for the interest of the state that the public health should be preserved as that life should be made secure.<sup>57</sup> Doctrines relating to the freedom of contract and of employment have no application to cases where the legislature has adjudged that a limitation is necessary for the preservation of the health of employees, and there are reasonable grounds for believing that such determination is supported by the facts.<sup>58</sup>

(3) *Protection of Laborer against Himself; Legislature Takes Notice That Employer and Employee Not upon an Equal Footing.*—The fact that both parties are of full age and competent to contract does not necessarily deprive the state of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself. The state still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety and welfare are sacrificed or neglected, the state must suffer.<sup>59</sup> In regulating the relation of master and servant, employer and employee, therefore, the legislature may take note of the fact that the laborer is at some disadvantage, and may enact statutes whose purpose and effect is to secure him the prompt payment of his wages, or prevent injury to his health through overwork in dangerous or peculiarly trying occupations.<sup>60</sup>

many under a sense of religious duty." *Hennington v. Georgia*, 163 U. S. 299, 304, 41 L. Ed. 166. See, also, the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 418.

**Barber shops; denial of equal protection.**—See the title CONSTITUTIONAL LAW, vol. 4, p. 375.

**56. Relation of master and servant; protection of employees.**—*Holden v. Hardy*, 169 U. S. 366, 42 L. Ed. 780.

**57. Same; extends to protection of health and morals.**—*Holden v. Hardy*, 169 U. S. 366, 395, 42 L. Ed. 780.

**58. Same.**—*Holden v. Hardy*, 169 U. S. 366, 398, 42 L. Ed. 780. See, generally, the title LABOR, vol. 7, p. 786.

**59. Protection of laborer against himself.**—*Holden v. Hardy*, 169 U. S. 366, 397, 42 L. Ed. 780.

**60. Same; legislature takes notice that employer and employee not upon an equal footing.**—*Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 46 L. Ed. 55 (followed in *Dayton, etc., Iron Co. v. Barton*, 183 U. S. 23, 46 L. Ed. 61); *Atchison, etc., R. Co. v. Matthews*, 174 U. S. 96, 43 L. Ed. 909;

*St. Louis, etc., R. Co. v. Paul*, 173 U. S. 404, 43 L. Ed. 746; *Holden v. Hardy*, 169 U. S. 366, 42 L. Ed. 780; *Lochner v. New York*, 198 U. S. 45, 49 L. Ed. 937. See, generally, the title LABOR, vol. 7, pp. 786, 788.

"The legislature has also recognized the fact, which the experience of legislators in many states has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employees, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority." *Holden v. Hardy*, 169 U. S. 366, 397, 42 L. Ed. 780.

(4) *Limitations; Regulations Must Be Reasonable; Arbitrary Interference Not Permissible.*—This power of the legislature, like every other exercise of the police power, is subject to the limitation that the regulations prescribed must be reasonable and that unnecessary and arbitrary interference will not be tolerated.<sup>61</sup> The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression, or spoliation of a particular class.<sup>62</sup>

(5) *Same; Liberty of Contract Includes Both Parties.*—The liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.<sup>63</sup>

(6) *Abolishing or Modifying the Doctrine of Fellow Servants.*—See the titles CONSTITUTIONAL LAW, vol. 4, pp. 381, 382; FELLOW SERVANTS, vol. 6, p. 270.

(7) *Securing Payment of Wages Promptly and in Money*—(a) *Generally.*—See the titles CONSTITUTIONAL LAW, vol. 4, p. 381; DUE PROCESS OF LAW, vol. 5, p. 561. As to sailors' wages, see the title DUE PROCESS OF LAW, vol. 5, p. 558.

(b) *Store Order Acts.*—Store order acts requiring the employers of labor to redeem such orders in cash have been held to be a valid exercise of the police power of the state and not an infringement of the liberty of contract guaranteed by the fourteenth amendment, nor an impairment of the charter rights of corporations affected thereby.<sup>64</sup>

(8) *Limiting Days and Hours of Employment*—(a) *Sunday Laws.*—See ante, "Sunday Laws," VI, K, 4, i.

(b) *Eight-Hour Laws.*—There are those employments, when too long pursued, the legislature has adjudged to be detrimental to the health of the employees, and, so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the federal courts.<sup>65</sup>

5. APPLICATION OF PRINCIPLES TO PARTICULAR BUSINESS, TRADE, OCCUPATION OR PROFESSION—a. *Regulation of the Import Trade.*—The power of congress to

**61. Regulations must be reasonable, etc.**—Holden v. Hardy, 169 U. S. 366, 42 L. Ed. 780; Lochner v. New York, 198 U. S. 45, 49 L. Ed. 937.

**62. Same.**—Holden v. Hardy, 169 U. S. 366, 398, 42 L. Ed. 780; Lochner v. New York, 198 U. S. 45, 49 L. Ed. 937.

**63. Liberty of contract includes both employer and employee.**—Atkin v. Kansas, 191 U. S. 207, 223, 48 L. Ed. 148; Lochner v. New York, 198 U. S. 45, 56, 49 L. Ed. 937.

**64. Store order acts.**—Knoxville Iron Co. v. Harbison, 183 U. S. 13, 46 L. Ed. 55 (affirming the validity of the Tennessee Act of March 17, 1899, Stats. of 1899, ch. 11, p. 17); followed in Dayton, etc., Iron Co. v. Barton, 183 U. S. 23, 46 L. Ed. 61.

The legislature of Tennessee passed an act providing for the redemption in cash of coupons, scrip, store orders, etc., by the firm or corporation issuing them to its employees in payment of wages, at their face value, the presentment thereof to be under certain reasonable regulations. It was held that such act was not an arbitrary abridgment of the right of contract or a taking of property without due process of law, but was a legitimate exercise of the police power of the state. Knoxville Iron Co. v. Harbison, 183 U. S. 13, 20, 46 L. Ed. 55.

A Tennessee act requiring a firm or corporation to redeem in cash at face value, store orders issued to its employees in payment of wages having been held constitutional in the case of a domestic corporation in Knoxville Iron Co. v. Harbison, 183 U. S. 13, 46 L. Ed. 55, it is here held applicable and valid as to foreign corporations. Dayton, etc., Iron Co. v. Barton, 183 U. S. 23, 24, 46 L. Ed. 61.

**65. Eight-hour laws.**—Holden v. Hardy, 169 U. S. 366, 395, 42 L. Ed. 780. See, generally, the title LABOR, vol. 7, pp. 786, 788.

"On few subjects has there been more regulation. How many hours shall constitute a day's work in the absence of contract, at what time shops in our cities shall close at night, are constant subjects of legislation. Laws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor. Such laws have always been deemed beneficent and merciful laws, especially to the poor and dependent, to the laborers in our factories and workshops and in the heated rooms of our cities; and their validity has been sus-



regulate commerce with foreign nations is expressly conferred upon congress, and being an enumerated power, is complete in itself, acknowledging no limitations other than those prescribed in the constitution.<sup>66</sup> No individual has a vested right to trade with foreign nations, which is so broad in character as to limit and restrict the power of congress to determine what articles of merchandise may be imported into this country and the terms upon which a right to import may be exercised. This being true, it results that a statute which restrains the introduction of particular goods into the United States from considerations of public policy does not violate the due process clause of the constitution.<sup>67</sup> It is competent for congress by statute, under the power to regulate foreign commerce, to establish standards and provide that no right shall exist to import teas or other articles from foreign countries into the United States unless such articles shall be equal to the prescribed standards. Such an act is not unconstitutional as depriving persons affected thereby of any vested right to import teas, drugs or other articles which fall below the standard even though such articles may be pure and free from adulteration.<sup>68</sup>

b. *Common Carriers*.—Common carriers exercise a sort of public office, and have duties to perform in which the public is interested. Their business is, therefore, affected with a public interest, and is the subject of public regulation.<sup>69</sup>

**Regulation Through Commissioners.**—The power of the state to exercise legislative control over railroad companies and other carriers in all respects necessary to protect the public against danger, injustice, and oppression, may be exercised through boards of commissioners.<sup>70</sup>

**As to Regulation of Rates.**—See the title CARRIERS, vol. 3, p. 622, et seq. And see post, "Regulation of Rates," VI, L, et seq.

c. *Regulation of Railroads*.—See, generally, the titles CARRIERS, vol. 3, p. 564, et seq.; CONSTITUTIONAL LAW, vol. 4, pp. 264, 361, 380, 383, 386, 388; INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 409; et seq.; RAILROADS.

**As to damages for injuries to animals**, see the title ANIMALS, vol. 1, p. 322.

**As to the equal protection of the laws**, see the title CONSTITUTIONAL LAW, vol. 4, pp. 264, 361, 380, 383, 386, 387.

d. *Street Railways*.—See, generally, the title STREET RAILWAYS. As to the continuing control of the state or municipality over tracks in streets, see ante, "A Continuing Power; Cannot Be Bargained Away," V, D, 3, et seq. As to the uncompensated removal of tracks, paving of tracks, etc., see the titles CONSTITUTIONAL LAW, vol. 4, p. 405, et seq.; DUE PROCESS OF LAW, vol. 5, pp. 583, 584; STREET RAILWAYS.

e. *Telegraphs and Telephones*.—See the titles INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 376, 377, 424, 425; LICENSES, vol. 7, pp. 875, 876, 879, 880;

tained by the highest courts of the states." *Soon Hing v. Crowley*, 113 U. S. 708, 710, 28 L. Ed. 1145.

66. **Regulation of the import trade.**—*Buttfield v. Stranahan*, 192 U. S. 470, 493, 48 L. Ed. 525, followed in *Buttfield v. Bidwell*, 192 U. S. 498, 48 L. Ed. 536; *Buttfield v. United States*, 192 U. S. 499, 48 L. Ed. 537. See, also, the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 304, 305.

67. **No individual possessed of a vested right.**—*Buttfield v. Stranahan*, 192 U. S. 470, 493, 48 L. Ed. 525, followed in *Buttfield v. Bidwell*, 192 U. S. 498, 48 L. Ed. 536; *Buttfield v. United States*, 192 U. S. 499, 48 L. Ed. 537.

68. **Same; congress may establish standards of purity, excellence, etc.**—*Buttfield v. Stranahan*, 192 U. S. 470, 493, 48 L. Ed.

525, followed in *Buttfield v. Bidwell*, 192 U. S. 498, 48 L. Ed. 536; *Buttfield v. United States*, 192 U. S. 499, 48 L. Ed. 537. See, generally, the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 331.

**Same; summary destruction of articles falling below the standard.**—See the title DUE PROCESS OF LAW, vol. 5, p. 583.

69. **Common carriers.**—*New Jersey Steam Navi. Co. v. Merchants' Bank*, 6 How. 344, 382, 12 L. Ed. 465; *Munn v. Illinois*, 94 U. S. 113, 130, 24 L. Ed. 77. See, generally, the titles CARRIERS, vol. 3, p. 622, et seq.; INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 409, et seq.

70. **Regulation through commissioners.**—*New York, etc., R. Co. v. Bristol*, 151



TELEGRAPHS AND TELEPHONES. As to state taxation or regulation of telegraph company employed as a federal agency, see the title CONSTITUTIONAL LAW, vol. 4, p. 200. As to state taxation of interstate companies with reference to power of state to tax property situated beyond its limits, see the title CONSTITUTIONAL LAW, vol. 4, p. 349.

f. *Warehouses and Elevators.*—The business of elevating and storing grain is affected with a public interest. The case falls within the principle which permits the legislature to regulate the business of common carriers, ferrymen and hackmen, and interest on the use of money.<sup>71</sup>

**Requirement of License.**—The mere requirement of a license from a person, firm or corporation engaged in the business of conducting a grain elevator for the purpose of buying, storing and shipping grain, even though the proprietor buys the grain outright and handles no grain except that which he has purchased, is not forbidden by the fourteenth amendment of the constitution of the United States.<sup>72</sup> The authority to make such a requirement is to be referred to the

U. S. 556, 571, 38 L. Ed. 269; *Connecticut, etc., R. Co. v. Woodruff*, 153 U. S. 689, 38 L. Ed. 869. See, generally, the title CARRIERS, vol. 3, p. 629.

71. **Warehouses and elevators.**—*Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Budd v. New York*, 143 U. S. 517, 533, 36 L. Ed. 247; *Brass v. Stoesser*, 153 U. S. 391, 403, 38 L. Ed. 757; *Cargill Co. v. Minnesota*, 180 U. S. 452, 45 L. Ed. 619.

**Requiring owner of elevator to give bond, insure grain, etc.**—The business of elevating and storing grain is a business affected with a public use, and the state law declaring those persons engaged therein to be public warehousemen and requiring them to give bond for the faithful performance of their duties, and fixing the rates of storage, and requiring them to keep all grain stored in them insured for the benefit of the owners thereof, is a valid exercise of the police power of the state, and does not deny them the equal protection of the laws nor deprive them of their property without due process of law. *Brass v. Stoesser*, 153 U. S. 391, 403, 38 L. Ed. 757, following and reaffirming *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Budd v. New York*, 143 U. S. 517, 36 L. Ed. 247.

The North Dakota act of March 7, 1891, ch. 126, declaring grain elevators to be public warehouses, and regulating the charges for storing and handling grain, and compelling the owners of such elevators to insure at their own expense grain stored with them, having been held by the supreme court of that state not to apply to elevators used solely for the purpose of storing the proprietor's own grain, was held not to deprive those persons owning elevators and who stored grain for others, of their property without due process of law in violation of the constitution of the United States. *Brass v. Stoesser*, 153 U. S. 391, 38 L. Ed. 757, reaffirming *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Budd v. New York*, 143 U. S. 517, 36 L. Ed. 247.

The proprietor of an elevator cannot escape the operation of such a law upon

the plea that his principal business in connection with such warehouse or elevator is in the storing of his own grain and that the storage of the grain of other persons is and always has been a mere incident, and that the effect of the law will be to compel him to renounce his principal business and become a mere warehouseman for others. The law does not affect him who uses his warehouse for the sole purpose of storing his own grain, but merely prescribes the rules and regulations by which he is to be governed in case he desires to engage in the business of storing grain for others. *Brass v. Stoesser*, 153 U. S. 391, 404, 38 L. Ed. 757.

The provisions requiring the warehousemen to insure the grain of owners at his own expense, while it may be burdensome, does not deprive the warehousemen of the equal protection of the law if it affects alike all engaged in the same business. *Brass v. Stoesser*, 153 U. S. 391, 404, 38 L. Ed. 757.

**Denial of equal protection**, see the title CONSTITUTIONAL LAW, vol. 4, pp. 359, 378.

**As to regulation of rates**, see the titles CONSTITUTIONAL LAW, vol. 4, p. 378; INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 428; WAREHOUSES AND WAREHOUSEMEN. And see post, "Regulation of Rates," VI, L, et seq.

**State regulation as a regulation of interstate commerce.**—See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 428.

72. **Requirement of license.**—*Cargill Co. v. Minnesota*, 180 U. S. 452, 467, 45 L. Ed. 619.

"The defendant's warehouse could be fairly regarded 'as a sort of public market where the farmers come with their grain for the purpose of selling the same, and where the purchaser, a party in interest, acts as marketmaster, weighmaster, inspector and grader of the grain.' We cannot question the power of the state, so far as the constitution of the United States is concerned, to require a license

general power of the state to adopt such regulations as are appropriate to protect the people in the enjoyment of their relative rights and privileges, and to guard them against fraud and imposition.<sup>73</sup>

g. *Port and Harbor Regulations*.—See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 394, 401, 429, 475.

h. *Pilots and Pilotage*.—See the titles INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 343, 401, et seq.; PILOTS, ante, p. 399.

i. *Wharves and Wharfage*.—See the titles INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 337, 429; WHARVES AND WHARFINGERS.

j. *Insurance*.—See, generally, the title INSURANCE, vol. 7, p. 66; as to subsequent police regulations, see, especially, p. 78.

**As to equal protection of the laws**, see the title CONSTITUTIONAL LAW, vol. 4, pp. 377, 378, 386, 387.

**As to Statutes Infringing the Liberty of Contract, Regulating Defenses to Actions upon Policies, etc.**—See the titles DUE PROCESS OF LAW, vol. 5, pp. 560, 561, 562, 660; INSURANCE, vol. 7, p. 159.

**Insurance as Commerce**.—See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 293.

k. *Places of Amusement, Public Entertainment, etc.*—Places of public entertainment and amusement are by the act of the owners and proprietors thereof so far affected with a public interest that the state may, in the interest of good order and fair dealing, require the proprietors thereof to perform their engagements to the public and to recognize their own tickets of admission in the hands of persons entitled to claim the benefits thereof. Regulations to that end do not violate any right of property secured by the constitution of the United States.<sup>74</sup>

l. *Sale of Drugs, Poisons, etc.*—It is within the power of the legislature to impose restrictions upon the sale of noxious or poisonous drugs, such as opium and similar articles, extremely valuable as medicines, but equally baneful to the habitual user.<sup>75</sup>

m. *Manufacture and Sale of Intoxicating Liquors*.—See the titles INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 378, et seq.; INTOXICATING LIQUORS, vol. 7, p. 518, et seq.

**Discrimination against Nonresidents in Violation of United States Constitution, Art. 4, § 2**.—See the title CONSTITUTIONAL LAW, 4, pp. 476, 477.

for the privilege of carrying on business of that character within its limits—such a license not being required for the purpose of forbidding a business lawful or harmless in itself, but only for purposes of regulation.” *Cargill Co. v. Minnesota*, 180 U. S. 452, 467, 45 L. Ed. 619.

73. *Same*.—*Cargill Co. v. Minnesota*, 180 U. S. 452, 467, 45 L. Ed. 619.

Generally, as to power to regulate, license, etc., see the titles CONSTITUTIONAL LAW, vol. 4, p. 378; LICENSES, vol. 7, pp. 880, 885; WAREHOUSES AND WAREHOUSEMEN. And see references under ELEVATORS, vol. 5, p. 731.

74. *Places of amusement, public entertainment, etc.*—*Western Turf Ass'n v. Greenberg*, 204 U. S. 359, 364, 51 L. Ed. 520.

A state law which requires the proprietor of places of public entertainment, amusement, etc., to admit every person holding a ticket acquired by purchase and who is not intoxicated or guilty of boisterous conduct, and who is not of immoral character, is not unconstitutional

as depriving the owners or proprietors of such places of their property without due process of law. *Western Turf Ass'n v. Greenberg*, 204 U. S. 359, 364, 51 L. Ed. 520.

A race course held out as a place of public entertainment and amusement is, by the act of the proprietors, so far affected with a public interest that the state may, in the interest of good order and fair dealing, require them to perform their engagement to the public, and recognize their own tickets of admission in the hands of persons entitled to claim the benefits of the statute. That such a regulation violates any right of property secured by the constitution of the United States cannot, for a moment, be admitted. *Western Turf Ass'n v. Greenberg*, 204 U. S. 359, 364, 51 L. Ed. 520.

**Equal civil rights as to such places**.—See the title CIVIL RIGHTS, vol. 3, p. 834.

75. *Sale of drugs, poisons, etc.*—*Austin v. Tennessee*, 179 U. S. 343, 348, 45 L. Ed. 224.



**Power of State to Suppress without Compensation, etc.**—See ante, "Regulation May Extend to Suppression," VI, K, 3, d, (2); "A Continuing Power; Cannot Be Bargained Away," V, D, 3, et seq. See, also, the titles CONSTITUTIONAL LAW, vol. 4, p. 377; INTOXICATING LIQUORS, vol. 7, p. 520.

**Denial of the Equal Protection of the Laws.**—See the title CONSTITUTIONAL LAW, vol. 4, pp. 369, 377.

n. *Manufacture and Sale of Cigarettes.*—Whether dealing in and selling cigarettes is that kind of a business which ought to be licensed, considering the character of the article to be sold, is a question for the state, and through it for the cities of the state to determine for themselves; and an ordinance providing reasonable conditions upon the performance of which a license may be granted to sell such articles, does not violate any provision of the federal constitution.<sup>76</sup>

o. *Manufacture and Sale of Food Stuff.*—It is unquestionably within the police power of the states to protect their citizens against the sale of unwholesome, impure and adulterated articles of food.<sup>77</sup>

**Power to Prevent Fraud and Deception.**—A state enactment forbidding the sale of deceitful imitations of articles of food in general use among the

76. *Manufacture and sale of cigarettes.*—*Gundling v. Chicago*, 177 U. S. 183, 187, 44 L. Ed. 725.

"There is doubtless fair ground for dispute as to whether the use of cigarettes is not hurtful to the community, and therefore it would be competent for a state, with reference to its own people, to declare under penalties that cigarettes should not be manufactured within its limits. No one could say that such legislation trenching upon the liberty of the citizen by preventing him from pursuing a lawful business." *Austin v. Tennessee*, 179 U. S. 343, 361, 45 L. Ed. 224.

"Without undertaking to affirm or deny their evil effects, we think it within the province of the legislature to say how far they may be sold, or to prohibit their sale entirely after they have been taken from the original packages or have left the hands of the importer, provided no discrimination be used as against such as are imported from other states." *Austin v. Tennessee*, 179 U. S. 343, 348, 45 L. Ed. 224.

An ordinance of the city of Chicago, imposing a license tax of \$100 upon persons engaged in the business of selling cigarettes, is not an improper or illegal interference with the rights of a citizen in violation of the due process clause of the fourteenth amendment. *Gundling v. Chicago*, 177 U. S. 183, 188, 44 L. Ed. 725.

**Equal protection in the matter of obtaining license.**—See the title CONSTITUTIONAL LAW, vol. 4, p. 370.

**Cigarettes as articles of interstate commerce.**—See the titles INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 360.

77. *Manufacture and sale of foodstuffs.*—*Powell v. Pennsylvania*, 127 U. S. 678, 32 L. Ed. 253; *Brimmer v. Rebman*, 138 U. S. 78, 82, 34 L. Ed. 862; *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. Ed.

223; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. Ed. 49; *Capitol City Dairy Co. v. Ohio*, 183 U. S. 238, 246, 46 L. Ed. 171; *Crossnan v. Lurman*, 192 U. S. 189, 48 L. Ed. 401; *McCray v. United States*, 195 U. S. 27, 49 L. Ed. 78; *Schick v. United States*, 195 U. S. 65, 49 L. Ed. 99. See the titles CONSTITUTIONAL LAW, vol. 4, pp. 370, 376, 377; INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 361, et seq. See FOOD, vol. 6, p. 302, and references there given.

"Undoubtedly, a state may establish regulations for the protection of its people against the sale of unwholesome meats, provided such regulations do not conflict with the powers conferred by the constitution upon congress, or infringe rights granted or secured by that instrument. But it may not, under the guise of exerting its police powers, or of enacting inspection laws, make discriminations against the products and industries of some of the states in favor of the products and industries of its own or of other states." *Brimmer v. Rebman*, 138 U. S. 78, 82, 34 L. Ed. 862.

The prohibition of the manufacture out of oleomargarine substances, or out of any compound thereof other than that produced from unadulterated milk or cream from unadulterated milk, of an article designed to take the place of butter or cheese produced from pure unadulterated milk or cream from unadulterated milk, or the prohibition upon the manufacture of any imitation or adulterated butter or cheese, or upon the selling or offering for sale, or having in possession with intent to sell, the same, as an article of food, is a lawful exercise by the state of the power to protect, by police regulations, the public health, and does not deny to any person the equal protection of the laws or deprive any person of property without due process of law, notwithstanding the law operates to render use-



people does not abridge any privilege secured to citizens of the United States, nor, in any just sense, interfere with the freedom of commerce among the several states. It is legislation which can be most advantageously exercised by the states themselves. The constitution of the United States does not secure to any one the privilege of manufacturing and selling an article of food in such manner as to induce the mass of the people to believe that they are buying something which, in fact, is wholly different from that which is offered for sale.<sup>78</sup>

**As Affected by the Commerce Clause.**—The freedom of commerce among

less that which has already been made. *Powell v. Pennsylvania*, 127 U. S. 678, 683, 684, 32 L. Ed. 253.

**78. Prevention of fraud and deception.**—*Dent v. West Virginia*, 129 U. S. 114, 32 L. Ed. 623; *Plumley v. Massachusetts*, 155 U. S. 461, 472, 39 L. Ed. 223, followed in *Crossman v. Lurman*, 192 U. S. 189, 197, 48 L. Ed. 401.

The constitution has not secured to any one the privilege of committing a wrong against society. *Plumley v. Massachusetts*, 155 U. S. 461, 471, 39 L. Ed. 223.

**Artificially colored oleomargarine.**—The right to engage in the manufacture or sale of artificially colored oleomargarine is not included in the doctrine which declares that the liberty of the citizen extends to the right to engage in a lawful occupation, trade, or business; but it is of such a character that a free government may entirely suppress or prohibit it. *McCray v. United States*, 195 U. S. 27, 49 L. Ed. 78; *Schick v. United States*, 195 U. S. 65, 49 L. Ed. 99; *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. Ed. 223. See, generally, the titles CONSTITUTIONAL LAW, vol. 4, p. 376; INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 354, 361, 362, 398, 423.

A statute prohibiting the manufacture and sale of oleomargarine, enacted in good faith for the objects expressed in its title, namely, to protect the public health and to prevent the adulteration of dairy products and fraud in the sale thereof, cannot be adjudged as abridging the rights guaranteed by the fourteenth amendment, unless it has, in fact, no real or substantial relation to those objects. *Powell v. Pennsylvania*, 127 U. S. 678, 684, 32 L. Ed. 253. Accord: *Mugler v. Kansas*, 123 U. S. 623, 661, 31 L. Ed. 205.

An act of the state of Ohio which permitted the use of harmless coloring matter in butter, but which required that oleomargarine be sold in its natural state, and which prohibited the manufacture or sale within the state of any oleomargarine if it contained coloring matter of any kind, did not deprive a corporation created by the laws of Ohio and engaged in the manufacture of oleomargarine of its property without due process of law nor deny to it the equal protection of the laws. It was competent to the legislature to provide a ready means by which the public might know that an article conferred for sale was butter and not oleomargarine. *Capitol City Dairy Co. v. Ohio*, 183 U. S.

238, 246, 46 L. Ed. 171. See, also, *Gundling v. Chicago*, 177 U. S. 183, 44 L. Ed. 725; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. Ed. 253; *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. Ed. 223.

**Effect of federal statutes upon power of states.**—See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 401.

**Federal institutions within the states.**—See the title CONSTITUTIONAL LAW, vol. 4, p. 206.

**Discrimination in federal excise.**—“Whilst undoubtedly both the fifth and tenth amendments qualify, in so far as they are applicable, all the provisions of the constitution, nothing in those amendments operates to take away the grant of power to tax conferred by the constitution upon congress.” *McCray v. United States*, 195 U. S. 27, 61, 49 L. Ed. 78.

The right of congress to tax within its delegated power being unrestrained, except as limited by the constitution, it is within the authority conferred on congress to select the objects upon which an excise should be laid. It therefore follows that, in exerting its power, no want of due process of law can possibly result, because that body chooses to impose an excise on artificially colored oleomargarine and not upon natural butter artificially colored. *McCray v. United States*, 195 U. S. 27, 61, 49 L. Ed. 78.

The distinction between artificially colored oleomargarine and artificially colored butter is sufficient to uphold an excise tax upon the former without including the latter. The oleomargarine Act, 24 Stats. 209, 32 Stats. 93, is not, therefore, obnoxious to the due process clause of the fifth amendment as arbitrarily imposing an excise upon one article and not upon another of essentially the same class. *McCray v. United States*, 195 U. S. 27, 62, 49 L. Ed. 78; *Schick v. United States*, 195 U. S. 65, 49 L. Ed. 99.

Neither is such act unconstitutional as trespassing upon fundamental human rights and excluding men from the right to engage in a lawful occupation or business. *McCray v. United States*, 195 U. S. 27, 49 L. Ed. 78; *Schick v. United States*, 195 U. S. 65, 49 L. Ed. 99.

Neither is such act an unconstitutional encroachment upon the police powers reserved to the several states. *McCray v. United States*, 195 U. S. 27, 46, 49 L. Ed. 78; *Schick v. United States*, 195 U. S. 65, 49 L. Ed. 99.

the states and the exclusive right of congress to regulate interstate commerce does not demand a recognition of the right to practice a deception upon the public in the sale of any article, even those that may have become subject to trade in different parts of the country.<sup>79</sup> The states cannot, however, discriminate against the products and industries of its own or other states under the guise of exerting its police powers.<sup>80</sup>

p. *Public Markets*.—By the law of Louisiana, as in states where the common law prevails, the regulation and control of markets for the sale of provisions, including the places and the distances from each other at which they may be kept, are matters of municipal police, and may be intrusted by the legislature to a city council to be exercised as in its discretion the public health and convenience may require.<sup>81</sup>

q. *Slaughter Houses*.—The regulation of the place and manner of conducting the slaughtering of animals, and the business of butchering within a city, and the inspection of the animals to be killed for meat, and the meat afterwards, are among the most necessary and frequent exercises of the police power.<sup>82</sup>

**Exclusive Privileges**.—While it has been held that the state may grant an exclusive privilege of the right to slaughter live stock for an entire city without infringing any constitutional right of persons engaged in the butcher trade and who desire to do their own slaughtering,<sup>83</sup> it has also been held that in a matter so closely affecting the public health, the state cannot make an irrevocable grant of its police power, and that for good cause such a monopoly may be abolished.<sup>84</sup>

r. *Hawkers, Peddlers, Hucksters, etc.*—See, generally, the titles HAWKERS AND PEDDLERS, vol. 6, p. 680; INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 450.

**Hucksters**.—See footnote.<sup>85</sup>

s. *Operation of Mines*.—The subject of mines and mining is one peculiarly within the police power of the state, and the enactment of regulations controlling the relation of mine owners and mine workers, such as abolishing or modifying fellow servants' rule, or limiting the hours of labor, or providing for the adequate inspection of mines, is an appropriate exercise of such power.<sup>86</sup>

79. **Power to prevent fraud and deception; as limited by interstate commerce clause**.—*Plumley v. Massachusetts*, 155 U. S. 461, 468, 39 L. Ed. 223.

80. **Same; discrimination against foreign products**.—*Brimmer v. Rebman*, 138 U. S. 78, 82, 34 L. Ed. 862. See, generally, the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 354, 361, 362, 386, 398, 400, 423.

81. **Public markets**.—*Natal v. Louisiana*, 139 U. S. 621, 624, 35 L. Ed. 288. See, generally, the title MARKET, vol. 8, p. 245, and references there given.

"The ordinance of the city of New Orleans prohibiting the keeping of a private market within six squares of any public market of the city, under penalty of a fine of twenty-five dollars, and of imprisonment for not more than thirty days if the fine is not paid, was within the authority constitutionally conferred upon the city council by the legislature of the state." *Natal v. Louisiana*, 139 U. S. 621, 624, 35 L. Ed. 288.

82. **Slaughter houses**.—*Slaughter-House Cases*, 16 Wall. 36, 63, 21 L. Ed. 394; *Butchers' Union Slaughter-House, etc., Co. v. Crescent City, etc., Slaughter-House Co.*, 111 U. S. 746, 28 L. Ed. 585.

See, generally, the title CONSTITUTIONAL LAW, vol. 4, p. 376.

83. **Exclusive privileges**.—*Slaughter-House Cases*, 16 Wall. 36, 21 L. Ed. 394. See the title CONSTITUTIONAL LAW, vol. 4, p. 409.

84. **Same; abolition of monopoly**.—*Butchers' Union Slaughter-House, etc., Co. v. Crescent City, etc., Slaughter-House Co.*, 111 U. S. 746, 28 L. Ed. 585. See, also, *Crescent City Live Stock Co. v. Butchers' Union Slaughter-House Co.*, 120 U. S. 141, 142, 144, 30 L. Ed. 614.

85. **Hucksters**.—An ordinance of the city of Philadelphia imposed a penalty of 37s. 6d. upon any huckster, who, within the limits of the city, should buy any provision, fruit, etc., more than was necessary for his or her family use, except after 10 o'clock on market days. Upon prosecution under this ordinance, it being objected that it was contrary to the constitution and laws of the state, and therefore void, the court took the matter under advisement; no decision so far as appears from the reported case. *De Willer v. Smith*, 2 Dall. 236, 1 L. Ed. 363.

86. **Operation of mines**.—*Wilmington Star Min. Co. v. Fulton*, 205 U. S. 60, 73, 51 L. Ed. 708; *St. Louis, etc., Coal Co. v.*



t. *Labor Agents*.—The business of a labor agent is itself of such nature and importance as to justify the exercise of the police power in its regulation.<sup>87</sup>

u. *Sheep Grazing*.—See the titles ANIMALS, vol. 1, p. 324; CONSTITUTIONAL LAW, vol. 4, p. 380; LICENSES, vol. 7, p. 888.

v. *Laundries*.—Laundries and wash houses are proper subjects for reasonable police regulation by the states.<sup>88</sup>

Illinois, 185 U. S. 203, 46 L. Ed. 872; Holden v. Hardy, 169 U. S. 366, 42 L. Ed. 780; Knoxville Iron Co. v. Harbison, 183 U. S. 13, 46 L. Ed. 55.

The use and enjoyment of mining property is subject to the reasonable exercise of the police power of the state. Wilmington Star Min. Co. v. Fulton, 205 U. S. 60, 73, 51 L. Ed. 708.

**Requiring employment of licensed mine managers.**—A state law which requires the employment of only licensed mine managers and mine examiners and which imposes upon mine owners responsibility, for the defaults or negligence of such mine managers and mine owners, but which, as construed by the state court, does not render it obligatory upon a mine owner, to select a particular individual licensed by the state board or to retain one when selected, if found incompetent, is not repugnant to the fourteenth amendment in any particular, but it is a proper exercise of the police power and not wanting in due process. Wilmington Star Min. Co. v. Fulton, 205 U. S. 60, 73, 51 L. Ed. 708.

The rights, privileges and immunities of a mine owner as a citizen of the United States are not invaded by the regulations of the Illinois Mining Act of 1899, which imposes upon mine owners the obligation to employ as mine managers and examiners only those licensed by the state. The imposition of liability upon such owner for violation of such regulations, and the modification of the fellow-servant doctrine by such act, is an appropriate exercise of the police power and is not wanting in due process of law, nor does it impose an unreasonable or arbitrary discretion or deny the equal protection of the laws. Wilmington Star Min. Co. v. Fulton, 205 U. S. 60, 73, 74, 51 L. Ed. 708.

The fact that the liability imposed upon the mine owners to respond in damages for the willful failure of the mine manager and mine examiner to comply with the requirements of the statute was not in harmony with the principles of the common law applicable to the relation of master and servant does not bring such statute in conflict with the fourteenth amendment, it being competent for the state to change and modify those principles in accord with its conceptions of public policy. Wilmington Star Min. Co. v. Fulton, 205 U. S. 60, 74, 51 L. Ed. 708.

**Inspection of coal and coal mines; equal protection.**—See the title CONSTITUTIONAL LAW, vol. 4, pp. 371, 374, 379.

**Same; delegation of powers.**—See the title CONSTITUTIONAL LAW, vol. 4, p. 291.

**Same; temporary invasion or injury of another's mine for purpose of inspection.**—See the title DUE PROCESS OF LAW, vol. 5, p. 596.

**Condemning private property in order to facilitate exploitation of privately owned mine.**—See the title DUE PROCESS OF LAW, vol. 5, p. 611.

**Hours of labor; eight-hour laws.**—See the title LABOR, vol. 7, p. 788.

**Gas and oil; prohibiting waste; adjusting conflicting interests.**—See the titles DUE PROCESS OF LAW, vol. 5, pp. 569, 570; GAS, vol. 6, p. 546.

**87. Labor agents.**—Williams v. Fears, 179 U. S. 270, 275, 45 L. Ed. 186.

**License tax as a denial of equal protection.**—See the title CONSTITUTIONAL LAW, vol. 4, p. 379.

**As abridging the freedom of contract.**—See the title DUE PROCESS OF LAW, vol. 5, pp. 554, 564.

**As an interference with interstate commerce,** see the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 450.

**88. Laundries.**—Soon Hing v. Crowley, 113 U. S. 703, 28 L. Ed. 1145; Barbier v. Connolly, 113 U. S. 27, 30, 28 L. Ed. 923.

A prohibition to carry on the washing and ironing of clothes in public laundries and wash houses, within certain prescribed limits of the city and county, from ten o'clock at night until six o'clock on the morning of the following day, is purely a police regulation within the competency of any municipality possessed of the ordinary powers belonging to such bodies. Soon Hing v. Crowley, 113 U. S. 703, 28 L. Ed. 1145; Barbier v. Connolly, 113 U. S. 27, 30, 28 L. Ed. 923.

The objection that such an ordinance is void on the ground that it deprives a man of the right to work at all times is equally without force. Soon Hing v. Crowley, 113 U. S. 703, 709, 28 L. Ed. 1145.

Of the necessity of such regulations the municipal bodies are the exclusive judges; at least any correction of their action in such matters can come only from state legislation or state tribunals. Soon Hing v. Crowley, 113 U. S. 703, 28 L. Ed. 1145; Barbier v. Connolly, 113 U. S. 27, 30, 28 L. Ed. 923.

**Equal protection of the laws.**—In Yick Wo v. Hopkins, 118 U. S. 356, 30 L. Ed. 220, it was held that a municipal ordinance of the city of San Francisco to regulate the carrying on of public laundries within the limits of the municipality violated the provisions of the constitution of the United States if it conferred upon the municipal authorities arbitrary power, at



w. *Lotteries*.—Lotteries are proper subjects for the exercise of the police power and may be lawfully suppressed, and those who manage them may be punished as violators of the rules of social morality.<sup>89</sup>

**L. Regulation of Rates.**—See, generally, the titles CONSTITUTIONAL LAW, vol. 4, p. 378; CORPORATIONS, vol. 4, pp. 634, 635, 708; INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 428, 476, 480, 481. As to regulation of railroad rates, see the title CARRIERS, vol. 3, p. 622, et seq. As to regulation of water rates, see the titles IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 5, p. 818; WATER COMPANIES AND WATERWORKS. As to regulation of rates of street railways, see the titles IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 5, p. 816; STREET RAILWAYS. As to posting rates, see the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 415. As to regulation of rates where corporation organized under law of United States, see the title CONSTITUTIONAL LAW, vol. 4, p. 204.

1. **POWER TO REGULATE**—a. *In General*.—Where private property is devoted to a use in which the public has an interest, a state legislature has the authority, where its powers have not been restrained by contract, to fix a maximum of charge to be made for services rendered, accommodations furnished and articles sold, upon the ground that the public may not rightfully be required to submit to unreasonable exactions,<sup>90</sup> provided the charges fixed by the statute are not unreasonable, and property is not taken without due process of law, and there has been no denial of the equal protection of the laws.<sup>91</sup> Indeed, this power is inherent in every sovereignty, and has been exercised from time immemorial.<sup>92</sup>

their own will, without regard to discretion in the legal sense of the term, to give or withhold consent as to persons or places, without regard to the competency of the persons applying, or the propriety of the places selected for the carrying on of the business. It was held to be a covert attempt on the part of the municipality to make an arbitrary and unjust discrimination against the Chinese race. See, generally, the title CONSTITUTIONAL LAW, vol. 4, pp. 368, 375.

89. *Lotteries*.—Stone v. Mississippi, 101 U. S. 814, 818, 25 L. Ed. 1079.

As to the power to revoke lottery grants and destroy the value of rights acquired upon the faith thereof, see ante, "Generally," V, D, 3, a; "Where Grant Is Contained in the State Constitution," V, D, 3, b, (1). See, generally, the title LOTTERIES, vol. 7, p. 1070.

90. **Power of legislature to regulate rates.**—Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77; Sinking-Fund Cases, 99 U. S. 700, 747, 25 L. Ed. 496; Budd v. New York, 143 U. S. 517, 36 L. Ed. 247; Covington, etc., Turnpike Road Co. v. Sandford, 164 U. S. 578, 41 L. Ed. 560.

"Down to the time of the adoption of the fourteenth amendment, it was not supposed that statutes regulating the use or even the price of the use, of private property, necessarily deprived an owner of his property without due process of law; that, when private property was devoted to a public use, it was subject to public regulation." Budd v. New York, 143 U. S. 517, 535, 36 L. Ed. 247; Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77.

91. **Reduction in rates must not be confiscatory, etc.**—Budd v. New York, 143 U. S. 517, 548, 36 L. Ed. 247.

"As to parties engaged in performing a public service, while the power to regulate has been sustained, negatively the court has held that the legislature may not prescribe rates which, if enforced, would amount to a confiscation of property. But it has not held affirmatively that the legislature may enforce rates which stop only this side of confiscation and leave the property in the hands and under the care of the owners without any remuneration for its use." Cotting v. Kansas City Stock Yards Co., 183 U. S. 79, 97, 46 L. Ed. 92.

"The legislature may itself fix a maximum beyond which any charge would be unreasonable, in respect to services rendered in a public employment, or for the use of property in which the public has an interest, subject to the proviso that such power of limitation or regulation is not without limit, and is not a power to destroy, or a power to compel the doing of the services without reward, or to take private property for public use without just compensation or without due process of law." Budd v. New York, 143 U. S. 517, 547, 36 L. Ed. 247. See, also, Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77; Chicago, etc., R. Co. v. Iowa, 94 U. S. 155, 161, 162, 24 L. Ed. 94; Peik v. Chicago, etc., R. Co., 94 U. S. 164, 178, 24 L. Ed. 97; Chicago, etc., R. Co. v. Ackley, 94 U. S. 179, 24 L. Ed. 99; Winona, etc., R. Co. v. Blake, 94 U. S. 180, 24 L. Ed. 99; Stone v. Wisconsin, 94 U. S. 181, 24 L. Ed. 102; Ruggles v. Illinois, 108 U. S. 526, 27 L. Ed. 812; Illinois Cent. R. Co. v. Illinois, 108 U. S. 541, 27 L. Ed. 818; Railroad Commission Cases, 116 U. S. 307, 29 L. Ed. 636.

92. **Under the powers inherent in every sovereignty, to regulate the conduct of its**

And this power to regulate is a power of government continuing in its nature, and if it can be bargained away at all it can only be by words of positive grant, or something which is in law equivalent. If there is reasonable doubt it must be resolved in favor of the existence of power.<sup>93</sup> But this power of limitation or regulation is not itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward. Neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law.<sup>94</sup>

b. *Power to Prescribe Rates a Legislative Function.*—The power to prescribe rates to be charged by public service companies is a legislative and not an administrative or judicial function,<sup>95</sup> and the general rule is that legislative action cannot be interfered with by injunction.<sup>96</sup>

c. *Delegation of Power.*—And it seems that this power to fix the rates of compensation to be charged for the use of public utilities may be conferred by the legislature upon a municipal corporation.<sup>97</sup>

citizens toward each other, and when necessary for the public good, the manner in which each shall use his own property, it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered; accommodations furnished and articles sold. *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77.

The limitation by legislative enactment of the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, establishes no new principle in the law, but only gives a new effect to an old one. *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77.

93. *Power to regulate cannot be bargained away.*—Railroad Commission Cases, 116 U. S. 307, 325, 29 L. Ed. 636; *Freeport Water Co. v. Freeport City*, 180 U. S. 587, 599, 45 L. Ed. 679; *Danville Water Co. v. Danville City*, 180 U. S. 619, 45 L. Ed. 696; *Rogers Park Water Co. v. Fergus*, 180 U. S. 624, 45 L. Ed. 702.

"The same principles should be recognized when the claim is of immunity or exemption from legislative control of tolls to be exacted by a corporation established by authority of law for the construction of a public highway. It is of the highest importance that such control should remain with the state, and it should never be implied that the legislative department intended to surrender it. Such an intention should not be imputed to the legislature if it be possible to avoid doing so by any reasonable interpretation of its statutes." *Covington, etc., Turnpike Road Co. v. Sandford*, 164 U. S. 578, 587, 41 L. Ed. 560.

94. *Chicago, etc., R. Co. v. Minnesota*, 134 U. S. 418, 455, 33 L. Ed. 970, citing *Minneapolis, etc., R. Co. v. Minnesota*, 134 U. S. 467, 33 L. Ed. 985.

95. *Power to prescribe rates a legislative function.*—*Interstate Commerce Commission v. Cincinnati, etc., R. Co.*, 167 U. S. 479, 505, 42 L. Ed. 243.

What is a reasonable compensation for the use of property affected with a public interest is not a judicial but a legislative question. *Budd v. New York*, 143 U. S. 517, 536, 36 L. Ed. 247; *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77.

"It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act." *Chicago, etc., R. Co. v. Minnesota*, 134 U. S. 418, 458, 33 L. Ed. 970; *Reagan v. Farmers' Loan, etc., Co.*, 154 U. S. 362, 397, 38 L. Ed. 1014; *St. Louis, etc., R. Co. v. Gill*, 156 U. S. 649, 663, 39 L. Ed. 567; *Cincinnati, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 196, 40 L. Ed. 935; *Texas, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 216, 40 L. Ed. 940; *Munn v. Illinois*, 94 U. S. 113, 114, 24 L. Ed. 77; *Peik v. Chicago, etc., R. Co.*, 94 U. S. 164, 178, 24 L. Ed. 97; *Express Cases*, 117 U. S. 1, 29, 29 L. Ed. 791; *Interstate Commerce Commission v. Cincinnati, etc., R. Co.*, 167 U. S. 479, 499, 42 L. Ed. 243.

96. *McChord v. Louisville, etc., R. Co.*, 183 U. S. 483, 495, 46 L. Ed. 289.

97. *Delegation of power to municipalities.*—That it was competent for the state of California to declare that the use of all water appropriated for sale, rental or distribution should be a public use and subject to public regulation and control, and that it could confer upon the proper municipal corporation power to fix the rates of compensation to be collected for the use of water supplied to any city, county or town or to the inhabitants thereof, is not disputed. It is equally clear that this power could not be exercised arbitrarily and without reference to what was just



d. *Exercise of the Power with Respect to Particular Corporations*—(1) *Railroads and Other Public Service Companies*.—For example, the power of a state legislature to order railroads to reduce their rates where those rates are unreasonably high, has never been questioned since the famous Granger cases were decided by the supreme court of the United States.<sup>98</sup> And the rule in these cases has been extended to many other employments and businesses of such a nature as to be affected with a public interest.<sup>99</sup>

(2) *Stock Yards*.—The state has the power to make reasonable regulations of the charges for services rendered by a stock yard company where its stock yards are situated in one of the gateways of commerce, and so located that they furnish important facilities to all seeking transportation of cattle. While not a common carrier, nor engaged in any distinctively public employment, it is doing a work in which the public has an interest, and, therefore, must be considered as subject to governmental regulation, to the extent at least that the legislature may regulate the rates of compensation to be charged for services rendered by such yards.<sup>1</sup> Moreover, in determining whether given rates for stock yard services are reasonable or confiscatory, the valuation placed upon the property of the stock yards company is a prime factor. The capital of such a company cannot, however, be taken as truly representing the value of the corporate property, nor can the opinion of experts as to the value of the property be regarded as conclusive.<sup>2</sup> If the classification is based solely on the amount of business

and reasonable as between the public and those who appropriated water and supplied it for general use. *San Diego Land, etc., Co. v. National City*, 174 U. S. 739, 753, 43 L. Ed. 1154.

98. *Regulation of railroad rates*.—*Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155, 24 L. Ed. 94; *Peik v. Chicago, etc., R. Co.*, 94 U. S. 164, 24 L. Ed. 97; *Chicago, etc., R. Co. v. Ackley*, 94 U. S. 179, 24 L. Ed. 99; *Winona, etc., R. Co. v. Blake*, 94 U. S. 180, 24 L. Ed. 99; *Stone v. Wisconsin*, 94 U. S. 181, 24 L. Ed. 102; *Ruggles v. Illinois*, 108 U. S. 526, 27 L. Ed. 812; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 28 L. Ed. 173; *Railroad Commission Cases*, 116 U. S. 307, 347, 352, 29 L. Ed. 636; *Wabash, etc., R. Co. v. Illinois*, 118 U. S. 557, 30 L. Ed. 244; *Chicago, etc., Ry. v. Dey*, 35 Fed. Rep. 866; *Chicago, etc., R. Co. v. Minnesota*, 134 U. S. 418, 33 L. Ed. 970; *Budd v. New York*, 143 U. S. 517, 36 L. Ed. 247; *Chicago, etc., R. Co. v. Wellman*, 143 U. S. 339, 36 L. Ed. 176. See the title *CARRIERS*, vol. 3, p. 622, et seq.

99. *Where under the law of the state all water, steam or other mills, whose owners or occupiers grind or offer to grind grain for toll or pay, are declared to be public mills, it is competent for the legislature to regulate the toll to be taken.* *Burlington Tp. v. Beasley*, 94 U. S. 310, 314, 24 L. Ed. 161.

*State laws requiring water companies, gas companies, and other companies of like character to supply their customers at prices to be fixed by the municipal authorities of the locality, are within the scope of legislative power, unless prohibited by constitutional limitations or valid contract obligations.* *Spring Valley Waterworks v. Schottler*, 110 U. S. 347,

353, 28 L. Ed. 173.

**Distinction between case in which person is engaged in rendering a strictly public service, and case in which person is engaged in pursuit of business for private profits, but the nature of business is such that property is affected with the public use.**—*Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 93, 46 L. Ed. 92.

"This may be affirmed to be the present scope of the decisions of this court in respect to the power of the legislature in regulating rates: As to those individuals and corporations who have devoted their property to a use in which the public has an interest, although not engaged in a work of a confessedly public character, there has been no further ruling than that the state may prescribe and enforce reasonable charges. What shall be the test of reasonableness in those charges is absolutely undisclosed." *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 91, 46 L. Ed. 92, opinion of Mr. Justice Brewer.

1. *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 83, 46 L. Ed. 92, following *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77.

2. **Basis for calculating reasonableness of stock yard rates.**—*Cotting v. Kansas City Stock Yards Co.*, 82 Fed. Rep. 850, reversed, however, 183 U. S. 79, 46 L. Ed. 92, on the ground that the particular statute under consideration, defining what should constitute public stock yards, defining the duties of the person or persons operating them, regulating all charges thereof, removing restrictions in the trade of dead animals, and providing penalties for violations of the act, was in violation of the fourteenth amendment of the constitution of the United States, in that it applied only to one stock yard company,



done and without any reference to the value or character of the services rendered, this amounts to a denial of the equal protection of the laws. In the picturesque and forceful language of Mr. Justice Brewer: "If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would."<sup>3</sup>

(3) *Grain Elevators*.—In the famous *Granger* cases it was decided that the state has power to fix the maximum charges for the storing of grain in warehouses.<sup>4</sup>

e. *Corporations Organized under Federal Statutes*.—A corporation organized under the laws of the United States is subject to the control of the state as to rates which are wholly within the state. The fact that it receives all its franchises from congress; that among those franchises is the right to charge and collect tolls; does not exempt it, as to business done wholly within the state, from the control of the state in all matters of taxation, rates, and other police regulations.<sup>5</sup>

2. REASONABLENESS OF RATES—*a. Right of Courts to Interfere*.—While the determination of rates is primarily for the legislature, such determination cannot be made so conclusive as to prevent the matter from becoming the subject

and not to other companies or corporations engaged in like business in the state, and thereby denied to that company the equal protection of the laws.

3. *Classification based on amount of business done*.—*Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 112, 46 L. Ed. 92.

"There can be no pretense that a stock yard which receives 99 head of cattle per day a year is not doing precisely the same business as one receiving 101 head of cattle per day each year. It is the same business in all its essential elements, and the only difference is that one does more business than the other. But the receipt of an extra two head of cattle per day does not change the character of the business. If once the door is opened to the affirmance of the proposition that a state may regulate one who does much business, while not regulating another who does the same but less business, then all significance in the guarantee of the equal protection of the laws is lost." *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 112, 46 L. Ed. 92.

4. *Rule in the Granger cases*.—*Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77. This case has been followed and approved repeatedly both by the federal and state courts. See *Budd v. New York*, 143 U. S. 517, 36 L. Ed. 247; *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 83, 46 L. Ed. 92.

The business of elevating, receiving, weighing and discharging grain, and of handling grain, by means of floating and stationary elevators, lake vessels or propellers, ocean vessels or steamships, and canal boats, is a business affected with a public interest and one which is competent for the legislature to prescribe a maximum rate for the handling, loading and unloading of grain. *Budd v. New York*, 143 U. S. 517, 36 L. Ed. 247 fol-

lowing *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77.

Ch. 581, of the laws of New York of 1888, prescribing a maximum charge of five-eighths of one cent a bushel for elevating, receiving, weighing and discharging grain, and providing that in the process of handling grain by means of floating and stationary elevators, the lake vessels or propellers, the ocean vessels or steamships and canal boats, the charge should not exceed the actual cost of trimming and shoveling to the leg of the elevator when unloading and trimming cargo when loading, was not unconstitutional as denying due process of law or the equal protection of the laws, but was a valid exercise of the police power of the state over a business affected with a public interest. *Budd v. New York*, 143 U. S. 517, 36 L. Ed. 247.

"The principle maintained in *Munn v. Illinois* is firmly established; and we think it covers the present cases, in respect to the charge for elevating, receiving, weighing and discharging the grain, as well as in respect to the charge for trimming and shoveling, to the leg of the elevator when loading and trimming the cargo when loaded." *Budd v. New York*, 143 U. S. 517, 543, 36 L. Ed. 247.

5. *Reagan v. Mercantile Trust Co.*, 154 U. S. 413, 417, 38 L. Ed. 1028, following the doctrine of *Thomson v. Pacific Railroad*, 9 Wall. 579, 19 L. Ed. 792; *Railroad Co. v. Peniston*, 18 Wall. 5, 21 L. Ed. 787, in which it was held that the exemption of federal agencies from state taxation or control is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the taxation. See the titles CARRIERS, vol. 3, p. 624; CONSTITUTIONAL LAW, vol. 4, p. 204.

of judicial inquiry.<sup>6</sup> It is both the power and duty of the courts to inquire whether a body of rates prescribed by legislature or a commission is unjust and unreasonable, and such as to work a practical destruction of rights of property, and,

**6. Conclusiveness of legislative determination.**—*Smyth v. Ames*, 169 U. S. 466, 42 L. Ed. 819.

Upon this point the court says, in *Munn v. Illinois*, 94 U. S. 113, 133, 24 L. Ed. 77: "It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question. As has already been shown, the practice has been otherwise. In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable. Undoubtedly, in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the legislature has no control over such a contract. So too, in matters which do not affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common-law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates at will, and compel the public to yield to his terms, or forego the use."

"As to the claim that the courts must decide what is reasonable and not the legislature. This is not new to this case. It has been fully considered in *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77. Where property has been clothed with a public interest, the legislature may fix a limit to that which shall in law be reasonable for its use. This limit binds the courts as well as the people. If it has been improperly fixed, the legislature, not the courts, must be appealed to for the change." *Peik v. Chicago, etc., R. Co.*, 94 U. S. 164, 178, 24 L. Ed. 97; *Chicago, etc., R. Co. v. Ackley*, 94 U. S. 179, 24 L. Ed. 99; *Winona, etc., R. Co. v. Blake*, 94 U. S. 180, 24 L. Ed. 99.

"The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is de-

prived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital the company is deprived of the equal protection of the laws." *Chicago, etc., R. Co. v. Minnesota*, 134 U. S. 418, 33 L. Ed. 970, citing *Minneapolis, etc., R. Co. v. Minnesota*, 134 U. S. 467, 33 L. Ed. 985.

**Constitutionality of state statute.**—By the act of the legislature of Minnesota (General Laws of 1887, c. 10), establishing a railroad and warehouse commission, the rates recommended and published by the commission, if it proceeds in the manner pointed out by the act, are not simply advisory, not merely *prima facie* equal and reasonable, but final and conclusive as to what are equal and reasonable charges. It neither contemplates nor allows any issue to be made or inquiry to be had as to their equality or reasonableness in fact. So construed, it conflicts with the constitution of the United States in that it deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy and denies to it the equal protection of the laws. *Chicago, etc., R. Co. v. Minnesota*, 134 U. S. 418, 456, 33 L. Ed. 970, citing *Minneapolis, etc., R. Co. v. Minnesota*, 134 U. S. 467, 33 L. Ed. 985.

**Cases reconciled.**—"It is further contended that, under the decision of this court in *Chicago, etc., R. Co. v. Minnesota*, 134 U. S. 418, 33 L. Ed. 970, the fixing of elevator charges is a judicial question, as to whether they are reasonable or not; that the statute must permit and provide for a judicial settlement of the charges; and that, by the statute under consideration, an arbitrary rate is fixed and all inquiry is precluded as to whether that rate is reasonable or not. But this is a misapprehension of the decision of this court in the case referred to. \* \* \* What was said in the opinion in 134 U. S. as to the question of the reasonableness of the rate of charge being one for judicial investigation, had no reference to a case where the rates are prescribed directly by the legislature." *Budd v. New York*, 143 U. S. 517, 545, 36 L. Ed. 247.



if found so to be, to restrain its operation.<sup>7</sup> In short the courts decide whether the rates and charges are so unjust and unreasonable as to conflict with the constitutional guaranties. The legislature cannot say finally that the rate is just and reasonable, nor can the court reverse or change the rates or say what would be a just and reasonable rate.<sup>8</sup> But the judiciary ought not to interfere with the collection of rates established under legislative sanction unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as under all the circumstances is just both to the owner and to the public; that is, judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use.<sup>9</sup>

b. *Determination of Reasonableness of Rates*—(1) *Mere Reduction of Rates*.—A mere reduction of rates, while still leaving reasonable, fair or just compen-

7. **Courts may inquire as to reasonableness of rates.**—*Smyth v. Ames*, 169 U. S. 466, 42 L. Ed. 819; *Reagan v. Farmers' Loan, etc., Co.*, 154 U. S. 362, 38 L. Ed. 1014.

"A court may not, under the guise of protecting private property, extend its authority to a subject of regulation not within its competency, but is confined to ascertaining whether the particular assertion of the legislative power to regulate has been exercised to so unwarranted a degree as in substance and effect to exceed regulation, and be equivalent to a taking of property without due process of law, or a denial of the equal protection of the laws." *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1, 20, 51 L. Ed. 933.

The question of the reasonableness of a rate of charge for transportation by a railroad company, involving, as it does, the element of reasonableness, both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law, and in violation of the constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws." *Chicago, etc., R. Co. v. Minnesota*, 134 U. S. 418, 456, 457, 33 L. Ed. 970, distinguished in *San Diego Land, etc., Co. v. National City*, 174 U. S. 739, 749, 43 L. Ed. 1154.

A question of the unreasonableness of rates is always an embarrassing one to a judicial tribunal, because it is primarily for the determination of the legislature or of some public agency designated by it.

But when it is alleged that a state enactment invades or destroys rights secured by the constitution of the United States a judicial question arises, and the courts, federal and state, must meet the issue, taking care always not to entrench upon the authority belonging to a different department, nor to disregard a statute unless it be unmistakably repugnant to the fundamental law. *San Diego Land, etc., Co. v. National City*, 174 U. S. 739, 754, 43 L. Ed. 1154.

8. *Smyth v. Ames*, 169 U. S. 466, 42 L. Ed. 819; *Interstate Commerce Commission v. Cincinnati, etc., R. Co.*, 167 U. S. 479, 42 L. Ed. 243; *St. Louis, etc., R. Co. v. Gill*, 156 U. S. 649, 39 L. Ed. 567; *Minneapolis, etc., R. Co. v. Minnesota*, 134 U. S. 467, 33 L. Ed. 985; *Express Cases*, 117 U. S. 1, 29 L. Ed. 791; *Railroad Commission Cases*, 116 U. S. 307, 29 L. Ed. 636.

9. *Chicago, etc., R. Co. v. Wellman*, 143 U. S. 339, 344, 36 L. Ed. 176; *Reagan v. Farmers' Loan, etc., Co.*, 154 U. S. 362, 399, 38 L. Ed. 1014; *Smyth v. Ames*, 169 U. S. 466, 524, 42 L. Ed. 819; *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 614, 615, 43 L. Ed. 823; *San Diego Land, etc., Co. v. National City*, 174 U. S. 739, 754, 43 L. Ed. 1154.

"And in *Chicago, etc., R. Co. v. Wellman*, 143 U. S. 339, 344, 36 L. Ed. 176, is this declaration of the law: 'The legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates.' *Budd v. New York*, 143 U. S. 517, 36 L. Ed. 247, announces nothing to the contrary. The question there was not whether the rates were reasonable, but whether the business, that of elevating grain, was within legislative control as to the matter of rates." *Reagan v. Farmers' Loan, etc., Co.*, 154 U. S. 362, 398, 38 L. Ed. 1014, followed and reaffirmed in *Reagan v. Mercantile Trust Co.*, 154 U. S. 413, 38 L. Ed. 1028; *Reagan v. Mercantile Trust Co.*, 154 U. S. 418, 38 L. Ed. 1030; *Reagan v. Farmers' Loan, etc., Co.*, 154 U. S. 420, 38 L. Ed. 1031.



sation for the use of the property, is not prohibited.<sup>10</sup>

(2) *Admissibility of Evidence.—Presumptions and Burden of Proof.*—The legislative prescription of rates is prima facie evidence of their reasonableness.<sup>11</sup> The question of whether the reduction is a reasonable one is a question of fact which must be determined by proper proof, the burden of proof being upon the corporation which complained.<sup>12</sup>

**Usage and Custom.**—In Gunning on Laws of Tolls, the author says (p. 61): "Long usage and acquiescence in one uniform payment for toll is undoubtedly cogent evidence that it is reasonable."<sup>13</sup>

c. *Basis for Calculating Reasonableness of Rates*—(1) *In General.*<sup>14</sup>—While each case must depend upon its special facts, yet the courts have pointed out various elements to be taken into consideration in the general inquiry as to whether the rates established are unjust and unreasonable.<sup>15</sup> In the first place, the proper basis of calculation is the real value of the property and the fair value in themselves of the services rendered to the public.<sup>16</sup> And in order to ascertain

**10. Reduction of rates not prohibited.**—*Stanislaus County v. San Joaquin, etc., Irrigation Co.*, 192 U. S. 201, 213, 48 L. Ed. 406.

**Reduction of water rates.**—"It is not confiscation nor a taking of property without due process of law, nor a denial of the equal protection of the laws, to fix water rates so as to give an income of six per cent upon the then value of the property actually used, for the purpose of supplying water as provided by law, even though the company had prior thereto been allowed to fix rates that would secure to it one and a half per cent a month income upon the capital actually invested in the undertaking." *Stanislaus County v. San Joaquin, etc., Irrigation Co.*, 192 U. S. 201, 213, 48 L. Ed. 406. See the title **WATER COMPANIES AND WATERWORKS.**

**11. Presumptions as to reasonableness.**—*Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 97, 46 L. Ed. 92.

"The determination of the legislature is to be presumed to be just, and must be upheld unless it clearly appears to result in enforcing unreasonable and unjust rates." *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 91, 46 L. Ed. 92.

**12. Burden of proving unreasonable-ness.**—*Chicago, etc., R. Co. v. Wellman*, 143 U. S. 339, 36 L. Ed. 176.

"In approaching the consideration of a case of this kind we start with the presumption that the act of the legislature is valid, and upon any company seeking to challenge its validity rests the burden of proving that it infringes the constitutional guarantee of protection to property. The case must be a clear one in behalf of the railroad company or the legislation of the state must be upheld." *Chicago, etc., R. Co. v. Tompkins*, 176 U. S. 167, 173, 44 L. Ed. 417.

**13. Admissibility of usage to show unreasonableness.**—*Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 98, 46 L. Ed. 92.

**Rates chargeable by stock yards.**—While custom is not controlling, for there

may be a custom on the part of all stock yards companies to make excessive charges, yet in the absence of testimony to the contrary a customary charge should be regarded as reasonable and rightful. *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 97, 46 L. Ed. 92.

**14.** The titles **CARRIERS**, vol. 3, p. 631; **TURNPIKES AND TOLLROADS**, should be consulted in this connection as no attempt has been made to recapitulate the cases dealt with there.

**15.** "So that the right of the public to use the defendant's turnpike upon payment of such tolls as in view of the nature and value of the service rendered by the company are reasonable, is an element in the general inquiry whether the rates established by law are unjust and unreasonable. That inquiry also involves other considerations, such, for instance, as the reasonable cost of maintaining the road in good condition for public use, and the amount that may have been really and necessarily invested in the enterprise. In short, each case must depend upon its special facts; and when a court, without assuming itself to prescribe rates, is required to determine whether the rates prescribed by the legislature for a corporation controlling a public highway are, as an entirety, so unjust as to destroy the value of its property for all the purposes for which it was acquired, its duty is to take into consideration the interests both of the public and of the owner of the property, together with all other circumstances that are fairly to be considered in determining whether the legislature has, under the guise of regulating rates, exceeded its constitutional authority, and practically deprived the owner of property without due process of law." *Covington, etc., Turnpike Road Co. v. Sanford*, 164 U. S. 578, 597, 41 L. Ed. 560.

**16. Proper basis of calculation stated.**—*San Diego Land, etc., Co. v. National City*, 174 U. S. 739, 43 L. Ed. 1154, approved in *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 46 L. Ed. 92.

that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stocks, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case.<sup>17</sup> It has been declared that the present value of the property is the basis by which the test of reasonableness is to be determined, although the actual cost is to be considered, and that the value of the services rendered to each individual is also to be considered.<sup>18</sup>

(2) *Original Cost*.—In determining the valuation of the property for the purpose of ascertaining whether the rate prescribed will yield a fair return, the original cost may be considered, and should have more or less importance according to circumstances.<sup>19</sup> But the original cost is of very little value in determining the reasonableness of the rates, when such cost is inflated by improper charges to that account and by injudicious expenditures.<sup>20</sup> And where the business has been sold, the price received is evidence, and more important evidence than the original cost.<sup>21</sup>

(3) *Capacity to Pay Dividends as a Factor*.—An act regulating the maximum rates to be charged by a public service company cannot be held unconstitutional on the ground that such rates are unreasonably reduced and confiscatory, merely because the company cannot earn more than four per cent upon its capital stock. It cannot be said that a corporation is entitled, as of right, and without reference to the interests of the public, to realize a given per cent upon its cap-

The utmost that any corporation, operating a public highway, can rightfully demand at the hands of the legislature when exerting its general powers, is that it receive what, under all the circumstances, is such compensation for the use of its property as will be just both to it and to the public. *Covington, etc., Turnpike Road Co. v. Sanford*, 164 U. S. 578, 598, 41 L. Ed. 560.

"The contention of the appellant in the present case is that in ascertaining what are just rates the court should take into consideration the cost of its plant; the cost per annum of operating the plant, including interest paid on money borrowed and reasonably necessary to be used in constructing the same; the annual depreciation of the plant from natural causes resulting from its use; and a fair profit to the company over and above such charges for its services in supplying the water to consumers, either by way of interest on the money it has expended for the public use, or upon some other fair and equitable basis. Undoubtedly, all these matters ought to be taken into consideration, and such weight be given them, when rates are being fixed, as under all the circumstances will be just to the company and to the public. The basis of calculation suggested by the appellant is, however, defective in not requiring the real value of the property and the fair value in themselves of the services rendered to be taken into consideration. What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable

value of the property at the time it is being used for the public. The property may have cost more than it ought to have cost, and its outstanding bonds for money borrowed and which went into the plant may be in excess of the real value of the property. So that it cannot be said that the amount of such bonds should in every case control the question of rates, although it may be an element in the inquiry as to what is, all the circumstances considered, just both to the company and to the public." *San Diego Land, etc., Co. v. National City*, 174 U. S. 739, 757, 43 L. Ed. 1154, quoted with approval in *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 46 L. Ed. 92.

"We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience." *San Diego Land, etc., Co. v. National City*, 174 U. S. 739, 756, 43 L. Ed. 1154.

17. *How fair value of property ascertained*.—*San Diego Land, etc., Co. v. National City*, 174 U. S. 739, 756, 43 L. Ed. 1154.

18. *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 97, 46 L. Ed. 92.

19. *Original cost of property*.—*San Diego Land, etc., Co. v. Jasper*, 189 U. S. 439, 442, 47 L. Ed. 892.

20. *San Diego Land, etc., Co. v. Jasper*, 189 U. S. 439, 47 L. Ed. 892.

21. *Selling price of business to be considered*.—*San Diego Land, etc., Co. v. Jasper*, 189 U. S. 439, 443, 47 L. Ed. 892.

ital stock. When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose right or interests are to be considered. The rights of the public are not to be ignored.<sup>22</sup>

(4) *Valuation of Property for Taxation*.—The valuation of the property of a water company for the purposes of taxation may not be technical evidence in a court of law, yet it may be considered when coming to a decision whether the action of the supervisors in fixing rates was unfair, especially where such valuation was sworn to by the officers of the company.<sup>23</sup>

(5) *Classification Based upon Amount of Business Done*—(a) *In General*.—An act which imposes a rate regulation upon corporations doing business over a certain amount and leaving all corporations doing a like business less than that amount free from such regulations is unconstitutional as denying the equal protection of the laws.<sup>24</sup>

(b) *Amount of Aggregate Profits*.—It may sometimes be, however, that the amount of the aggregate profits may be a factor in considering the question of the reasonableness of the charges, but it is only one factor, and is not that which finally determines the question of reasonableness.<sup>25</sup>

See, also, *Dow v. Beidelman*, 125 U. S. 680, 31 L. Ed. 841.

**22. Capacity to pay dividends as a factor.**—*Covington, etc., Turnpike Road Co. v. Sanford*, 164 U. S. 578, 596, 41 L. Ed. 560.

If it is alleged that the rates prescribed are unreasonable and unjust to the company and its stockholders, that involves an inquiry as to what is reasonable and just for the public. If the establishing of new lines of transportation should cause a diminution in the number of those who need to use a turnpike road, and, consequently, a diminution in the tolls collected, that is not, in itself, a sufficient reason why the corporation, operating the road, should be allowed to maintain rates that would be unjust to those who must or do use its property. The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. *Covington, etc., Turnpike Road Co. v. Sanford*, 164 U. S. 578, 596, 41 L. Ed. 560.

If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the constitution does not require to be remedied by imposing unjust burdens upon the public. *Covington, etc., Turnpike Road Co. v. Sanford*, 164 U. S. 578, 597, 41 L. Ed. 560.

**23. Valuation of property for taxation.**—*San Diego Land, etc., Co. v. Jasper*, 189 U. S. 439, 443, 47 L. Ed. 892.

**24. Classification based upon amount of business done.**—*Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 109, 46 L. Ed. 92.

Legislation by which one individual or even one set of individuals is selected from others doing the same business in the same way and subjected to regulations not cast upon them, the classification being based solely upon the volume of busi-

ness done, is a discrimination forbidden by the equal protection clause of the constitution. *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 109, 112, 46 L. Ed. 92.

The Kansas Act of March 3, 1897, which undertakes to prescribe the rates to be charged by all stock yards doing business in excess of a certain amount, those yards receiving more than a certain number of cattle per day being subject to the regulation, and those receiving less than that number being left free from the regulation, was unconstitutional as denying the equal protection of the laws of those yards affected thereby. *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 46 L. Ed. 92.

**25. Amount of aggregate profits.**—*Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 97, 46 L. Ed. 92.

The authority of the legislature to interfere by a regulation of rates is not an authority to destroy the principles of these decisions, but simply to enforce them. Its prescription of rates is *prima facie* evidence of their reasonableness. In other words, it is a legislative declaration that such charges are reasonable compensation for the services rendered, but it does not follow therefrom that the legislature has power to reduce any reasonable charges because by reason of the volume of business done by the party he is making more profit than others in the same or other business. The question is always not what does he make as the aggregate of his profits, but what is the value of the services which he renders to the one seeking and receiving such services. Of course, it may sometimes be, as suggested in the opinion of Lord Chancellor Selborne, that the amount of the aggregate profits may be a factor in considering the question of the reasonableness of the charges, but it is only one factor, and is not that which finally determines the



(6) *Rule Where Private Business Is Merely Affected with Public Use.*—Where one is engaged in a private business in which his property is merely affected by a public use, the state's regulations and charges are to be measured in accordance with the question whether any particular charge to an individual dealing with him, is, considering the services rendered, a reasonable exaction.<sup>26</sup>

**POLICY OF INSURANCE.**—See note 1.

**POLICY SLIPS.**—See the titles CONSTITUTIONAL LAW, vol. 4, p. 508; DUE PROCESS OF LAW, vol. 5, p. 672.

**POLL.**—As to deed poll, see the titles DEEDS, vol. 5, p. 250; ESTOPPEL, vol. 5, p. 928.

**POLITICAL FACTS.**—As to judicial notice of, see the title JUDICIAL NOTICE, vol. 7, p. 685.

**POLITICAL OPINIONS.**—As effecting qualification of juror, see the title JURY, vol. 7, p. 771.

**POLITICAL QUESTIONS.**—See the title CONSTITUTIONAL LAW, vol. 4, p. 228.

**POLITICAL STATUS.**—See CIVIL STATUS, vol. 3, p. 847.

**POLITICAL OFFENSES.**—See the title EXTRADITION, vol. 6, p. 218.

**POLLUTION.**—See the title WATERS AND WATERCOURSES.

**POLLS.**—See the title ELECTIONS, vol. 5, p. 726.

question of reasonableness. *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 97, 46 L. Ed. 92.

26. A difference in the rule as to property devoted to public uses from that in respect to property used solely for purposes of private gain, and which only by virtue of the conditions of its use becomes such as the public has an interest in.—“The state's regulation and charges, where one is engaged not in rendering a strictly public service, but in a private business in which his property is merely affected with the public use, is to be measured not by the aggregate of his profits, determined by the volume of business, but by the question whether any particular charge to an individual dealing with him is, considering the service rendered, an unreasonable exaction; that the question is not how much he makes out of his volume of business but whether in each particular transaction the charge is an unreasonable exaction for the services rendered. That he has a right to do business, and to charge for each separate service that which is reasonable compensation therefor, and that the legislature may not deny him such reasonable compensation and may not interfere simply because out of the multitude of his transactions the amount of his profits is large. “The question is not how much he makes out of his volume of business, but whether in each particular transaction the charge is an unreasonable exaction for the services rendered. He has a right to do business. He has a right to charge for each separate service that which is reasonable compensation therefor, and the legislature may not deny him such reasonable compensation, and may not

interfere simply because out of the multitude of his transactions the amount of his profits is large. Such was the rule of the common law even in respect to those engaged in a quasi public service independent of legislative action. In any action to recover for an excessive charge, prior to all legislative action, whoever knew of an inquiry as to the amount of the total profits of the party making the charge?” *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 95, 46 L. Ed. 92.

1. **Policy of Insurance.**—See the title INSURANCE, vol. 7, p. 66.

In *Insurance Co. v. Haven*, 95 U. S. 242, 24 L. Ed. 473, it is said: “Policies of fire insurance are contracts whereby the insurers undertake for a stipulated sum to indemnify the insured against loss or damage by fire, in respect to the property covered by the policy, during the prescribed period of time, to an amount not exceeding the sum specified in the written contract. *Angell, Fire and Life Insurance*, 43.”

Issuing a policy of insurance is not a transaction of commercial concern. *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357; *Hooper v. California*, 155 U. S. 647, 39 L. Ed. 297. See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 293.

In *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357, Mr. Justice Field said: “The policies are simply contracts of indemnity against loss by fire, entered into between the corporations, and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word.” See, also, *Hooper v. California*, 155 U. S. 647, 39 L. Ed. 297.

**POLYGAMIST.**—See note 1.

**POLYGAMY.**—See the title **BIGAMY AND POLYGAMY**, vol. 3, p. 225.

**PONDS.**—See references under **LAKEs AND BONDS**, vol. 7, p. 825.

**POOL.**—See note 2.

**POOLING AGREEMENTS.**—See the title **INTERSTATE AND FOREIGN COMMERCE**, vol. 7, p. 493.

**POOR AND POOR LAWS.**—See the title **PAUPERS**, ante, p. 318, and references given.

**PORCELAIN WARE.**—See note 3.

**PORT.**—See note 4.

**PORTO RICO.**—See note 5.

**POSITIVE EVIDENCE.**—See the title **EVIDENCE**, vol. 5, p. 1047.

**POSSESSED.**—See note 6.

**POSSESSION.**—See note 7.

1. **Polygamist.**—In *Murphy v. Ramsey*, 114 U. S. 15, 41, 29 L. Ed. 47, it is said: "In our opinion, any man is a **polygamist** or bigamist, in the sense of this section of the act, who, having previously married one wife, still living, and having another at the time when he presents himself to claim registration as a voter, still maintains that relation to a plurality of wives, although from the date of the passage of the act of March 22, 1882, until the day he offers to register and to vote, he may not in fact have cohabited with more than one woman." See, also, *Cannon v. United States*, 116 U. S. 55, 72, 29 L. Ed. 561.

2. **Pool.**—In *Kilbourn v. Thompson*, 103 U. S. 168, 195, 26 L. Ed. 377, it is said: "The word **pool** in the sense here used, is of modern date, and may not be well understood, but in this case it can mean no more than that certain individuals are engaged in dealing in real estate as a commodity of traffic." See, generally, the title **MONOPOLIES AND CORPORATE TRUSTS**.

3. **Porcelain ware.**—See *Arthur v. Jacoby*, 103 U. S. 677, 26 L. Ed. 454. And see, generally, the title **REVENUE LAWS**.

4. **Port of entry.**—In *Cross v. Harrison*, 16 How. 164, 196, 14 L. Ed. 889, it is said: "That collection districts and **ports** of entry are no more than designated localities within and at which congress had extended a liberty of commerce in the United States, and that so much of its territory as was not within any collection district, must be considered as having been withheld from that liberty. It is very well understood to be a party of the laws of nations, that each nation may designate, upon its own terms, the **ports** and places within its territory for foreign commerce, and that any attempt to introduce foreign goods elsewhere, within its jurisdiction, is a violation of its sovereignty." Quoted in *De Lima v. Bidwell*, 182 U. S. 1, 45 L. Ed. 1041. See, generally, the title **REVENUE LAWS**.

**Port of loading.**—See the title **MARINE INSURANCE**, vol. 8, p. 160.

5. **Porto Rico.**—See *Huus v. New York*, etc., *Steamship Co.*, 182 U. S. 392, 396, 45 L. Ed. 1146. And see the titles **ALIENS**, vol. 1, pp. 220, 249; **APPEAL AND ERROR**, vol. 1, p. 805; **CONSTITUTIONAL LAW**, vol. 4, p. 97; **COURTS**, vol. 4, p. 1126; **REMOVAL OF CAUSES**; **REVENUE LAWS**; **SHIPS AND SHIPPING**; **TERRITORIES**. As to right of heir ab intestato under Porto Rican practice, see the title **EXECUTORS AND ADMINISTRATORS**, vol. 6, p. 159. As to rule with respect to community property, see the title **HUSBAND AND WIFE**, vol. 6, p. 728. As to qualifications of grand and petit jurors in, see the titles **GRAND JURY**, vol. 6, p. 572; **JURY**, vol. 7, p. 764. As to limitation of action on insurance policy under Porto Rican laws, see the title **INSURANCE**, vol. 7, p. 207.

6. **Possessed.**—In *Douglass v. Lewis*, 131 U. S. 75, 33 L. Ed. 53, it is said: "'Possessed of an irrevocable possession in fee simple' means 'seized of an indefeasible estate in fee simple.'"

7. **Possession.**—See the titles **LIMITATION OF ACTIONS AND ADVERSE POSSESSION**, vol. 7, p. 934; **POSSESSION**, **WRIT OF**. As to sufficiency of **possession** as evidence, see the title **EVIDENCE**, vol. 5, p. 1030.

In *United States v. Arredondo*, 6 Pet. 691, 743, 8 L. Ed. 547, it is said: "The law deems every man to be in the legal seisin and **possession** of land to which he has a perfect and complete title; this seisin and **possession** is coextensive with his right, and continues till he is ousted thereof by an actual adverse **possession**. \* \* \* This gives to the words 'in **possession** of the lands,' their well-settled and fixed meaning; **possession** does not imply occupation or residence; had it been so intended, we must presume they would have been used. By adopting words of a known legal import, the grantors must be presumed to have used them in that sense, and to have so intended them; to depart from this rule would be to overturn established principles."

In *Taylor v. Macon*, 9 Wheat. 325, 351, 6 L. Ed. 101, it is said: "The change of

## POSSESSION, WRIT OF.

### CROSS REFERENCES.

See the titles **EJECTMENT**, vol. 5, p. 695; **EQUITY**, vol. 5, p. 803; **JUDGMENTS AND DECREES**, vol. 7, p. 544.

As to the issuance of a writ of assistance to put a purchaser of real property in possession, see the title **ASSISTANCE, WRIT OF**, vol. 2, p. 632. As to power of circuit court of Tennessee to award writ of possession, see the title **COURTS**, vol. 4, p. 897. As to whether a purchaser pendente lite is subject to the operation of a writ of possession, see the title **LIS PENDENS**, vol. 7, pp. 1051, 1054. As to mandate from supreme court to circuit court to put purchaser in possession, see the title **MANDATE AND PROCEEDINGS THEREON**, vol. 8, p. 144. As to the necessity of the execution of a writ of possession to constitute an eviction under a general warranty, see the title **VENDOR AND PURCHASER**.

A writ of possession is a writ issued out of a court of competent jurisdiction for the purpose of placing in possession of real property, a person rightfully entitled thereto.<sup>1</sup> Where a court of equity has jurisdiction to entertain a bill for the purpose of establishing the title of a party to real estate, and for the recovery of possession thereof, and the decree by its legal effect and operation entitles the party seeking relief to the possession of the property, the court may enforce its decree by issuing a writ of possession to place such party, or his privy in estate in possession.<sup>2</sup> Where a writ of possession, issued in pursuance of a judgment, calls for the west half of a lot, it gives the officer executing the writ no authority to change the possession of the east half of such lot.<sup>3</sup>

**POSSESSORY ACTIONS.**—See the titles **EJECTMENT**, vol. 5, p. 695; **REAL ACTIONS**; **TRESPASS**.

**POST.**—See note 4.

**POSTAGE STAMPS.**—See **PERSONAL PROPERTY**, ante, p. 396. See, also, the titles **LARCENY**, vol. 7, p. 845; **POSTAL LAWS**.

language, and the adoption of the word **possession**, indicate very strongly that the word was used in its popular sense, to denote the taking actual and corporal **possession** of an estate."

In *The Davis*, 10 Wall. 15, 21, 19 L. Ed. 875, it is said: "The **possession** of the government can only exist through some of its officers, using that phrase in the sense of any person charged on behalf of the government with the control of the property coupled with its actual **possession**. This, we think, is a sufficiently liberal definition of the **possession** of property by the government to prevent any unseemly conflict between the court and the other departments of the government, and which is consistent with the principle which exempts the government from suit and its **possession** from disturbance by virtue of judicial process." See, generally, the title **UNITED STATES**.

**Possession in the sense of occupancy.**—See *Taylor v. Mason*, 9 Wheat. 352, 6 L. Ed. 101.

**Possessor.**—In *Ainsa v. United States*,

184 U. S. 639, 646, 46 L. Ed. 727, it is said: "The laws of Mexico and of the state of Sonora in respect of demasias treated excess over rightful titles as subject to the *jus disponendi* of the government. The **possessor** did not have title to the overplus, but might acquire it under the circumstances and in the way provided. A **possessor** does not mean owner."

1. **Nature of writ.**—*Tyler v. Magwire*, 17 Wall. 253, 21 L. Ed. 576.

2. **Power of court of equity to issue writ of possession.**—*Root v. Woolworth*, 150 U. S. 401, 37 L. Ed. 1123. See the titles **EQUITY**, vol. 5, p. 803; **JUDGMENTS AND DECREES**, vol. 7, pp. 544, 609.

3. *Woodward v. Brown*, 13 Pet. 1, 10 L. Ed. 31.

4. **Post.**—See **DEPOT**; vol. 5, p. 334; **STATION**.

**Postoffices and post roads.**—See *Ex parte Jackson*, 96 U. S. 727, 24 L. Ed. 877; *In re Rapier*, 143 U. S. 110, 134, 36 L. Ed. 93. And see the title **POSTAL LAWS**.



## POSTAL LAWS.

BY WALTER CARRINGTON.

- I. Powers of the States before the Union Was Formed, 552.**
- II. Power of the Federal Government under the Constitution, 552.**
  - A. In General, 552.
  - B. Power to Designate Post Routes and Postoffices and Provide for Carriage of Mail, 553.
  - C. Power to Designate What Things Are Mailable and What Not, 553.
  - D. Power to Authorize Postmaster General to Seize and Detain Letters, 553.
  - E. Power to Prescribe Weight and Form of Mail Matter and Postage Charges, 554.
- III. Power of Postmaster General to Review Predecessor's Decision, 554.**
- IV. Postoffices, 554.**
  - A. Establishment, 554.
  - B. Discontinuance, 555.
- V. Postmasters, 555.**
  - A. Appointment, 555.
  - B. Salary, 555.
  - C. Powers, Duties and Liabilities, 558.
    - 1. No Power to Contract in Respect to Mail Messenger Service, 558.
    - 2. Duty in Regard to Matter Deposited in the Postoffice, 558.
    - 3. Liability on Bond, 558.
      - a. Authority to Take Bonds, 558.
      - b. Rule of Liability, 558.
      - c. Time from Which Bond Takes Effect, 558.
      - d. Jurisdiction of Suits on Bonds, 558.
      - e. Time within Which Suit Must Be Brought, 558.
      - f. What Defenses Are Available, 559.
      - g. Amount Recoverable, 559.
      - h. Evidence, 560.
        - (1) Admissibility, 560.
        - (2) Weight and Sufficiency, 561.
    - 4. Liability for Wrongfully Withholding Mail Matter, 561.
    - 5. Liability for Negligence, 561.
  - D. Application of Payments Made by a Postmaster, 561.
- VI. Compensation of Clerks and Letter Carriers, 561.**
  - A. Chief Clerk of Postoffice Department, 561.
  - B. Letter Carriers, 561.
- VII. What Things Are Mailable, 562.**
  - A. In General, 562.
  - B. Things Prohibited to Be Sent or Delivered by Mail, 562
    - 1. In General, 562.
    - 2. Obscene Matter, 562.
    - 3. Matter Pertaining to Lotteries or Schemes for Obtaining Money or Property by False Pretenses, 562.
    - 4. Articles Dangerous in Their Nature or to Other Articles with Which They May Come in Contact, 564.
    - 5. Dutiable Articles, 564.

**VIII. Enforcement of Regulations Excluding Nonmailable Matter—  
Right of Inspection, 564.**

- A. Distinction between Sealed Matter, and Matter Open to Inspection, 564.
- B. Methods of Enforcement, 564.

**IX. Postage, 565.**

- A. Classification and Rates, 565.
- B. Contracts by the Government for the Purchase of Stamps, 566.

**X. Withdrawal of Letters after Mailing, 566.**

**XI. Arrival and Departure of Mail, 566.**

**XII. Carriage of Mails, 566.**

- A. Power of Postmaster General, 566.
- B. Contracts for Carriage, 567.
  - 1. Notice Inviting Proposals, 567.
  - 2. Form of Contract, 567.
  - 3. Compensation, 567.
    - a. Acceptance by Contractor of Action of Postoffice Department Fixing Rate, 567.
    - b. Readjustment of Compensation, 567.
    - c. Compensation for Carriage over Subsidized Railroads, 568.
    - d. Compensation for Additional Service, 569.
    - e. Compensation for Increase of Expedition, 569.
    - f. Deductions and Fines, 570.
    - g. Presentation of Claim for Compensation, 570.
    - h. Estoppel to Claim Compensation, 571.
    - i. Waiver of Right to Demand Compensation, 571.
    - j. Action of Postmaster General Directing Payment of Compensation Not Conclusive, 571.
- 4. Power of Postmaster General to Change Schedules of Departures and Arrivals, 572.
- 5. Power of Postmaster General to Change Route, 572.
- 6. Power of Postmaster General to Discontinue or Curtail Service under Contract, 572.
- 7. Construction of Contracts, 572.
- 8. Acquiescence in Contractor's Interpretation of Contract, 575.
- 9. Contracts for Carriage over Extension beyond Terminal of Established Route, 575.
- 10. Effect of Annulment of Contract by Act of Congress, 575.
- 11. Measure of Damages for Illegally Refusing to Award Contract, 575.
- 12. Weight of Evidence in Suit on Bond Given to Secure Performance of Contract, 576.
- C. Appropriation for Mail Service Performed in Confederate States Prior to War, 576.
- D. Mandamus to Compel Postmaster General to Credit Mail Contractor with Amount Found Due Him, 576.
- E. Status of Person in Charge of Mail on Railroad Train, 576.

**XIII. Recovery of Money Illegally Paid, 577.**

**XIV. Offenses against the Postal Laws, 578.**

- A. In General, 578.
- B. Particular Offenses, 579.
  - 1. Obstructing or Retarding the Mail, 579.
  - 2. Taking, Secreting, Opening, Embezzling of Destroying Mail Matter, 579.

- a. Persons Employed in the Postal Service, 579.
  - (1) Secreting, Embezzling or Destroying Mail Matter, 579.
  - (2) Stealing an Article of Value Out of a Letter or Other Mail Matter, 580.
- b. Irrespective of Employment in the Postal Service, 581.
3. Embezzlement of Money Order Funds, 581.
4. Larceny of Postage Stamps, 581.
5. Selling or Disposing of Postage Stamps Otherwise than for Cash, 582.
6. Attempt to Induce Postmaster to Sell Postage Stamps for Credit, 582.
7. Procuring and Assisting a Mail Carrier to Rob the Mail, 582.
8. Unlawful Use of Mail, 582.
  - a. Use for Dissemination of Obscene Writings or Publications, or Articles Intended for Indecent or Immoral Uses, 582.
  - b. Use for Disseminating Matter Pertaining to Lotteries, 585.
  - c. Use for Disseminating Matter Pertaining to Schemes to Defraud or to Sell Counterfeit Money, 585.
9. Transporting Mailable Matter on a Post Route Otherwise than in the Mail, 586.

#### CROSS REFERENCES.

See the titles *APPEAL AND ERROR*, vol. 2, p. 1; *BILL OF PARTICULARS*, vol. 3, p. 243; *BRIDGES*, vol. 3, p. 516; *CARRIERS*, vol. 3, p. 556; *CONSTITUTIONAL LAW*, vol. 4, p. 1; *CONTRACTS*, vol. 4, p. 552; *COURTS*, vol. 4, p. 861; *CRIMINAL LAW*, vol. 5, p. 43; *DOCUMENTARY EVIDENCE*, vol. 5, p. 431; *EMBEZZLEMENT*, vol. 5, p. 742; *ESTOPPEL*, vol. 5, p. 913; *EVIDENCE*, vol. 5, p. 1004; *FRAUD AND DECEIT*, vol. 6, p. 394; *IMPAIRMENT OF OBLIGATION OF CONTRACTS*, vol. 6, p. 758; *INTEREST*, vol. 7, p. 217; *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 269; *JURY*, vol. 7, p. 748; *LARCENY*, vol. 7, p. 844; *LOTTERIES*, vol. 7, p. 1070; *PAYMENT*, ante, p. 319; *PRINCIPAL AND SURETY*; *PRIZE*; *PUBLIC LANDS*; *PUBLIC OFFICERS*; *RAILROADS*; *REVENUE LAWS*; *TELEGRAPHS AND TELEPHONES*; *TURNPIKES AND TOLLRoads*; *UNITED STATES*; *WITNESSES*.

#### I. Powers of the States before the Union Was Formed.

The states before the Union was formed could establish postoffices and post roads, and in doing so could bring into play the police power in the protection of their citizens from the use of the means so provided for purposes supposed to exert a demoralizing influence upon the people.<sup>1</sup>

#### II. Power of the Federal Government under the Constitution.

**A. In General.**—Among the powers expressly given to the national government is the creation and management of a postoffice system for the nation.<sup>2</sup> This power is given by article 1, § 8, of the constitution, which provides that congress shall have power "to establish postoffices and post roads."<sup>3</sup> The power thus conferred embraces the regulation of the entire postal system of the country<sup>4</sup> and the right to exercise all powers necessary to make it effective.<sup>5</sup> It is

1. Powers of the states before the Union was formed.—In *re Rapier*, 143 U. S. 110, 134, 36 L. Ed. 93.

2. Creation and management of postal system vested in national government.—In *re Debs*, 158 U. S. 564, 579, 39 L. Ed. 1092.

3. *Ware v. United States*, 4 Wall. 617, 632, 18 L. Ed. 389; In *re Debs*, 158 U. S. 564, 579, 39 L. Ed. 1092.

Reason for conferring power upon congress.—The postal service is placed within the power of congress, because,

being national in its operation, it should be under the protecting care of the national government. *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 9, 24 L. Ed. 708.

4. What the power embraces.—Ex parte Jackson, 96 U. S. 727, 24 L. Ed. 877; In *re Rapier*, 143 U. S. 110, 133, 36 L. Ed. 93; *Public Clearing House v. Coyne*, 194 U. S. 497, 506, 48 L. Ed. 1092.

5. In *re Rapier*, 143 U. S. 110, 134, 36 L. Ed. 93.



not confined to the instrumentalities of the postal service known or in use when the constitution was adopted, but keeps pace with the progress of the country, and adapts itself to the new developments of time and circumstances.<sup>6</sup> As the power was intrusted to the general government for the good of the nation, it is not only the right, but the duty, of congress to see to it that the transmission of the mails is not obstructed or unnecessarily encumbered by state legislation.<sup>7</sup>

**The United States have a property in the mails.** They are not mere common carriers, but a government, performing a high official duty in holding and guarding its own property as well as that of its citizens committed to its care.<sup>8</sup>

**B. Power to Designate Post Routes and Postoffices and Provide for Carriage of Mail.**—The power vested in congress has been practically construed, since the foundation of the government, to authorize not merely the designation of the routes over which the mail shall be carried,<sup>9</sup> and the offices where letters and other documents shall be received to be distributed or forwarded,<sup>10</sup> but to embrace the carriage of the mail, and all measures necessary to secure its safe and speedy transit, and the prompt delivery of its contents.<sup>11</sup>

**C. Power to Designate What Things Are Mailable and What Not.**—Congress may designate what may be carried in the mails and what excluded.<sup>12</sup> Such designation and exclusion must, however, be consistent with the rights of the people as reserved by the constitution.<sup>13</sup> But with this limitation in view, it must be left to congress in the exercise of a sound discretion to determine in what manner it will exercise its power to exclude objectionable matter from the mail.<sup>14</sup>

**D. Power to Authorize Postmaster General to Seize and Detain Letters.**—It is within the power of congress to entrust the postmaster general with

6. *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 24 L. Ed. 708.

7. *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 9, 24 L. Ed. 708.

8. **United States have a property in the mails.**—*Searight v. Stokes*, 3 How. 151, 169, 11 L. Ed. 537; *In re Debs*, 158 U. S. 564, 583, 39 L. Ed. 1092.

9. **Designation of post routes.**—*Ex parte Jackson*, 96 U. S. 727, 732, 24 L. Ed. 877.

10. **Designation of postoffices.**—*Ex parte Jackson*, 96 U. S. 727, 732, 24 L. Ed. 877.

11. **Safe and speedy carriage of mail.**—*Ex parte Jackson*, 96 U. S. 727, 732, 24 L. Ed. 877.

A state statute, which unnecessarily interferes with the speedy and uninterrupted carriage of the mails, is not a reasonable police regulation, but is unconstitutional and void. *Illinois Cent. R. Co. v. Illinois*, 163 U. S. 142, 155, 41 L. Ed. 107.

**Power to prevent interference with transportation.**—The national government under its power over the transportation of the mails may prevent any unlawful and forcible interference therewith, either by legislation making such interference a criminal offense, by the use of force, on the part of the executive authorities when such transportation is obstructed or by the exercise by the federal courts of their powers of prevention by the issuance of a writ of injunction. *In re Debs*, 158 U. S. 564, 581, 582, 39 L. Ed. 1092.

In a suit for such an injunction the government has such an interest in the

subject matter as will enable it to appear as a party plaintiff. *In re Debs*, 158 U. S. 564, 583, 39 L. Ed. 1092. See ante, "In General," II, A.

12. **Power to designate what things are mailable and what not.**—*Ex parte Jackson*, 96 U. S. 727, 24 L. Ed. 877; *In re Rapier*, 143 U. S. 110, 133, 36 L. Ed. 93; *Public Clearing House v. Coyne*, 194 U. S. 497, 507, 48 L. Ed. 1092; *Burton v. United States*, 202 U. S. 344, 371, 50 L. Ed. 1057.

13. **Power must be exercised within constitutional limits.**—*Burton v. United States*, 202 U. S. 344, 371, 50 L. Ed. 1057.

**Regulations cannot be enforced so as to interfere with freedom of press.**—Regulations against transporting in the mail printed matter, which is open to examination, cannot be enforced so as to interfere in any manner with the freedom of the press. Liberty of circulating is essential to that freedom. *Ex parte Jackson*, 96 U. S. 727, 24 L. Ed. 877.

When, therefore, printed matter is excluded from the mail, its transportation in any other way as merchandise cannot be forbidden by congress. *Ex parte Jackson*, 96 U. S. 727, 24 L. Ed. 877; *In re Rapier*, 143 U. S. 110, 133, 36 L. Ed. 93.

14. **Manner of exercising power within sound discretion of congress.**—*In re Rapier*, 143 U. S. 110, 134, 36 L. Ed. 93.

Congress may restrict the use of the postal system to letters, and deny it to periodicals; it may include periodicals, and

the power of seizing and detaining letters upon evidence satisfactory to himself.<sup>15</sup>

**E. Power to Prescribe Weight and Form of Mail Matter and Postage Charges.**—Congress may prescribe the weight and form of mail matter and the charges to which it shall be subjected.<sup>16</sup>

### III. Power of Postmaster General to Review Predecessor's Decisions.

The right of a postmaster general to review his predecessor's decisions, extends to mistakes in matters of fact, arising from errors in calculation, and to cases of rejected claims, in which material testimony is afterwards discovered and produced.<sup>17</sup> But if a credit has been given, or an allowance made, by such predecessor, and it is alleged to be an illegal allowance, the judicial tribunals must be resorted to, to construe the law under which the allowance was made, and to settle the right between the United States, and the party to whom the credit was given.<sup>18</sup>

### IV. Postoffices.

**A. Establishment.**—The postmaster general has the power to establish postoffices,<sup>19</sup> and under it he may designate the places, that is, the localities, at which the mails are to be received,<sup>20</sup> but cannot bind the United States by any lease or purchase of a building to be used for the purposes of a postoffice, unless the power to do so is derived from a statute which either expressly or by necessary implication authorizes him to make such lease or purchase.<sup>21</sup>

exclude books, it may admit books to the mails and refuse to admit merchandise, or it may include all of these and fail to embrace within its regulations telegrams or large parcels of merchandise, although in most civilized countries of Europe these are also made a part of the postal service. *Public Clearing House v. Coyne*, 194 U. S. 497, 507, 48 L. Ed. 1092.

"It may also refuse to include in its mails such printed matter or merchandise as may seem objectionable to it upon the ground of public policy, as dangerous to its employees or injurious to other mail matter carried in the same packages." *Public Clearing House v. Coyne*, 194 U. S. 497, 507, 48 L. Ed. 1092. See post, "Articles Dangerous in Their Nature or to Other Articles with Which They May Come in Contact," VII, B, 4.

Under its power to classify mailable matter, applying different rates of postage to different articles, and prohibiting some altogether, it may also classify the recipients of such matter, and forbid the delivery of letters to such persons or corporations as in its judgment are making use of the mails for the purpose of fraud or deception or the dissemination among its citizens of information of a character calculated to debauch the public morality. *Public Clearing House v. Coyne*, 194 U. S. 497, 507, 48 L. Ed. 1092. See post, "Things Prohibited to Be Sent or Delivered by Mail," VII, B.

"It is not necessary that congress should have the power to deal with crime or immorality within the states in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime or immorality." *In re Rapier*, 143 U. S. 110, 134, 36 L. Ed. 93.

**15. Power to authorize postmaster**

**general to seize and detain letters.**—*Public Clearing House v. Coyne*, 194 U. S. 497, 509, 48 L. Ed. 1092.

**16. Weight and form of mail matter and postage charges.**—*Ex parte Jackson*, 96 U. S. 727, 732, 24 L. Ed. 877. See post, "Classification and Rates," IX, A.

**17. In what cases postmaster general may review predecessor's decisions.**—*United States v. Bank*, 15 Pet. 377, 10 L. Ed. 774.

**18. United States v. Bank**, 15 Pet. 377, 10 L. Ed. 774.

**19. Postmaster general has power to establish postoffices.**—*Chase v. United States*, 155 U. S. 489, 502, 39 L. Ed. 234; *Ware v. United States*, 4 Wall. 617, 623, 18 L. Ed. 389.

**By the legislation of congress in force in 1866** the postmaster general had the power to establish postoffices as well where the commissions of the office amounted to or exceeded one thousand dollars as where they did not. *Ware v. United States*, 4 Wall. 617, 18 L. Ed. 389.

**20. Postmaster general may designate places for receiving mails.**—*Chase v. United States*, 155 U. S. 489, 502, 39 L. Ed. 234.

"The policy of the government from the time the general postoffice was established, has been to delegate the power to designate the places where the mails shall be received and delivered to the postmaster general." *Ware v. United States*, 4 Wall. 617, 632, 18 L. Ed. 389.

**21. Postmaster general cannot lease or purchase building without statutory authority.**—*Chase v. United States*, 155 U. S. 489, 502, 39 L. Ed. 234.

"The general authority to establish postoffices does not itself, or without more, necessarily imply authority to bind

**B. Discontinuance.**—Unless there is some provision in the acts of congress restraining its exercise, the power to establish postoffices, as interpreted by usage coeval with the creation of the postoffice department and recognized in congressional legislation, infers a power to discontinue them;<sup>22</sup> and postmasters occupy their offices subject to the contingency that such offices may be so discontinued.<sup>23</sup> If the postmaster general exercise this power, the office of postmaster is gone. There is no longer a postmaster at the place.<sup>24</sup>

## V. Postmasters.

**A. Appointment.—When Appointment Is Complete.**—The nomination of a postmaster by the president, his confirmation by the senate, and the signature of the commission, and affixing to it the seal of the United States, are all the acts necessary to render the appointment complete.<sup>25</sup> Hence, the appointment is not rendered invalid by the subsequent death of the president before the transmission of the commission to the appointee, even though it is necessary that the appointee should perform certain acts before he can legally enter upon the duties of the office.<sup>26</sup>

**B. Salary.**—Prior to 1864 postmasters were paid by a commission upon the receipts of their offices. In that year an act was passed dividing postmasters into classes and putting their compensation upon a salary basis.<sup>27</sup> By that and subsequent acts provision was also made for readjusting postmasters' salaries under certain conditions, and upon a basis prescribed.<sup>28</sup> If the postmaster general fails to readjust a salary in a case where the statutes require it, he may be con-

the United States by a contract to lease or purchase a postoffice building." *Chase v. United States*, 155 U. S. 489, 502, 39 L. Ed. 234.

But an appropriation of money to pay for the rent of a postoffice building at a named place might give authority to the postmaster general to lease such building in that locality as he deemed proper for the service, always keeping within the amount so appropriated. *Chase v. United States*, 155 U. S. 489, 502, 39 L. Ed. 234.

General appropriation to pay for rent of postoffices.—"So also the power to lease a building to be used as a postoffice may be implied from a general appropriation of money to pay for rent of postoffices in any particular fiscal year or years." *Chase v. United States*, 155 U. S. 489, 502, 39 L. Ed. 234.

Under the statutes in force on May 1, 1870, the postmaster general had no authority to enter into a written contract of lease, for a term of years, of a part of a building, to be used for the purposes of a local postoffice. *Chase v. United States*, 155 U. S. 489, 500, 39 L. Ed. 234.

**22. Power to establish postoffices infers power to discontinue them.**—*Ware v. United States*, 4 Wall. 617, 18 L. Ed. 389.

**23. Postmasters occupy their offices subject to contingency of discontinuance.**—*Ware v. United States*, 4 Wall. 617, 18 L. Ed. 389.

Possessing thus the power to discontinue postoffices, the postmaster general may exercise the power, notwithstanding that the postmasters have been appointed by the president, by and with the advice and consent of the senate, and under a statute which enacts that the appointee

shall hold his office for the term of four years unless sooner removed by the president. *Ware v. United States*, 4 Wall. 617, 18 L. Ed. 389.

A postmaster cannot recover damages against the United States because of the lawful discontinuance of a postoffice. *Ware v. United States*, 4 Wall. 617, 18 L. Ed. 389.

**24. Discontinuance of postoffice abolishes office of postmaster.**—*Ware v. United States*, 4 Wall. 617, 18 L. Ed. 389.

**25. Acts necessary to render appointment complete.**—*United States v. Le Baron*, 19 How. 73, 15 L. Ed. 525.

**26. Appointment not rendered invalid by death of president before transmission of commission.**—*United States v. Le Baron*, 19 How. 73, 15 L. Ed. 525.

**27. Postmaster classified and compensation put on salary basis.**—By this statute, act of July 1, 1864 (13 Stat. at L. 335), postmasters were divided into five classes and paid by a salary gauged by their compensation for the two consecutive years preceding the act. *United States v. Verdier*, 164 U. S. 213, 215, 41 L. Ed. 407; *McLean v. Vilas*, 124 U. S. 86, 89, 31 L. Ed. 329.

The classification was determined by the postmaster general upon the basis of the commissions previously paid to them, and the exact amount of their salaries fixed within a certain limitation provided by the act for each class. *United States v. Verdier*, 164 U. S. 213, 215, 41 L. Ed. 407; *McLean v. Vilas*, 124 U. S. 86, 31 L. Ed. 329.

**28. Readjustment of salaries.**—Under § 2 of the act of July 1, 1864, 13 Stat. at L. 335, provision was made for the review



strained by a mandamus.<sup>29</sup> But the courts cannot perform the duty for him or treat it as performed when it has been neglected. There is, therefore, no legal liability against the United States for the amount claimed by a postmaster for increased salary, until the postmaster general has readjusted his salary in accordance with the statutes.<sup>30</sup> If the postmaster general neglects his duty in failing to readjust the salary of a postmaster, the postmaster cannot recover interest on the amount allowed him before its liquidation, as the government is not affected by the laches of its officers.<sup>31</sup> It is competent for congress to provide that any

and readjustment of a postmaster's salary by the postmaster general, once in two years, upon the basis upon which the salary was originally fixed; but such change did not take effect until the first day of the quarter next following the order for the same. *United States v. Verdier*, 164 U. S. 213, 215, 41 L. Ed. 407; *McLean v. Vilas*, 124 U. S. 86, 91, 31 L. Ed. 329.

This section was amended by the act of July 12, 1866 (14 Stat. at L. 59, 60), by adding a proviso that when the quarterly returns of any postmaster showed that the salary allowed was 10 per cent less than it would have been on a basis of commissions, the postmaster general should review and readjust under the provisions of the prior act. *United States v. Verdier*, 164 U. S. 213, 215, 41 L. Ed. 407; *McLean v. Vilas*, 124 U. S. 86, 92, 31 L. Ed. 329.

By this act the postmaster general was not authorized to readjust an existing salary unless the quarterly returns made showed cause for it. *United States v. Verdier*, 164 U. S. 213, 219, 41 L. Ed. 407; *United States v. McLean*, 95 U. S. 750, 753, 24 L. Ed. 579.

The acts of 1864 and 1866 were both prospective in their operation. *United States v. Verdier*, 164 U. S. 213, 216, 41 L. Ed. 407; *United States v. McLean*, 95 U. S. 750, 24 L. Ed. 579.

By the act of March 3, 1883 (22 Stat. at L. 487), the postmaster general was authorized and directed to readjust the salaries of postmasters whose salaries had not theretofore been readjusted under the act of 1866, who had made sworn returns of their receipts and business for readjustment of salary to the department, or who had made quarterly returns in conformity to the then existing laws and regulations, showing that the salary allowed was 10 per cent less than it would have been upon the basis of commissions, such readjustment to be made in accordance with the act of 1866, and to date from the beginning of the quarter succeeding that in which such sworn returns of receipts and business, or quarterly returns, were made. *United States v. Verdier*, 164 U. S. 213, 216, 41 L. Ed. 407; *McLean v. Vilas*, 124 U. S. 86, 92, 31 L. Ed. 329.

When application is made to the postmaster general for a readjustment of the salary of a postmaster, it is his duty, under the acts of congress of March 3, 1883, ch. 119, 22 Stat. 487, and August 4, 1886,

24 Stat. 256, 307, § 8, to compare the salary which the petitioner received in the preceding biennial period with what he would have received in commissions on the receipts of his office, under the statute of 1854, 10 Stat. 298, during the same term; and if on such comparison it should appear that the salary thus allowed was ten per centum less than such commissions, then to readjust the salary, the readjustment to date from the immediately succeeding quarter. Such readjustment cannot apply to the biennial period for which quarterly returns were made. *United States v. Ewing*, 131 U. S. 140, 145, 46 L. Ed. 471.

The preceding statutes do not require a readjustment of the salaries of postmasters oftener than once in two years, as a legal duty or obligation upon the part of the postmaster general. *McLean v. Vilas*, 124 U. S. 86, 94, 31 L. Ed. 329; *United States v. Verdier*, 164 U. S. 213, 220, 41 L. Ed. 407.

But that officer is authorized, within his discretion, to make readjustments in special cases, upon satisfactory representations. *McLean v. Vilas*, 124 U. S. 86, 94, 31 L. Ed. 329.

No readjustment can be made, however, unless there have been quarterly returns for the two years preceding on which it can be based. *McLean v. Vilas*, 124 U. S. 86, 88, 31 L. Ed. 329.

When in compliance with the statutes the postmaster general has readjusted the salary of a postmaster, such readjustment establishes the amount of his salary prospectively for two years. *McLean v. Vilas*, 124 U. S. 86, 31 L. Ed. 329.

Under the act of March 3, 1883, no readjustment can be made except upon the application of the postmaster. *United States v. Verdier*, 164 U. S. 213, 217, 41 L. Ed. 407.

**29. Mandamus to compel readjustment of salary.**—*United States v. Verdier*, 164 U. S. 213, 220, 41 L. Ed. 407; *United States v. McLean*, 95 U. S. 750, 753, 24 L. Ed. 579. See, also, *McLean v. Vilas*, 124 U. S. 86, 87, 31 L. Ed. 329. See the title MANDAMUS, vol. 8, p. 1.

**30. Readjustment essential prerequisite to liability for increased salary.**—*United States v. Verdier*, 164 U. S. 213, 220, 41 L. Ed. 407; *United States v. McLean*, 95 U. S. 750, 753, 24 L. Ed. 579; *McLean v. Vilas*, 124 U. S. 86, 87, 31 L. Ed. 329.

**31. Interest not recoverable.**—*United*

sums ascertained to be due to claimants under statutes providing for the readjustment of salaries of postmasters, shall be paid directly to such claimants.<sup>32</sup> Where a postmaster of the fourth class is assigned by the postmaster general to the third class and his salary increased, he is entitled to the increased salary from the date of such increase though he is not commissioned by the president a third class postmaster until later.<sup>33</sup>

**Increased Compensation by Reason of Presence of Military or Naval Force.**—Under a statute passed during the Civil War, whenever by reason of the presence of a military or naval force near a postoffice, unusual business accrued thereat, the postmaster general was required to make a special order allowing proportionately reasonable compensation to the postmaster, and for clerical services.<sup>34</sup>

**Effect of Suspension from Office.**—A deputy postmaster who was suspended from office by the president under the power conferred by the act of April 5, 1869,<sup>35</sup> was not entitled to pay during the period of his suspension, and until he again took up the performance of the duties of the office.<sup>36</sup>

*States v. Verdier*, 164 U. S. 213, 220, 4 L. Ed. 407.

**32. Congress may provide for direct payment to claimants under readjustment statutes.**—*Spalding v. Vilas*, 161 U. S. 483, 490, 40 L. Ed. 780.

If such legislation work injury to an attorney employed by such claimants in that it gives his clients an opportunity to evade, for a time, the payment of what they may have agreed to allow him, it is an injury from which no cause of action can arise. *Spalding v. Vilas*, 161 U. S. 483, 490, 40 L. Ed. 780.

It results that the postmaster general not only has the right, but it is his duty, to cause all checks or warrants, issued under the authority of such statutes, to be sent directly to the claimants; and if not strictly his duty, it is his right to call the attention of claimants to the provisions of such statutes. *Spalding v. Vilas*, 161 U. S. 483, 491, 40 L. Ed. 780.

Nor does the postmaster general exceed his authority in such a case when he informs claimants that congress requires checks or warrants to be sent to them "because no attorney's services are necessary to the presentation of the claim before the department, and congress desires all the proceeds to reach the person really entitled thereto;" and that "after a claim of this character is filed in the department, its examination and the readjustment of salary, if found proper, are made directly from the books and papers in the department by its officers, and without further evidence." *Spalding v. Vilas*, 161 U. S. 483, 491, 40 L. Ed. 780.

Nor does the postmaster general exceed his authority when he informs claimants that they are under no legal obligation to respect any transfer, assignment, or power of attorney, which § 3477 of the Revised Statutes declares to be null and void. *Spalding v. Vilas*, 161 U. S. 483, 492, 40 L. Ed. 780.

The postmaster general cannot be held liable to a civil suit for damages alleged

to have resulted to the attorney of claimants from such communications by reason of any personal motive that may be alleged to have prompted his action; for personal motives cannot be imputed to duly-authorized official conduct. *Spalding v. Vilas*, 161 U. S. 483, 488, 498, 40 L. Ed. 780.

**33. A postmaster of the fourth class was assigned by the postmaster general to the third class and his salary was increased to a certain amount.** He was not commissioned by the president a third class postmaster until later, and by an order of the sixth auditor he was not allowed to enjoy the benefits of the increased salary until he was so commissioned. It was held that the postmaster became entitled to the increased salary from the date of such increase; that the commission by the president had nothing to do with the salary attached to the office; and that such salary was not affected by the order of the sixth auditor. *United States v. Wilson*, 144 U. S. 24, 27, 36 L. Ed. 332.

**34. Increased compensation by reason of presence of military or naval force.**—Act of March 3, 1863 (12 Stat. at L. 702), § 5; *United States v. Wright*, 11 Wall. 648, 20 L. Ed. 188.

The postmaster general is the sole judge to determine not only whether the exigencies in the case provided for by the act have arisen, but also, in case that he decides that they have, to determine the manner and extent of the allowance to be made. It is not competent for a court or jury to revise his decision. *United States v. Wright*, 11 Wall. 648, 20 L. Ed. 188.

**35.** 16 Stat. 6.

**36. Effect of suspension from office.**—*Embry v. United States*, 100 U. S. 680, 685, 25 L. Ed. 772.

April 20, 1867, the president duly commissioned A. as deputy postmaster at Nashville, Tenn., for the term of four years, "subject to the conditions pre-

**C. Powers, Duties and Liabilities**—1. **NO POWER TO CONTRACT IN RESPECT TO MAIL MESSENGER SERVICE.**—A postmaster, in the absence of special authority, has no power to contract in respect to the mail messenger service, and cannot bind the government by his knowledge or acts in respect thereto.<sup>37</sup>

2. **DUTY IN REGARD TO MATTER DEPOSITED IN THE POSTOFFICE.**—When letters are placed in a postoffice they are within the legal custody of the officers of the government, and it is the duty of postmasters to deliver them to the persons to whom they are addressed.<sup>38</sup> A postmaster is bound to exercise due diligence, and nothing more, in the care of matter deposited in the postoffice. He is not liable for a loss happening without his fault or negligence.<sup>39</sup>

3. **LIABILITY ON BOND**—a. *Authority to Take Bonds.*—Under the acts of congress relating to the postoffice department, in force in 1827, the postmaster general had authority to take bonds from deputy postmasters, to secure the payment of money due to the general postoffice.<sup>40</sup>

b. *Rule of Liability.*—In an action on the official bond of a postmaster the right of the government does not rest on the implied contract of bailment, but on the express contract found in the bond, to pay over the funds in his custody.<sup>41</sup> The only exceptions to this rule of liability are found in the acts of congress of April 29th, 1864, and March 3d, 1865.<sup>42</sup>

c. *Time from Which Bond Takes Effect.*—The bond of a postmaster takes effect and speaks from the time that it reaches the postmaster general and is accepted by him, and not from the day of its date, or from the time when it is deposited in the postoffice to be sent forward.<sup>43</sup>

d. *Jurisdiction of Suits on Bonds.*—The federal circuit courts had jurisdiction, under the federal constitution, and the acts of April 30th, 1810, ch. 262, § 29, and of March 3d, 1815, ch. 782, § 4, of suits brought in the name of the postmaster general, on the bonds of deputy postmasters.<sup>44</sup>

e. *Time within Which Suit Must Be Brought.*—Statutes prescribing the time within which suits upon postmasters' bonds must be brought have received the interpretation of the supreme court.<sup>45</sup>

scribed by law," and May 5, 1869, under the act of April 5, 1869 (16 Stat. 6), signed an order suspending him from office until the end of the next session of the senate, and designating B. to perform the duties of that office. A. delivered the office to B. May 27, 1869. The nomination of B. was sent to the senate at its next session, which terminated July 15, 1870, and on that date it was rejected. Pursuant to instructions from the postoffice department, A. took possession of said office July 25, 1870. B., when holding the office, received the salary. A. brought suit therefor against the United States. It was held, that he was not entitled to recover. *Embry v. United States*, 100 U. S. 680, 25 L. Ed. 772.

37. **No power to contract in respect to mail messenger service.**—*Slavens v. United States*, 196 U. S. 229, 238, 49 L. Ed. 457.

38. **Duty to deliver letters to persons to whom addressed.**—*McDonald v. Chemical Nat. Bank*, 174 U. S. 610, 620, 43 L. Ed. 1106.

39. **Only due diligence required in care of mail matter.**—*United States v. Thomas*, 15 Wall. 337, 343, 21 L. Ed. 89. As to liability of a postmaster for negligence, see post, "Liability for Negligence," V, C, 5.

40. **Authority of postmaster general under acts in force in 1827.**—*Postmaster-General v. Early*, 12 Wheat. 136, 150, 6 L. Ed. 577.

41. **Liability rests on express contract found in bond.**—*United States v. Keebler*, 9 Wall. 83, 88, 19 L. Ed. 574.

42. **Exceptions to rule.**—*United States v. Keebler*, 9 Wall. 83, 88, 19 L. Ed. 574.

The act of April 29, 1864, provided that in all cases where loyal postmasters were robbed by Confederate forces or rebel guerillas, without fault or neglect on their part, the postmaster general might credit them in settlement with the amount lost by the robbery, and if the officer had settled and paid the amount before the law was passed, that it should be paid back to him. And by the act of March 3d, 1865, the relief was extended to losses by any armed force whatever, either by robbery or burning. *United States v. Keebler*, 9 Wall. 83, 88, 19 L. Ed. 574.

43. **Time from which bond takes effect.**—*United States v. Le Baron*, 19 How. 73, 15 L. Ed. 525.

44. **Jurisdiction of suits on bonds.**—*Postmaster-General v. Early*, 12 Wheat. 136, 6 L. Ed. 577; *Dox v. Postmaster-General*, 1 Pet. 318, 323, 7 L. Ed. 160.

45. **The act of March 3, 1825** (4 Stat. at



f. *What Defenses Are Available.*—The claim of the United States upon the official bond of a postmaster, and upon all parties thereto, is not released by the laches of the postmaster general;<sup>46</sup> nor is it a defense in a suit against the sureties on such a bond, that the government, through their agent, the auditor of the treasury of the postoffice department, had notice of the defalcation and embezzlement of funds by the postmaster, and yet permitted him to remain in office, whereby he was enabled to commit the default and embezzlement, as to which such defense is attempted to be interposed.<sup>47</sup> The voluntary payment by a postmaster, of money held by him for the government, to a creditor of the United States, cannot be set up by him or his sureties as a defense in a suit on his bond.<sup>48</sup> In order to discharge the sureties on a postmaster's bond by giving time, the time which is given must operate upon the instrument which the sureties have signed.<sup>49</sup>

g. *Amount Recoverable.*—In an action on a postmaster's bond, the method of computing damages under a statute which imposes a forfeiture on the postmaster for neglecting to render his account within the time, and in the form and manner prescribed by law, is to be determined by an interpretation of the terms of the statute.<sup>50</sup> A postmaster is chargeable with interest on a judgment obtained in a suit on his bond, for a balance due on his accounts, and his administrator can-

L. 102), which exonerates the sureties of a postmaster if balances on his account are not sued for within two years after they occur, does not apply where by the mode of keeping the account, the balance due from the postmaster is thrown upon the last quarter of his term of office, which is within the period limited. *Jones v. United States*, 7 How. 681, 12 L. Ed. 870.

The act of congress for regulating the postoffice department, in force in 1828, did not, in terms, discharge the obligors in the official bond of a deputy postmaster, from the direct claim of the United States upon them, on the failure of the postmaster general to commence a suit against the defaulting postmaster, within the time prescribed by law; their liability, therefore, continued; the responsibility of the postmaster general was superadded to, not substituted for, that of the obligors. *Dox v. Postmaster-General*, 1 Pet. 318, 7 L. Ed. 160.

46. *Liability not released by laches of postmaster general.*—*Dox v. Postmaster-General*, 1 Pet. 318, 7 L. Ed. 160.

47. *That government had notice of embezzlement by postmaster, no defense.*—*Jones v. United States*, 18 Wall. 662, 21 L. Ed. 867.

48. *Voluntary payment by postmaster to creditor of United States, no defense.*—*United States v. Keehler*, 9 Wall. 83, 19 L. Ed. 574.

A postmaster cannot defend against a suit on his official bond by proving that he paid money due the United States to one of its creditors, under an order of the Confederate authorities, where he shows no force or physical coercion which compelled obedience to such order. *United States v. Keehler*, 9 Wall. 83, 19 L. Ed. 574.

49. *When giving time will discharge sureties.*—*United States v. Hodge*, 6 How. 279, 12 L. Ed. 437.

Therefore where a mortgage was given by a postmaster to secure the postoffice department, payment under which could not be enforced until after the lapse of six months from its date, it was held that its acceptance by the government did not release the sureties upon the postmaster's bond. The mortgage was only a collateral security which was beneficial to the sureties. *United States v. Hodge*, 6 How. 279, 12 L. Ed. 437.

Generally, as to when giving time to the principal in a bond will discharge the sureties, see the title PRINCIPAL AND SURETY.

50. *Computing damages under statute imposing forfeiture for neglect to render account as required by law.*—By the act of March 3, 1825 (4 Stat. at L., 112), congress declared that if any postmaster shall neglect to render his account for one month after the time, and in the form and manner, prescribed by law, and by the postmaster general's instructions conformable therewith, he shall forfeit double the value of the postage which shall have arisen at the same office in any equal portion of time, previous or subsequent thereto; or in case no account shall have been rendered at the time of the trial of such case, then such sum as the court and jury shall estimate as equivalent thereto. Where, at the time of the trial of a suit by the United States against a postmaster and his surety, there was no return for an entire quarter and a fraction of the ensuing quarter, the proper mode of computing damages was to go back to a quarter for which there was a return, calculate from it the amount due for the deficient quarter and deficient fraction taken together, and then double the sum arrived at by this calculation. The fraction is included, because the obligation to make a return is as binding upon a post-

not set off against it interest on an amount found to be due his estate on a readjustment of his salary made after his death.<sup>51</sup>

**Set-Offs.**—In an action on a postmaster's bond, the postmaster cannot set off as a credit a claim for damages against the United States unless it appears affirmatively that such claim had been presented to the auditor of the postoffice department, and had been by him disallowed in whole or in part, or that the postmaster had been prevented from so presenting it by some unavoidable accident.<sup>52</sup> Where in paying money to a mail contractor a postmaster violated his official duty and the instructions of the postmaster general and neglected to inform the postoffice department of such payment until after a final settlement of the accounts of the contractor had been made, in which settlement the contractor was not charged with the amount of such payment, it is not proper to allow a credit for such payment in a suit on the postmaster's bond.<sup>53</sup>

h. *Evidence*—(1) *Admissibility*.—Of **Treasury Transcripts**.—See the title **DOCUMENTARY EVIDENCE**, vol. 5, p. 439.

master who leaves office in the middle of a quarter, as if he remained in office until the end of the quarter. *United States v. Roberts*, 9 How. 501, 13 L. Ed. 234.

**51. Interest on judgment.**—*United States v. Verdier*, 164 U. S. 213, 41 L. Ed. 407.

Upon the termination of his services as postmaster, V. was found, upon the face of his accounts, to be indebted to the government. Suit was brought against him upon his bond, and the action resulted in a judgment against him, rendered in 1871, for a certain sum. By the act of March 3, 1883, c. 119, 22 Stat. 487, the postmaster general was authorized and directed to readjust the salaries of postmasters, whose salaries had not theretofore been readjusted under the act of 1866, such readjustment to be made in accordance with the act of 1866. Pursuant to this statute application was made by the administrator of V. for a review and readjustment of his salary as postmaster, and on December 23, 1885, his salary was readjusted, and a certain sum found to be due his estate. On August 4, 1886, an act was passed by congress, c. 903, 24 Stat. 256, 307, appropriating a sum of money to pay this and similar allowances. When V.'s account was audited he was charged with the judgment and interest thereon, to August 4, 1886 (the date of the appropriation). It was held that it was proper that he be charged with interest upon the judgment against him, and that the government was not to be charge with interest upon his readjusted compensation from the time he left the office. *United States v. Verdier*, 164 U. S. 213, 217, 41 L. Ed. 407. See ante, "Salary," V. B.

**52. Prerequisites to set-off of claim for damages.**—*Ware v. United States*, 4 Wall. 617, 629, 18 L. Ed. 389.

Where in a suit by the United States on the bond of a deputy postmaster to recover moneys which came to his hands during the six months next preceding the discontinuance of the office to which he was appointed, the defendant's rejoinder

(demurred to), by its whole context, and by its introductory allegations that the office was never supplied with mails after it was discontinued, showed that it meant nothing more than that the defendant was wrongfully prevented from earning commissions, it was held that such rejoinder presented a claim for damages merely, and that to such a claim it was an answer that it being for damages and not for commissions or receipts from boxes as ascertained in a quarterly account, it could not be sustained as a credit unless it appeared affirmatively that it had been presented to the auditor of the postoffice department and had been by him disallowed in whole or in part, or that the defendant had been prevented from so presenting it by some unavoidable accident. *Ware v. United States*, 4 Wall. 617, 18 L. Ed. 389.

**53. When improper to allow credit for payment of mail contractor.**—*United States v. Roberts*, 9 How. 501, 13 L. Ed. 234.

By the ninth section of the act of 1836 (5 Stat. at L. 81), it was enacted that the postmaster general was authorized to give instructions to postmasters for accounting and disbursing the public money. In 1838, the postmaster general gave instructions to all postmasters, that, where they paid money to contractors for carrying the mail, duplicate receipts were to be taken in the form prescribed, one of which the postmaster was to keep, and the other was directed to be sent by the next mail to the auditor for the postoffice department. Where a payment was made to a contractor by the surety of a postmaster in his behalf, and no duplicate receipt forwarded to the postoffice department, nor any information thereof given to the department until after a final settlement of the accounts of the contractor had been made, in which settlement the contractor was not charged with the amount of such payment, it was error in the circuit court to instruct the jury that they might allow a credit for it to the surety when sued upon his bond, provided they



(2) *Weight and Sufficiency.—Order of Postmaster General and Transcript of Accounts Only Prima Facie Evidence.*—In an action on a postmaster's bond to recover money alleged to have been illegally retained by the postmaster, an order of the postmaster general, made in pursuance of the act of June 17, 1878, c. 259, § 1,<sup>54</sup> withholding commissions on the postmaster's returns, and fixing his compensation, and the certified transcript of the postmaster's accounts based thereon, are not conclusive, but only prima facie evidence of the balance due the government.<sup>55</sup>

4. *LIABILITY FOR WRONGFULLY WITHHOLDING MAIL MATTER.*—When one to whom a letter or newspaper is addressed or his agent, tenders the lawful postage thereon, he is entitled to the immediate possession thereof, and if such possession be wrongfully withheld by the postmaster for a charge of unlawful postage, it is a conversion for which an action of trover will lie.<sup>56</sup> The courts of New York have jurisdiction of such an action.<sup>57</sup>

5. *LIABILITY FOR NEGLIGENCE.*—In order to make a postmaster liable for negligence, it must appear, that the loss or injury sustained by the plaintiff was the consequence of the negligence.<sup>58</sup> Where it is intended to charge him for the negligence of his assistants, the pleadings must be made up according to the case; and his liability then will only result from his own neglect, in not properly superintending the discharge of their duties in his office.<sup>59</sup> Where issue is taken upon the neglect of a postmaster himself, it is not competent to give in evidence, the neglect of his assistant.<sup>60</sup>

*D. Application of Payments Made by a Postmaster.*—See the title PAYMENT, ante, p. 319.

## VI. Compensation of Clerks and Letter Carriers.

*A. Chief Clerk of Postoffice Department.*—The rules and regulations of the postoffice department place the whole subject of finances under the charge of the chief clerk. It is within the range of his official duties, therefore, to superintend all matters relating to finance, and he is not entitled to charge a commission for negotiating loans for the use of the department.<sup>61</sup>

*B. Letter Carriers.—Extra Pay for Overtime Work.*—If a letter carrier is employed a greater number of hours per day than eight, he is entitled to extra pay therefor in proportion to the salary he is receiving.<sup>62</sup> For any excess on any day, the carrier is entitled to extra pay.<sup>63</sup> From the extra pay thus earned no deduction can be made for a deficit of less than eight hours a day worked on

believed from the testimony that the contractor had not received more money than he was entitled to. *United States v. Roberts*, 9 How. 501, 13 L. Ed. 234.

54. 20 Stat. 140.

55. *Order of postmaster general and transcript of accounts only prima facie evidence.*—*United States v. Dumas*, 149 U. S. 278, 37 L. Ed. 734.

56. *Liability for wrongfully withholding mail matter.*—*Teal v. Felton*, 12 How. 284, 292, 13 L. Ed. 990.

Where a postmaster refused to deliver a newspaper upon which there was an initial, unless the person to whom it was addressed would pay letter postage, it was held that he was properly held liable in an action of trover; that it was not a case calling for discretion in the discharge of his duties; that the law, and not the instructions of the postoffice department, furnished the proper guide for his action. *Teal v. Felton*, 12 How. 284, 13 L. Ed. 990.

57. *Teal v. Felton*, 12 How. 284, 292, 13 L. Ed. 990.

58. *Injury sustained must be the consequence of the negligence.*—*Dunlop v. Munroe*, 7 Cranch 242, 3 L. Ed. 329.

59. *Liability for negligence of assistants.*—*Dunlop v. Munroe*, 7 Cranch 242, 3 L. Ed. 329.

60. *Evidence of negligence of assistant not competent upon issue of postmaster's negligence.*—*Dunlop v. Munroe*, 7 Cranch 242, 3 L. Ed. 329.

61. *Chief clerk not entitled to commissions for negotiating loans.*—*Brown v. United States*, 9 How. 487, 13 L. Ed. 228.

62. *Extra pay in proportion to salary for overtime work.*—Act of May 24, 1888, ch. 308, 25 Stat. 157. *United States v. Gates*, 148 U. S. 134, 37 L. Ed. 396; *United States v. Post*, 148 U. S. 124, 37 L. Ed. 392.

63. *United States v. Gates*, 148 U. S. 134, 136, 37 L. Ed. 396.



Sundays and holidays.<sup>64</sup> The only set-off that can be maintained is when the carrier is absent from duty without leave.<sup>65</sup> In order that the carrier may earn this extra pay, his overtime employment need not be exclusively in the delivery, and collection of mail matter, but it may be such employment in the postoffice during the intervals between his trips, as the postmaster may direct, provided it be not employment as a clerk.<sup>66</sup> There is nothing in the provisions of §§ 1764 and 1765 of the Revised Statutes, which preclude a carrier from recovering extra pay for overtime work, where it is expressly allowed by statute.<sup>67</sup>

## VII. What Things Are Mailable.

**A. In General.**—The character of the things allowed to be carried in the mail has varied at different times, changing with the facility of transportation over the post roads.<sup>68</sup> At one time, only letters, newspapers, magazines, pamphlets, and other printed matter, not exceeding eight ounces in weight, were carried; afterwards books were added to the list; and now small packages of merchandise, not exceeding a prescribed weight, as well as books and printed matter of all kinds, are transported in the mail.<sup>69</sup>

**B. Things Prohibited to Be Sent or Delivered by Mail**—1. **IN GENERAL.—Object of Exclusion.**—In excluding various articles from the mail, the object of congress has not been to interfere with the freedom of the press, or with any other rights of the people; but to refuse its facilities for the distribution of matter deemed injurious to the public morals.<sup>70</sup>

2. **OBSCENE MATTER.**—The transmission by mail of obscene matter is prohibited by federal statutes, which have been held to be constitutional.<sup>71</sup>

3. **MATTER PERTAINING TO LOTTERIES OR SCHEMES FOR OBTAINING MONEY OR PROPERTY BY FALSE PRETENSES.**—Under § 3894 of the Revised Statutes, as amended by the act of September 19, 1890, c. 908,<sup>72</sup> the carriage in the mail, or delivery at or through any postoffice, of any of the matters therein specified, pertaining to lotteries or other similar enterprises, is forbidden.<sup>73</sup>

Under § 3929, as amended by the same act, the postmaster general may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery or other similar scheme or enterprise, or any scheme or device for obtaining money or property of any kind through the mails, by means of false or fraudulent pretenses, representations or promises, instruct post-

64. No deduction for deficit on Sundays and holidays.—United States v. Gates, 148 U. S. 134, 135, 37 L. Ed. 396.

"The carrier's eight-hour law declares 'that hereafter eight hours shall constitute a day's work,' but it allows compensation to continue in the form of an annual salary, and requires no deduction to be made if the duties of the day do not extend through the prescribed time." Act of May 24, 1888, c. 308, 25 Stat. 157. United States v. Gates, 148 U. S. 134, 136, 37 L. Ed. 396.

65. Only deduction allowed is for absence from duty without leave.—United States v. Gates, 148 U. S. 134, 136, 37 L. Ed. 396.

66. Character of overtime work.—Postal Laws and Regulations, 1887, § 647. United States v. Post, 148 U. S. 124, 131, 37 L. Ed. 392.

67. Carrier not precluded from recovering extra pay by provisions in Revised Statutes.—United States v. Post, 148 U. S. 124, 130, 37 L. Ed. 392.

68. What things are carried in the mail.—Ex parte Jackson, 96 U. S. 727, 732, 24 L. Ed. 877.

69. Ex parte Jackson, 96 U. S. 727, 732, 24 L. Ed. 877.

70. Object of excluding articles from mail.—Ex parte Jackson, 96 U. S. 727, 736, 24 L. Ed. 877; In re Rapiere, 143 U. S. 110, 133, 36 L. Ed. 93.

71. Statutes prohibiting transmission by mail of obscene matter, constitutional.—Public Clearing House v. Coyne, 194 U. S. 497, 508, 48 L. Ed. 1092.

As to the criminal liability entailed by using the mails for disseminating obscene writings or publications, see post, "Use for Dissemination of Obscene Writings or Publications, or Articles Intended for Indecent or Immoral Uses," XIV, B, 8, a. 72. 26 Stat. 465.

73. Transportation by mail of matter pertaining to lotteries.—In re Rapiere, 143 U. S. 110, 133, 36 L. Ed. 93; Horner v. United States, No. 1, 143 U. S. 207, 213,

masters at any postoffice at which registered letters arrive directed to any such person or company to return them to the postmaster at the office at which they were originally mailed, with the word "fraudulent" plainly written or stamped upon the outside thereof, and all such letters so returned to such postmasters must be by them returned to the writers thereof under such regulations as the postmaster general may prescribe.<sup>74</sup>

By § 4041 the postmaster general is authorized in similar terms to forbid the payment by any postmaster of any postal money order drawn in favor of any person engaged in the prohibited business.<sup>75</sup>

By § 4 of the act of March 2, 1895,<sup>76</sup> power conferred upon the postmaster general by § 3929 is extended and made applicable to all letters or other matter sent by mail.<sup>77</sup>

**These provisions are constitutional.**<sup>78</sup>

**Lottery Defined.**—Any scheme for the distribution of prizes by chance is a lottery within the meaning of these statutes.<sup>79</sup>

36 L. Ed. 126; *Horner v. United States*, No. 2, 143 U. S. 570, 578, 36 L. Ed. 266.

**74. Return of registered letters under instructions of postmaster general.**—*Public Clearing House v. Coyne*, 194 U. S. 497, 505, 48 L. Ed. 1092.

**75. Payment of postal money order forbidden.**—*Public Clearing House v. Coyne*, 194 U. S. 497, 505, 48 L. Ed. 1092.

**76.** 28 Stat. 963.

**77. Extension of power of postmaster general by act of March 2, 1895.**—*Public Clearing House v. Coyne*, 194 U. S. 497, 505, 48 L. Ed. 1092.

**Facts not vitiating fraud order.**—Where in pursuance of §§ 3929 and 4041 of the Revised Statutes the postmaster general issues a fraud order in a case where the person or company against which it is issued was engaged in conducting a lottery, if the order is properly issued in view of all the evidence, it is not vitiated by the fact that the postmaster general acted upon the theory that the person or company against which it was issued was engaged in conducting a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses and not in conducting a lottery, since both are within the purview of the statute. *Public Clearing House v. Coyne*, 194 U. S. 497, 505, 48 L. Ed. 1092.

**78. Provisions constitutional.**—In *re Rapier*, 143 U. S. 110, 133, 36 L. Ed. 93; *Horner v. United States*, No. 1, 143 U. S. 207, 213, 36 L. Ed. 126; *Horner v. United States*, No. 2, 143 U. S. 570, 578, 36 L. Ed. 266; *Public Clearing House v. Coyne*, 194 U. S. 497, 506, 48 L. Ed. 1092.

The provisions relating to the power of the postmaster general are not unconstitutional because they provide no judicial hearing upon the question of illegality. *Public Clearing House v. Coyne*, 194 U. S. 497, 508, 48 L. Ed. 1092. See the title **DUE PROCESS OF LAW**, vol. 5, p. 499.

The law is not unconstitutional, because the postmaster general may seize and detain all letters, which may include let-

ters of a purely personal or domestic character, and having no connection whatever with the prohibited enterprise. *Public Clearing House v. Coyne*, 194 U. S. 497, 510, 48 L. Ed. 1092.

Where it was alleged that the law was unconstitutional because it empowered the postmaster general to confiscate the money, or the representative of money, of the addressee, which had become his property by the depositing of the letter in the mails, it was held that the law was not unconstitutional on this ground as the action of the postmaster general in seizing the letter does not operate as a confiscation of the money or the determination of the title thereto; but merely as a refusal to extend the facilities of the postoffice department to the final delivery of the letter. *Public Clearing House v. Coyne*, 194 U. S. 497, 511, 48 L. Ed. 1092.

**79. Lottery defined.**—*Public Clearing House v. Coyne*, 194 U. S. 497, 510, 48 L. Ed. 1092.

The plan of the League of Equity contemplated that each member should pay an enrollment fee, and a certain sum per month for five years; and co-operate by inducing other persons to become members. Each member was to receive his pro rata share of the "realization" as provided at the end of five years; or in case he should have secured three new members in any one year, he was to realize at the end of each year one-fifth of the amount which he would be entitled to receive at the end of five years. The success of the plan depended upon constantly and rapidly increasing the number of members and the return to the members was not only uncertain in its amount but depended largely upon the growth in membership. As there was no reserve fund provided for the indemnification of the members, there was sure to be a loss to every one interested in the enterprise as soon as the number of new members ceased to increase. It was held that the scheme was a lottery within the meaning of the statutes. *Public Clearing*



**Only Cases of Actual Fraud in Fact within Purview of Statute.**—The statutes were not intended to cover any case of what the postmaster general might think to be false opinions, but only cases of actual fraud in fact, in regard to which opinion forms no basis.<sup>80</sup>

**Remedy Where Action of Postmaster General Is Wrong.**—Notwithstanding the statutes provide no judicial hearing upon the question of illegality, the person injured may apply to the courts for redress in case the postmaster general has exceeded his authority or his action is palpably wrong.<sup>81</sup> But not in doubtful cases.<sup>82</sup>

**4. ARTICLES DANGEROUS IN THEIR NATURE OR TO OTHER ARTICLES WITH WHICH THEY MAY COME IN CONTACT.**—The postal regulations issued in pursuance of act of congress contain a long list of prohibited articles dangerous in their nature or to other articles with which they may come in contact, such, for instance, as liquids, poisons, explosives and inflammable articles, fatty substances, or live or dead animals, and substances which exhale a bad odor. It has never been supposed that the exclusion of those articles denied to their owners any of their constitutional rights.<sup>83</sup>

**5. DUTIABLE ARTICLES.**—Under the express provisions of the postal treaty of Berne of Oct. 9, 1874, the introduction into the United States by mail, of a letter or packet containing any article liable to customs duties, is forbidden.<sup>84</sup>

## **VIII. Enforcement of Regulations Excluding Nonmailable Matter—Right of Inspection.**

**A. Distinction between Sealed Matter, and Matter Open to Inspection.**—In the enforcement of regulations excluding matter from the mail, a distinction is to be made between what is intended to be kept from inspection, such as letters and sealed packages, subject to letter postage, and what is open to inspection, such as newspapers, magazines, pamphlets, and other printed matter, purposely left in a condition to be examined. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to the former, wherever they may be.<sup>85</sup>

**B. Methods of Enforcement.**—Regulations excluding matter from the mail

*House v. Coyne*, 194 U. S. 497, 512, 4 L. Ed. 1092.

**80. Only cases of actual fraud in fact within purview of statutes.**—*American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 106, 47 L. Ed. 90.

A corporation carried on the business of healing human ills by mental treatment. The postmaster general issued an order prohibiting the delivery of mail matter to such corporation. It was held that such order was erroneous. *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 47 L. Ed. 90.

**81. Remedy where action of postmaster general is wrong.**—*Public Clearing House v. Coyne*, 194 U. S. 497, 509, 48 L. Ed. 1092.

Although the postmaster general has jurisdiction to determine whether letters sent to a certain person shall be delivered, and therefore it is his duty upon complaint being made to decide the question of law whether the case stated is within the statute under which he assumes to act, yet where such decision is a legal error it does not bind the courts, nor preclude them from granting a temporary injunction. *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 110, 47 L. Ed. 90.

**82. Public Clearing House v. Coyne**, 194 U. S. 497, 510, 48 L. Ed. 1092.

As to the criminal liability entailed by using the mails for disseminating matter pertaining to lotteries, or schemes to defraud, see post, "Use for Disseminating Matter Pertaining to Lotteries," XIV, B, 8, b; "Use for Disseminating Matter Pertaining to Schemes to Defraud or to Sell Counterfeit Money," XIV, B, 8, c.

**83. Exclusion of dangerous articles not unconstitutional.**—*Public Clearing House v. Coyne*, 194 U. S. 497, 507, 48 L. Ed. 1092.

**84. Introduction by mail of dutiable articles forbidden.**—*Cotzhausen v. Nazro*, 107 U. S. 215, 217, 27 L. Ed. 540. See the title REVENUE LAWS.

**85. Sealed matter protected by constitutional guaranty against unreasonable searches and seizures.**—*Ex parte Jackson*, 96 U. S. 727, 24 L. Ed. 877; *Public Clearing House v. Coyne*, 194 U. S. 497, 507, 48 L. Ed. 1092.

Sealed matter can be opened and examined only under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. *Ex parte Jackson*, 96 U. S. 727, 24 L. Ed. 877.



may be enforced through the courts, upon competent evidence of their violation obtained in other ways than by the unlawful inspection of letters and sealed packages;<sup>86</sup> and with respect to objectionable printed matter, open to examination, they may in some cases also be enforced by the direct action of the officers of the postal service upon their own inspection, as where the object is exposed, and shows unmistakably that it is prohibited, as in the case of an obscure picture or print.<sup>87</sup>

## IX. Postage.

**A. Classification and Rates.**—Under the federal statutes mailable matter of the second class embraces all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year, and are within certain prescribed conditions.<sup>88</sup> But though the statute lays down such conditions, it does not define a periodical, or declare that upon compliance with those conditions the publication shall be deemed such.<sup>89</sup> A publication to be a "periodical publication," within the meaning of the statute, must not only have the feature of periodicity, but must be a periodical in the ordinary meaning of the term.<sup>90</sup> The fact that publications are not bound when issued or intended for preservation, is immaterial in determining whether they are periodicals.<sup>91</sup> The fact that from the time of the passage of the statute classifying mailable matter, under different administrations and by several successive postmasters general, certain books have been classified as periodicals, will not preclude the postmaster general from making a different classification of them in

**86. Enforcement through the courts.**—Ex parte Jackson, 96 U. S. 727, 24 L. Ed. 877.

**87. Enforcement by direct action of postal officers.**—Ex parte Jackson, 96 U. S. 727, 24 L. Ed. 877.

**88. What second class matter embraces.**—Act of March 3, 1879 (20 Stat. 355, 358) §§ 7, 10, 12, 14. Houghton v. Payne, 194 U. S. 88, 94, 48 L. Ed. 888.

**89. Houghton v. Payne,** 194 U. S. 88, 96, 48 L. Ed. 888.

**90. What is a "periodical publication" within meaning of the statute.**—Houghton v. Payne, 194 U. S. 88, 96, 48 L. Ed. 888.

A periodical, as ordinarily understood, is a publication appearing at stated intervals, each number of which contains a variety of original articles by different authors, devoted either to general literature or some special branch of learning or to a special class of subjects. Ordinarily each number is incomplete in itself and indicates a relation with prior or subsequent numbers of the same series. Houghton v. Payne, 194 U. S. 88, 97, 48 L. Ed. 888.

The fact that a publication is issued at stated intervals, under a collective name, does not necessarily make it a periodical. While this fact may be entitled to weight in determining the character of the publication, it is by no means conclusive, when all their other characteristics are those of books rather than those of magazines. Houghton v. Payne, 194 U. S. 88, 98, 48 L. Ed. 888. See, also, Bates, etc., Co. v. Payne, 194 U. S. 106, 107, 48 L. Ed. 893.

A series of novels published under a collective name, and numbered consecutively, but with nothing to indicate that

they are issued periodically but a notice upon the outside of the back cover in small type that they are weekly or semi-monthly publications, are not "periodicals" within the meaning of the act of March 3, 1879, and should not be classified as second class matter. Smith v. Payne, 194 U. S. 104, 105, 48 L. Ed. 893.

A periodical implies a continuity of literary character, a connection between the different numbers of the series in the nature of articles appearing in them, whether they be successive chapters of the same story or novel or essays upon subjects pertaining to general literature. If, for instance, one number were devoted to law, another to medicine, another to religion, another to music, another to painting, etc., the publication could not be considered as a periodical, as there is no connection between the subjects and no literary continuity. Houghton v. Payne, 194 U. S. 88, 97, 48 L. Ed. 888.

"A book is readily distinguishable from a periodical, not only because it usually has a more substantial binding (although this is by no means essential), but in the fact that it ordinarily contains a story, essay or poem, or a collection of such, by the same author, although even this is by no means universal, as books frequently contain articles by different authors. Books are not often issued periodically, and, if so, their periodicity is not an element of their character." Houghton v. Payne, 194 U. S. 88, 97, 48 L. Ed. 888.

**91. Fact that publications are not bound immaterial.**—Houghton v. Payne, 194 U. S. 88, 98, 48 L. Ed. 888.

pursuance of the plain requirements of the statute.<sup>92</sup>

**Discretion of Postmaster General.**—Although the question of the proper classification of a publication is largely one of law, determined by a comparison of the exhibit with the statute, there is some discretion in the matter left in the postmaster general, the exercise of which will not be interfered with unless the court is clearly of the opinion that it was wrong. If the question is one of doubt his decision will be accepted as final.<sup>93</sup>

**An initial or letter upon the wrapper of a newspaper** did not subject it either under the 13th or the 30th section of the act of 1825,<sup>94</sup> to letter postage.<sup>95</sup>

**B. Contracts by the Government for the Purchase of Stamps.**—The peculiar provisions of contracts made by the United States with a corporation for the purchase of postage stamps have been interpreted by the supreme court.<sup>96</sup>

### X. Withdrawal of Letters after Mailing.

It would seem that, except on some extraordinary occasion and on evidence satisfactory to the postoffice authorities, a letter once mailed cannot be withdrawn by the party who mailed it.<sup>97</sup>

### XI. Arrival and Departure of Mail.

It rests altogether in the discretion of the postmaster general to determine at what hours the mail shall leave particular places and arrive at others, and to determine whether it shall leave the same place only once a day or more frequently.<sup>98</sup>

### XII. Carriage of Mails.

**A. Power of Postmaster General.**—The postmaster general is given

92. That books have formerly been wrongfully classified will not preclude correct classification.—*Houghton v. Payne*, 194 U. S. 88, 98, 48 L. Ed. 888.

93. Classification of postmaster general final if question is one of doubt.—*Bates, etc., Co. v. Payne*, 194 U. S. 106, 48 L. Ed. 893.

Where a bill was brought to compel the recognition by the defendant, the postmaster general, of the right of the plaintiff to have a pamphlet, complete in itself, treating of the works of a single master musician, with a greater part of the pamphlet devoted to specimens of his genius, received and transmitted through the mails as matter of the second class, and to enjoin defendant from enforcing an order, denying it entry as such, it was held that, while the question was one of doubt, the decision of the postmaster general, who was vested by congress with the power to exercise his judgment and discretion in the matter, should be accepted as final. *Bates, etc., Co. v. Payne*, 194 U. S. 106, 48 L. Ed. 894.

94. 4 Stat. at L. 105, 111.

95. Effect of initial or letter upon wrapper of newspaper.—*Teal v. Felton*, 12 How. 284, 290, 13 L. Ed. 990.

96. Contracts for purchase of stamps construed.—Under contracts with the United States to furnish postage stamps, the contractor, a corporation, was bound to furnish the postoffice department all the adhesive postage stamps that might be required during a period ending on the 30th day of April, 1877. As part of the several contracts, also, it bound itself to

keep on hand at all times a stock of the several denominations of stamps sufficient to meet all the orders of the department and to provide against any and all contingencies likely to occur, so that each and every order might be promptly filled. For this the United States agreed to pay at the stipulated prices for all stamps delivered, and by express stipulation this was to be "full compensation for everything required to be done or furnished under" the contracts. It was held that there was no liability on the part of the United States to pay until there had been a requisition by the department, and a delivery in conformity with what was required; that the contracts were limited to a fixed period; that the United States were neither bound to order nor the contractor to deliver after the end of the term; that although the stock on hand was manufactured and stored under the supervision of an agent of the department, it remained the property of the contractor until delivered under the contracts; that if loss occurred by reason of the failure of the United States to call for the whole stock on hand before the end of the term, it was compensated for in the payment for what was delivered. *Continental Bank Note Co. v. United States*, 154 U. S. 671, 26 L. Ed. 997.

97. Ordinarily, withdrawal not allowed.—*McDonald v. Chemical Nat. Bank*, 174 U. S. 610, 620, 43 L. Ed. 1106.

98. Time and frequency of arrival and departure in discretion of postmaster general.—*Neil, etc., Co. v. Ohio*, 3 How. 720, 11 L. Ed. 801.

power to arrange the railway routes upon which the mail is to be carried, and to adjust and readjust compensation for such carriage,<sup>99</sup> with this limitation, that the rate of compensation must be ascertained by the average weight of the mails, as prescribed by § 4002 of the Revised Statutes.<sup>1</sup> The postmaster general has also the right to designate the character and description of the vehicle in which the mail is to be carried, and the number of carriages to be employed on every post road.<sup>2</sup>

As to the power of the postmaster general in relation to particular matters pertaining to contracts for carriage, see post, "Contracts for Carriage," XII, B.

**B. Contracts for Carriage**—1. NOTICE INVITING PROPOSALS.—It was required by the act of June 8, 1872, § 243,<sup>3</sup> that before making any contract for carrying the mail the postmaster general should give public notice describing the route, the time at which the mail was to be made up, the time at which it was to be delivered and the frequency of the service.<sup>4</sup>

2. FORM OF CONTRACT.—**Proposal for Carrying Mails and Acceptance Thereof.**—A proposal for carrying the mails on the part of a contractor, and the acceptance of the proposal by the postoffice department will create a contract of the same force and effect as a formal contract in writing signed by the parties.<sup>5</sup>

3. COMPENSATION<sup>6</sup>—a. *Acceptance by Contractor of Action of Postoffice Department Fixing Rate.*—A rate of compensation for carrying the mail cannot be forced upon a railroad company without its consent, but it may accept and become bound by the action of the postoffice department fixing the rate;<sup>7</sup> and the receipt without protest or objection of compensation at a certain rate amounts to such acceptance.<sup>8</sup>

b. *Readjustment of Compensation.*—The acts of 1876 and 1878<sup>9</sup> authorizing the postmaster general to readjust the compensation to be paid for transportation of mails on railroad routes by reducing the compensation to all railroad companies a specified per centum per annum from the then existing rates, applied only to cases where no time contracts for services were then in existence, and to contracts thereafter to be entered into. They did not apply to contracts then existing providing for transportation of mails for a specified period at a specified rate.<sup>10</sup>

**99. Power to arrange routes and adjust compensation.**—Chicago, etc., R. Co. v. United States, 198 U. S. 385, 389, 49 L. Ed. 1094.

1. Chicago, etc., R. Co. v. United States, 198 U. S. 385, 389, 49 L. Ed. 1094. See post, "Compensation," XII, B, 3.

2. Power to designate character of vehicle and number of carriages.—Seagrigh v. Stokes, 3 How. 151, 171, 11 L. Ed. 537.

3. 17 Stat. 313.

4. Notice inviting proposals.—Garfield v. United States, 93 U. S. 242, 245, 23 L. Ed. 779.

In a notice inviting proposals for carrying the mails on route number 43,132, from Portland, Oregon, to Sitka, Alaska, the distance was stated to be 1,400 miles. The trip was required to be performed each way once in each month in safe and suitable steamboats by way of Port Townsend and San Juan. The time of departure and arrival at each terminus was specified and ten days was allowed for passage. It was then added "proposals

invited to begin at Port Townsend (W. T.) five hundred miles less." It was held that this was a sufficient notice under the statute that proposals were desired for carrying the mail from Port Townsend to Sitka. Garfield v. United States, 93 U. S. 242, 245, 23 L. Ed. 779.

5. Proposal for carrying mails and acceptance thereof.—Garfield v. United States, 93 U. S. 242, 244, 23 L. Ed. 779.

6. For the construction of the peculiar terms of contracts to determine the amount recoverable thereunder, see post, "Construction of Contracts," XII, B, 7.

7. Acceptance by contractor of action of postoffice department fixing rate.—Chicago, etc., R. Co. v. United States, 198 U. S. 385, 389, 49 L. Ed. 1094; Eastern R. Co. v. United States, 129 U. S. 391, 32 L. Ed. 730.

8. Eastern R. Co. v. United States, 129 U. S. 391, 396, 32 L. Ed. 730.

9. Act of July 12, 1876, ch. 179; Act of June 17, 1878, ch. 259.

10. In what cases readjustment was authorized by acts of 1876 and 1878.—



c. *Compensation for Carriage over Subsidized Railroads.*—Numerous acts of congress granting lands to railroads, or to states to aid in the construction of railroads, contain the condition that the mail shall be carried by such roads at such rates as congress may fix,<sup>11</sup> with, in some cases, the further condition that until congress acts the postmaster general may fix the rates. The power under the latter condition to establish the rates includes the power to prescribe the period of their duration.<sup>12</sup> When, however, a price is agreed upon for a prescribed service for a designated period, and there are collateral stipulations annexed to the same which could not be exacted by the government without the assent of the company, as, for instance, the giving of sureties for the performance of the service in a particular way, then a contract is created which cannot be regarded by the government without a breach of good faith.<sup>13</sup> But where no such collateral stipulations are made, and no duration of time is prescribed, but the service is exacted simply from the obligation growing out of the acceptance of the condition of the land grant, it rests in the discretion of the postmaster general to change the price, from time to time, as in his judgment the public interests may require.<sup>14</sup> An intention to surrender the right to demand the carriage of the mails over subsidized roads at reasonable charges

Chicago, etc., *R. Co. v. United States*, 104 U. S. 680, 685, 26 L. Ed. 891; Chicago, etc., *R. Co. v. United States*, 104 U. S. 680, 687, 688, 26 L. Ed. 891; *St. Paul, etc., R. Co. v. United States*, 112 U. S. 733, 735, 28 L. Ed. 861.

Generally, as to the power of the postmaster general to adjust and readjust compensation for the carriage of mail, see ante, "Power of Postmaster General," XII, A.

11. **The terms and conditions imposed by the act of May 5, 1864, granting certain public lands to Wisconsin**, to aid in the construction of railroads, embraced the condition that the mail should be carried by such roads at such rates as congress might fix; and therefore, the rates fixed by § 13 of the act of July 12, 1876, c. 179, 19 Stat. 78, relating to subsidized roads, applied to roads coming within the purview of the act of 1864. *Wisconsin Cent. R. Co. v. United States*, 164 U. S. 190, 205, 41 L. Ed. 399.

The general policy of the act of 1864 was not inconsistent with the imposition upon such roads of the duty imposed by the act of June 3, 1856, by which they were originally subsidized of transporting the mails at such price as congress might fix. *Wisconsin Cent. R. Co. v. United States*, 164 U. S. 190, 204, 41 L. Ed. 399.

**Contract fixing rates for prescribed period binding upon government.**—Where congress in pursuance of the power to fix rates reserved as a condition of land grants, authorizes the postmaster general to fix the price by contract, within specified maximum rates, and for a prescribed period the compensation so agreed upon cannot be withheld by the government, for the period covered by the contract without a breach of public faith. *Chicago, etc., R. Co. v. United States*, 104 U. S. 680, 26 L. Ed. 891; *Chicago,*

*etc., R. Co. v. United States*, 104 U. S. 687, 688, 26 L. Ed. 893.

**Construction of statute fixing rates on subsidized railroads.**—Section 13 of the act of July 12, 1876, provided "that railroad companies whose railroad was constructed in whole or in part by a land grant made by congress on the condition that the mails should be transported over their road at such price as congress should by law direct, shall receive only eighty per centum of the compensation authorized" by the act. In construing this provision it was held that where the construction of part of a railroad was aided by a land grant made by congress, reduced rates should be paid for carrying the mail only upon that part of the road which had been aided by such grant, and that full rates should be paid for the residue of the road. *United States v. Alabama, etc., R. Co.*, 142 U. S. 615, 621, 35 L. Ed. 1134.

12. **Power of postmaster general to fix period of duration of rates.**—*Jacksonville, etc., R. Co. v. United States*, 118 U. S. 626, 627, 30 L. Ed. 273.

Under such condition the postmaster general may, if he thinks it expedient, prescribe specially for the service of each day. *Jacksonville, etc., R. Co. v. United States*, 118 U. S. 626, 627, 30 L. Ed. 273.

13. **Contract precluding government from changing rates during a designated period.**—*Jacksonville, etc., R. Co. v. United States*, 118 U. S. 626, 627, 30 L. Ed. 273.

14. **Power of postmaster general to change rates.**—*Jacksonville, etc., R. Co. v. United States*, 118 U. S. 626, 628, 30 L. Ed. 273.

**Facts held not to raise an implied contract as to rates.**—The petitioner was aided in the construction of its road by a grant of land from the United States. The act making the grant provided that the mails should be transported over the

would be opposed to the policy established by well-nigh uniform congressional legislation, and therefore such an intention will not be presumed in construing an act of congress, except perhaps under very exceptional circumstances.<sup>15</sup>

d. *Compensation for Additional Service.*<sup>16</sup>—When one under contract to carry the mail, is obliged, in order to perform services additional to those called for by his contract, which are required by a peremptory order of the postmaster general, to put on additional coaches, he is entitled to additional compensation therefor.<sup>17</sup> The compensation to be allowed for additional service under § 3960 of the Revised Statutes must be in the exact proportion which the original compensation bore to the original service.<sup>18</sup>

**Extra Services Performed under Requirement of a Postmaster.**—As a postmaster, in the absence of special authority, has no power to contract in respect to the mail messenger service,<sup>19</sup> a contractor who performs services not within the terms of his contract under the requirement of a postmaster, is not entitled to extra compensation therefor.<sup>20</sup>

e. *Compensation for Increase of Expedition.*<sup>21</sup>—Under § 3961 of the Revised Statutes no extra allowance can be made for any increase of expedition in carrying the mail unless thereby the employment of additional stock and car-

road under the direction of the postmaster general, at such price as congress might direct; and that until the price should be thus fixed, the postmaster general should have power to determine the same, 11 Stat. 16, c. 31, § 5. The petitioner had a contract with the government for the transportation of the mail from July 1, 1871, to June 30, 1875, at prescribed rates. After the termination of this contract the petitioner continued to carry the mail until the 21st of March, 1876, when the postmaster general fixed the rate of compensation at a less sum for the service until June 30, 1876. From the first of July, 1876, until June 30, 1880, the same service was performed by the company; but further reductions from the compensation previously allowed were made under the acts of congress of July 13, 1876, and of June 17, 1878. Notice of all reductions was given to the company, but the service by it was continued, and the reduced price was received, without objection. It was claimed that the company was entitled to the difference between the price thus allowed and the price paid previous to July 1, 1876. It was to recover such difference that the petition was filed; the contention being that, by the continuation of the service of the company after June 30, 1876, without objection from the postmaster general, a contract was implied that the same compensation should be subsequently allowed, and also that as the road was within the section in which contracts were to be made for four years from July 1, 1876, the contract implied from the service afterwards rendered, as mentioned above, was to continue for four years. It was held that no implication could arise from the continuance of the service, other than that the company was carrying out the obligation imposed by its acceptance of the land grants. *Jacksonville, etc., R. Co. v. United States*, 118 U. S. 626, 629, 30 L. Ed. 273.

**15. Intention to surrender right to fix rates not presumed.**—*Wisconsin Cent. R. Co. v. United States*, 164 U. S. 190, 204, 41 L. Ed. 399.

**16.** For the construction of the peculiar terms of contracts in relation to the recovery of compensation for additional service, see post, "Construction of Contracts," XII, B, 7.

**17. Contractor entitled to additional compensation for additional services.**—*Alvord v. United States*, 95 U. S. 356, 359, 24 L. Ed. 414. In this case it was held that under the findings of the court the contractor was entitled to \$35,100 as the fair and reasonable value of the additional services performed by him.

**18. Mode of computing compensation for additional service.**—*United States v. Barlow*, 132 U. S. 271, 278, 33 L. Ed. 346; *Allman v. United States*, 131 U. S. 31, 34, 33 L. Ed. 51.

"Section 3960 treats the rate of pay for additional service as definitely fixed by the original contract, and under its provisions the compensation, which the contractor is to receive for each extra trip placed upon his route, is to bear an exact proportion to the additional service performed; that is, it is to be based upon the rate established by the original contract." *Allman v. United States*, 131 U. S. 31, 34, 33 L. Ed. 51.

**19.** See ante, "No Power to Contract in Respect to Mail Messenger Service," V, C, 1.

**20. Extra services performed under requirement of a postmaster.**—*Slavens v. United States*, 196 U. S. 229, 238, 49 L. Ed. 457, distinguishing *United States v. Otis*, 120 U. S. 115, 30 L. Ed. 609.

**21.** For the construction of the peculiar terms of contracts in relation to the recovery of compensation for expedited service, see post, "Construction of Contracts," XII, B, 7.



riers is made necessary,<sup>22</sup> in which case the increased compensation is to be calculated upon the basis of the necessary stock and carriers required to perform the service under the original contract.<sup>23</sup> Whatever may be comprehended by the term "stock and carriers," it certainly includes within it men and horses.<sup>24</sup> Prior to the act of April 7, 1880, it was left within the discretion of the postmaster general to expedite the mail service to an indefinite extent, and to allow a pro rata compensation therefor.<sup>25</sup> But under a proviso contained in that act such discretion was limited and the postmaster general precluded from expediting the service, under any contract, beyond 50 per cent of the rate established in the original contract.<sup>26</sup> This proviso refers in express terms to the "rate of pay" established in the contract as originally let, and intends it as the unit of computation and not the amount expressed in the first contract.<sup>27</sup> The fact that a mail contractor had from the time his contract went into effect carried the mails with greater expedition than the contract required, will not invalidate an extra allowance subsequently made to him for an increase of expedition over that required by his original contract, though there is no actual increase in the expedition with which the mails are, in fact carried.<sup>28</sup>

**Claim for Additional Compensation Referred by Congress to Court of Claims.**—Where one under contract to carry the mails by vessels between specified places, increases the expedition with which they are carried beyond what the terms of the contract require, and does this at the request of the proper government agent, and under the expectation of additional compensation, and with reliance upon congress to fix the amount, and where congress upon application made to it refers the matter to the court of claims, that court is authorized to make and adjudge such an allowance as is required *ex æquo et bono* by all the circumstances of the case.<sup>29</sup>

f. *Deductions and Fines.*—Under the express terms of the Revised Statutes,

**22. No extra allowance unless employment of additional stock and carriers is made necessary.**—United States *v.* Barlow, 132 U. S. 271, 279, 33 L. Ed. 346; United States *v.* Piatt, 157 U. S. 113, 39 L. Ed. 639; United States *v.* Salisbury, 157 U. S. 121, 39 L. Ed. 642.

**23. Basis of calculation of increased compensation.**—United States *v.* Voorhees, 135 U. S. 550, 34 L. Ed. 258.

The additional compensation must bear no greater proportion to the additional stock and carriers necessarily employed than the compensation in the original contract bears to the stock and carriers necessarily employed in its execution. United States *v.* Piatt, 157 U. S. 113, 39 L. Ed. 639; United States *v.* Salisbury, 157 U. S. 121, 39 L. Ed. 642; Allman *v.* United States, 131 U. S. 31, 34, 33 L. Ed. 51.

**24. Term "stock and carriers" includes men and horses.**—United States *v.* Piatt, 157 U. S. 113, 117, 39 L. Ed. 639.

**25. Discretion of postmaster general prior to act of 1880.**—Allman *v.* United States, 131 U. S. 31, 34, 33 L. Ed. 51.

**26. Limitation upon discretion under proviso in act of 1880.**—Allman *v.* United States, 131 U. S. 31, 35, 33 L. Ed. 51.

**27. Unit of computation under proviso.**—Allman *v.* United States, 131 U. S. 31, 34, 33 L. Ed. 51.

**28. Facts not invalidating extra allowance.**—United States *v.* Voorhees, 135 U. S. 550, 553, 34 L. Ed. 258.

**29. Claim for additional compensation referred by congress to court of claims.**—Roberts *v.* United States, 92 U. S. 41, 48, 23 L. Ed. 646.

Contractors for the transportation of the mails between New York and New Orleans, touching at Havana, and between Havana and Chagres, having subsequently established a direct line between New York and Chagres, which made the passage between the latter points in a shorter time, by two days, than the mailships running under the contract by way of Havana, consented to take Chagres and California mails outward and homeward by the direct steamers, without requiring from the postoffice department a prior stipulation to pay for the extra service, but without precluding themselves from applying to congress for such compensation as it might deem just and reasonable. To this arrangement the postmaster general assented, with the understanding that his department did not thereby become responsible for any additional expense. Application was made to congress for equitable relief, and an act passed referring the claim to the court of claims, with directions to examine the same, and determine and adjudge what if any, amount was due for extra service. It was held that the court of claims was authorized to adjudge such an allowance as was required *ex æquo et bono* by all the circumstances of the case. Roberts *v.* United States, 92 U. S. 41, 23 L. Ed. 646.



the postmaster general may make deductions from the pay of contractors, for failures to perform service according to contract, and impose fines upon them for other delinquencies. He may deduct the price of the trip in all cases where the trip is not performed; and not exceeding three times the price if the failure be occasioned by the fault of the contractor or carrier.<sup>30</sup> This provision applies to all contractors, whether they be natural persons or corporations.<sup>31</sup> It was not repealed by § 5 of the act of March 3, 1879,<sup>32</sup> making appropriations for the service of the postoffice department for the fiscal year ending June 30, 1880. At most the latter statute merely made an exception to the provisions of the former, so far as railway companies were concerned.<sup>33</sup> Accordingly the repeal of the latter statute by the act of June 11, 1880,<sup>34</sup> left the original provision in full force.<sup>35</sup> Forfeitures imposed by the postmaster general under this statute, are not subject to review by the supreme court.<sup>36</sup>

g. *Presentation of Claim for Compensation.*—The presentation of a claim for compensation for carrying the mails, to the second assistant postmaster general, with whom all the business in relation to the claim had been previously transacted, is, in contemplation of law, the presentation of it to the postmaster general.<sup>37</sup>

h. *Estoppel to Claim Compensation.*—See the title ESTOPPEL, vol. 5, p. 979.

i. *Waiver of Right to Demand Compensation.*—A mail contractor may waive his right to demand compensation for services performed.<sup>38</sup> Thus, a railroad company under contract to carry the mails may waive its right to additional compensation for transporting postoffice inspectors, by a silent and peaceful acquiescence in the demand made by the government for the free transportation of such officials.<sup>39</sup> But where a contractor renders services in compliance with a mandatory statute, and under protest against the government's construction of the law relating to the compensation to be allowed for such services, he does not thereby waive his right to demand such compensation as should be allowed under a proper construction of the law.<sup>40</sup> The performance by a railroad company, under contract to carry the mail, of the service required by its contract, notwithstanding a notice of an intended reduction of the compensation by the postmaster general given under an erroneous construction of a statute, cannot be construed as a waiver of its rights or an acquiescence in new proposals; and this whether it protests against the erroneous construction of the law or not.<sup>41</sup>

j. *Action of Postmaster General Directing Payment of Compensation Not Conclusive.*—The postmaster general in directing payment of compensation for mail transportation, under the statutes providing the rate and basis thereof, does not act judicially, and such direction is not conclusive when brought in question in a

30. **Power of postmaster general to make deductions and impose fines.**—Revised Statutes, § 3962. *Chicago, etc., R. Co. v. United States*, 127 U. S. 406, 32 L. Ed. 180.

31. *Chicago, etc., R. Co. v. United States*, 127 U. S. 406, 407, 32 L. Ed. 180.

32. 20 Stat. c. 180, 355, 358.

33. *Chicago, etc., R. Co. v. United States*, 127 U. S. 406, 408, 32 L. Ed. 180.

Section 5 of the act of 1879 applied only to railroad companies, and had special reference to failures of delivery within schedule time, and made a difference between them and failures to make the trips, leaving the provision for the latter substantially as it was in the Revised Statutes. *Chicago, etc., R. Co. v. United States*, 127 U. S. 406, 408, 32 L. Ed. 180.

34. 21 Stat. c. 206, 177, 178.

35. *Chicago, etc., R. Co. v. United States*, 127 U. S. 406, 409, 32 L. Ed. 180.

36. **Forfeitures imposed not subject to review by supreme court.**—*Allman v. United States*, 131 U. S. 31, 35, 33 L.

Ed. 51.

37. **Presentation of claim to second assistant postmaster general.**—*Alvord v. United States*, 95 U. S. 356, 24 L. Ed. 414.

38. **Contractor may waive right to demand compensation.**—*Central Pac. R. Co. v. United States*, 164 U. S. 93, 41 L. Ed. 362.

39. *Central Pac. R. Co. v. United States*, 164 U. S. 93, 99, 41 L. Ed. 362. In this case it appeared that the railroad company had for a number of years presented its accounts to the government for services in the transportation of mails, and had made no claim in any of these years for compensation for the transportation of postoffice inspectors.

40. **Facts held not to constitute a waiver.**—*Union Pac. R. Co. v. United States*, 104 U. S. 662, 666, 26 L. Ed. 884; *Central Pac. R. Co. v. United States*, 164 U. S. 93, 99, 41 L. Ed. 362.

41. *Chicago, etc., R. Co. v. United States*, 104 U. S. 680, 686, 26 L. Ed. 891.

court of justice.<sup>42</sup>

4. **POWER OF POSTMASTER GENERAL TO CHANGE SCHEDULES OF DEPARTURES AND ARRIVALS.**—Under § 263 of the act of June 8, 1872, which provided that the postmaster general might in his discretion change the schedules of departures and arrivals of mails in all cases, without increase of pay, provided the running time was not abridged, the postmaster general had the power to name the precise days of the month on which a steamer under contract to carry mails should leave its terminal ports.<sup>43</sup>

5. **POWER OF POSTMASTER GENERAL TO CHANGE ROUTE.**—Under the regulations of the postoffice department the postmaster general can change the direction of a mail route where it becomes necessary to do so in order to avoid an almost impassable portion of the original route.<sup>44</sup>

6. **POWER OF POSTMASTER GENERAL TO DISCONTINUE OR CURTAIL SERVICE UNDER CONTRACT.**<sup>45</sup>—Under the postal laws and regulations power is given the postmaster general whenever, in his judgment, the public interest shall require, to discontinue or curtail the service on any mail route, giving the contractor as indemnity one month's extra pay.<sup>46</sup>

7. **CONSTRUCTION OF CONTRACTS.**—The same principles of right and justice which prevail between individuals should control in the construction and carrying out of contracts for the carriage of mail between the government and individuals. In giving a proper construction to such a contract the court is required to examine the entire contract, to consider the relation of the parties, and the circumstances under which it was signed. The substance of the agreement as contradistinguished from its mere form must be carefully looked to, in order that the court may give it a fair and just construction, and ascertain the substantial intent of the parties.<sup>47</sup> The supreme court upon these principles of construction has interpreted the terms of a number of mail carriage contracts. The questions to which such interpretation has been directed have been as to the route by which the mails were to be carried,<sup>48</sup> the places at which they were to be delivered,<sup>49</sup> what was prerequisite

42. **Action of postmaster general directing payment of compensation not conclusive.**—*Wisconsin Cent. R. Co. v. United States*, 164 U. S. 190, 205, 41 L. Ed. 399.

43. **Power to name dates of departure of mail steamer from terminal ports.**—*Garfield v. United States*, 93 U. S. 242, 246, 23 L. Ed. 779.

44. **Power of postmaster general to change mail route.**—*United States v. Barlow*, 132 U. S. 271, 278, 33 L. Ed. 346.

45. As to the authority of the postmaster general to terminate a contract or curtail the service, under the terms of the contract, see post, "Construction of Contracts," XII, B, 7.

46. **Power to discontinue or curtail service on mail route.**—*Slavens v. United States*, 196 U. S. 229, 236, 49 L. Ed. 457. See, also, *Garfield v. United States*, 93 U. S. 242, 246, 23 L. Ed. 779.

**Facts held to constitute a discontinuance.**—Under the act of February 28th, 1861, which authorized the postmaster general to discontinue, under certain circumstances specified, the postal service on any route, a "suspension" during the late rebellion at the postmaster general's direction of a route in certain rebellious states, with a notice to the contractor that he would be held responsible for a renewal when the postmaster general should deem it safe to renew the service there, was held

to be a discontinuance; and the mail carrier's contract with the government calling for a month's pay if the postmaster general discontinued the service, it was adjudged that he was entitled to a month's pay accordingly. *Reese v. United States*, 8 Wall. 38, 19 L. Ed. 318.

47. **Principles of construction.**—*United States v. Utah, etc., Stage Co.*, 199 U. S. 414, 423, 50 L. Ed. 251.

48. **Claimant contracted to carry the mails "from S., by R. and N., to G., 15 miles and back."** The mails were carried on the outward trip by the two intervening stations, but on the return trip were carried directly from G. to S., by a shorter route, thereby avoiding such intervening stations. It was held that the contractor was clearly required to return to S. from G. by the same route he went from S. to G. *United States v. Carr*, 132 U. S. 644, 652, 33 L. Ed. 482.

49. **Agreement to deliver mail into post-offices, mail stations and cars.**—Where in a contract for the carriage of mail a contractor agreed to deliver the mail into the postoffices, mail stations and cars, it was held that the contract was not exclusively for wagon service, but, reasonably construed, required the delivery of the mail into the stations of an elevated railroad in such wise as to be placed in the cars, and consequently required it



to recovery on a contract,<sup>50</sup> as to the amount of compensation recoverable,<sup>51</sup> as to the right of additional compensation for extra service,<sup>52</sup> as to whether a re-

to be carried upstairs without extra allowance of pay. *United States v. Utah, etc., Stage Co.*, 199 U. S. 414, 425, 50 L. Ed. 251.

**50. Acceptance by postmaster general prerequisite to recovery on contract.**—A steamship company entered into a contract with the United States to carry the mail from San Francisco to China and Japan in first class American vessels to be inspected and accepted by the postmaster general. It was held that the company could only recover on the contract for the service rendered by vessels which had been so accepted, and that it could not recover thereon for mails carried in vessels which had not been accepted; that as to these, the sea postages offered by the postmaster general was, as it was before the making of the contract, the only compensation recoverable. *Steamship Co. v. United States*, 103 U. S. 721, 729, 26 L. Ed. 419; *United States v. Steamship Co.*, 104 U. S. 480, 26 L. Ed. 850.

**51. Statute constituting a contract to pay fair and reasonable rates.**—In the case of *Union Pac. R. Co. v. United States*, 104 U. S. 662, 666, 26 L. Ed. 884, it was decided that the railroad company, by virtue of the sixth section of the act of July 1, 1862, ch. 120, 12 Stat. at L. 489, incorporating said company, was entitled to be paid by the government for services rendered in the transportation of the mails over its road, and of the employees accompanying them, compensation at fair and reasonable rates, not to exceed the amounts paid by private parties for the same kind of service, and that this section constituted a contract between the company and the United States which was not affected by § 4001 of the Revised Statutes authorizing the postmaster general to fix the rate of compensation to land-grant roads, in the absence of a price fixed by law, and that he had no authority to insist that it was not binding. See, also, *United States v. Central Pac. R. Co.*, 118 U. S. 235, 238, 30 L. Ed. 173.

In *Union Pac. R. Co. v. United States*, 117 U. S. 355, 29 L. Ed. 920, it was held in construing the same statute, that it was immaterial whether the amount actually found to be due for transportation of the mails, was ascertained upon evidence comparing them with the rates previously determined and fixed by the company, or with those allowed by the accounting officers of the government; that the only material thing was to adjudge what was due according to the rule prescribed by the statute.

It was further held in construing the same statute that if the parties did not agree upon the amount of compensation, or upon the rule of computation, the

compensation, at fair and reasonable rates, was to be determined upon a consideration of all the fact material to the issue, not to exceed the amounts paid by private parties for the same kind of service; that there should be included in the estimate an allowance for compensation for the transportation of mail agents and clerks; not, however, as a separate item of service, to be paid for, necessarily, at the rates which might reasonably be charged if that were the whole; but as a part of and incident to the entire service rendered in the transaction of the postal business required by the government. *Union Pac. R. Co. v. United States*, 104 U. S. 662, 668, 26 L. Ed. 884.

The Omaha bridge of the Union Pacific Railway Company was subject to the provisions of this statute, as to the rates to be paid by the government for transportation service over it. *Union Pac. R. Co. v. United States*, 117 U. S. 355, 29 L. Ed. 920.

**52. Contractor entitled to additional compensation for extra service.**—Where the question involved was as to the right of a contractor for mail service to recover additional compensation for extra service, because the government's advertisement for proposals, instead of stating the number of elevated stations to be served as four, which was, in fact, the number, gave the number of stations at two, and where the advertisement required the bidders to inform themselves as to the facts, and stated that additional compensation would not be allowed for mistakes, it was held that the contractor had a right to presume that the government knew how many stations were to be served and that he could recover such additional compensation. *United States v. Utah, etc., Stage Co.*, 199 U. S. 414, 424, 50 L. Ed. 251.

A mail contractor secured the contracts for routes number 6636 and 6635. By the terms of the contract for route number 6636 he was to carry the mail "between the New York City postoffices and branch offices," for a stipulated amount, and for any increase in the service he was to be paid pro rata. The contract for route number 6635 was for the New York City mail messenger service and by its provisions he was to carry the mail "between the postoffice at New York and the railroad stations and steamship landings in said city, including transfer between stations." The contract also provided that all new or additional mail messenger and transfer service in New York City should be performed without additional compensation. While the contractor was engaged in the performance of this contract, the United States directed him to transport mails which



duction of compensation was authorized,<sup>53</sup> and as to the right of the postmaster

theretofore had been transferred, as required by the contract, "from the New York City postoffice to the Pennsylvania Railroad depot (foot of Cortlandt Street) and back, fifty times per week," across the Hudson River to the Pennsylvania Railroad depot at Jersey City, in the State of New Jersey. This item for the extra service was allowed by the court of claims. But the United States questioned the propriety of its allowance contending that it was mail messenger service, and was governed by the terms of the contract for route No. 6635, which forbade extra compensation in regard to it. It was held that the contractor could recover additional compensation as the mail messenger contract for route No. 6635 did not contemplate mail station service, but only service between the main postoffice and railroad stations and steamboat landings, and that the new or additional service which was to be performed without additional compensation was new or additional service in the city of New York. *United States v. Otis*, 120 U. S. 115, 121, 30 L. Ed. 609.

**Term "new or additional service," construed.**—In a contract for the carriage of mail, where it was stipulated that the postmaster general might require new or additional service without additional compensation, the phrase "new or additional service," was held not to be one of exact meaning, defining the precise extent of the obligation incurred, but that the court might give it a reasonable construction with a view to doing justice between the parties; that the purpose of such a stipulation is to require the performance, without additional compensation, of new or additional service which may arise from improved methods in the transaction of the business of the postoffice department and in the increased demand for service resulting from the growth and development of towns and cities; that under such a contract the postmaster general cannot order service of a different character not within the contractual arrangement, even, it would seem, though such change or service would greatly decrease the burden of the contractor; that there must also be some limit to the service which can be required under such a contract, without additional compensation, and in determining whether that limit has been exceeded the entire contract and its surrounding circumstances must be considered in order to ascertain the intention of the parties. *United States v. Utah, etc., Stage Co.*, 199 U. S. 414, 422, 423, 50 L. Ed. 251; *Slavens v. United States*, 196 U. S. 229, 237, 49 L. Ed. 457.

Where in interpreting such a contract it appeared that the government in its advertisement had stated the probable additional annual mileage at 6718.40 miles, and the additional mileage actually re-

quired, over and above the normal increase, in a period of about sixteen months, was over 300,000 miles, and in addition the contractor was required in that period to pay an increased sum of nearly \$10,000 for ferrying wagons across rivers, it was held that the limit of reasonable requirement under the new and additional service clause was exceeded, and that the service required could not be held to be within the terms of the contract. *United States v. Utah, etc., Stage Co.*, 199 U. S. 414, 50 L. Ed. 251. See, also, *Serralles' Succession v. Esbri*, 200 U. S. 103, 113, 50 L. Ed. 391.

Where in a contract for the carriage of mail the contractor was required to perform all new or additional or changed wagon mail station service that the postmaster general should order, without additional compensation, whether caused by change of location of postoffice, stations or landings, or by the establishment of others than those existing at the time of the contract, or rendered necessary in the judgment of the postmaster general from any cause; and the postmaster general was authorized to change the schedule, vary the routes, increase, decrease or extend the service without change of pay, it was held that the postmaster general might order without additional compensation a change in the service requiring the mail to be taken to and from street cars, met at crossings instead of landings and stations. *Slavens v. United States*, 196 U. S. 229, 237, 49 L. Ed. 457.

**53. Reduction of rate of compensation authorized.**—In conformity with the law the postmaster general notified a railroad company which was carrying the mail under a contract with the government, that for a period of four years after a date specified the compensation for carriage would be at rates named in the notice "unless otherwise ordered." The company transported the mails, and, without objection, accepted pay therefor at the rates specified. It was held that the postmaster general could, before the expiration of the four years, without violating the contract, reduce the rate of compensation in compliance with an act of congress authorizing such reduction, but that the railroad company was not bound to continue to carry the mails at the reduced rates, but might discontinue their transportation on its cars. *Eastern R. Co. v. United States*, 129 U. S. 391, 395, 32 L. Ed. 730, distinguishing *Chicago, etc., R. Co. v. United States*, 104 U. S. 680, 26 L. Ed. 891.

**Contract not authorizing reduction of compensation for full service performed.**—A provision in a contract for the carriage of mail authorizing the postmaster general to discontinue or curtail the service, in whole or in part, he allowing, as an indemnity to the contractor, a month's

general to cancel a contract.<sup>54</sup>

8. ACQUIESCENCE IN CONTRACTOR'S INTERPRETATION OF CONTRACT.—**Burden on Contractor to Show Information by Department of His Conduct.**—Where a mail contractor has failed to perform his contract in the manner required by the proper legal interpretation thereof, but seeks to recover the full contract price upon the ground of an acquiescence by the postoffice department equivalent to assent in his mode of dealing with the subject matter of the contract, the burden is on him to show knowledge or information by the department of his conduct in the premises.<sup>55</sup>

9. CONTRACTS FOR CARRIAGE OVER EXTENSION BEYOND TERMINAL OF ESTABLISHED ROUTE.—Where an extension is made beyond the terminal of an established route, it is not essential that prior contracts shall be abrogated, but provision may be made for the extension alone. There is nothing in § 4002 of the Revised Statutes to preclude this.<sup>56</sup>

10. EFFECT OF ANNULMENT OF CONTRACT BY ACT OF CONGRESS.—Where a vessel carrying foreign mails under contract with the government starts on her voyage ten or twelve days before congress passed a statute annulling the contract, such annulment will not operate on that voyage.<sup>57</sup>

11. MEASURE OF DAMAGES FOR ILLEGALLY REFUSING TO AWARD CONTRACT.—An indemnity agreed upon as the amount to be paid for canceling a contract for carrying the mails, must afford the measure of damages for illegally refusing to awarding it.<sup>58</sup>

extra pay on the amount of service dispensed with, and a pro rata compensation for that retained and continued, does not confer power to reduce the compensation for the full service performed, or to alter the terms of the contract. *Chicago, etc., R. Co. v. United States*, 104 U. S. 680, 684, 26 L. Ed. 891.

54. A mail contract provided "that the postmaster general may discontinue the entire service whenever the public interest, in his judgment shall require such discontinuance." Under the power supposed to be conferred upon him by the terms of the contract, and the authority vested in him by the Postal Laws and Regulations, 1887, § 817, Revised Statutes, the postmaster general having decreased the service under the contract, by reason of the introduction of a new method of carrying the mails, discontinued the original service, and, the contractor declining to perform the work remaining at a lower compensation, put an end to the contract by an order of discontinuance, allowing the contractor one month's extra pay as full indemnity, and relet the contract for the remaining time of the service. It was held that the contract permitted the postmaster general to cancel the contract, whether the entire service was abandoned or not, upon the allowance of one month's extra pay to the contractor, and to relet the remaining service. *Slavens v. United States*, 196 U. S. 229, 233, 49 L. Ed. 457.

55. Burden on contractor to show information by department of his conduct.—*United States v. Carr*, 132 U. S. 644, 653, 33 L. Ed. 483.

There is no presumption that the local postmasters on such a contractor's route

were acquainted with the terms of the contract and the contractor's noncompliance therewith, and therefore knowledge or information by the postoffice department of the contractor's mode of dealing with the subject matter of the contract cannot be based upon such presumption, and upon the further presumption that such postmasters must have reported the failure in performance to the department. *United States v. Carr*, 132 U. S. 644, 653, 33 L. Ed. 483.

Evidence not justifying holding that department had acquiesced in contractor's interpretation.—Where a mail contractor failed to perform his contract according to its proper legal interpretation, and the certificate of the second assistant postmaster general stated in relation to the contract that the mails had been carried "without any failures or delinquencies, so far as shown by returns received," and it did not appear what the local postmasters on the contractor's route did, in fact, report, it was held that the evidence did not justify the court in holding that the postoffice department had paid the contractor the full measure of his compensation with knowledge of the manner in which he was performing the work or had acquiesced in his interpretation of the contract. *United States v. Carr*, 132 U. S. 644, 654, 33 L. Ed. 483.

56. Provision may be made for extension alone.—*Chicago, etc., R. Co. v. United States*, 198 U. S. 385, 389, 49 L. Ed. 1094.

57. Act passed after vessel carrying mails has started on her voyage.—*Steamship Co. v. United States*, 103 U. S. 721, 729, 26 L. Ed. 419.

58. Measure of damages for illegally refusing to award contract.—*Garfield v.*

12. **WEIGHT OF EVIDENCE IN SUIT ON BOND GIVEN TO SECURE PERFORMANCE OF CONTRACT.**—In a suit by the government to recover an amount alleged to be due on a bond given to secure the performance of a contract to carry mail on the ground that there has been an abandonment of such contract, the production in evidence of a certified copy of the account of the contractor as a failing contractor from the books of the auditor for the postoffice department, telegrams from the local postmaster stating that the service has been absolutely abandoned by the contractor, and the finding of the postmaster general that the contractor is a failing contractor, make out a *prima facie* case for the government.<sup>59</sup>

**C. Appropriation for Mail Service Performed in Confederate States Prior to War.**—The act of March 3, 1877,<sup>60</sup> appropriating a sum of money to pay the amount due to mail contractors for services performed in the Confederate States prior to the Civil War, has received the interpretation of the supreme court.<sup>61</sup>

**D. Mandamus to Compel Postmaster General to Credit Mail Contractor with Amount Found Due Him.**—See the title *MANDAMUS*, vol. 8, p. 1.

**E. Status of Person in Charge of Mail on Railroad Train.**—The federal statutes which authorize the postmaster general to appoint railway postal clerks,<sup>62</sup> and provide that every railway company carrying the mail shall carry on any train which may run over its road, and without extra charge therefor, all mailable matter directed to be carried thereon, with the person in charge of the same,<sup>63</sup> do not make the person thus to be carried with the mail a passenger nor entitle him to the rights of a passenger in case he receives personal injury in the course of his employment through the negligence of the railroad company;<sup>64</sup> and a state statute, which, as construed by the supreme court of the state, precludes a railway postal clerk in the event of his receiving a personal injury, from recovering from the railway company in the status of a passenger, and giving him only such rights as he would have had had he been an employee of the company, is not in conflict with the power of congress to establish postoffices and post roads;<sup>65</sup> nor is it violative

United States, 93 U. S. 242, 246, 23 L. Ed. 779.

By § 263 of the act of congress of June 8, 1872, the postmaster general was authorized to annul a contract for carrying the mail when his judgment advised that it should be done, and it was provided that for such annulment one month's pay should be deemed a full indemnity to the contractor. It was held that by analogy a sum equal to one month's compensation under the proposal made by a contractor and accepted by the postmaster general, was the proper measure of damages in an action for illegally refusing to award the contract. *Garfield v. United States*, 93 U. S. 242, 246, 23 L. Ed. 779.

59. Evidence held to make out *prima facie* case for government.—*United States v. McCoy*, 193 U. S. 593, 598, 48 L. Ed. 805.

60. 19 Stat. 344, 362, c. 105.

61. Only claims not paid by Confederate government payable out of appropriation.—Under this statute which provided that any claims which had been paid by the Confederate States government should not again be paid, it was held that congress intended to provide for the payment of only such claims as appeared not to have been paid by the Confederate government, and that the burden to show that the claim had not been so paid was upon the claimant. *Selma, etc., R. Co. v. United*

*States*, 139 U. S. 560, 564, 566, 35 L. Ed. 266.

62. Act of March 3, 1865, § 8, 13 Stats. 506.

63. Rev. Stat., § 4000.

64. Person in charge of mail not entitled to rights of passenger in case of injury.—*Price v. Pennsylvania R. Co.*, 113 U. S. 218, 221, 28 L. Ed. 980; *Martin v. Pittsburg, etc., R. Co.*, 203 U. S. 284, 292, 51 L. Ed. 184.

65. State statute precluding postal clerk recovering in status of passenger, not unconstitutional.—So held in relation to the Pennsylvania statute of April 4, 1868. *Price v. Pennsylvania R. Co.*, 113 U. S. 218, 221, 28 L. Ed. 980; *Martin v. Pittsburg, etc., R. Co.*, 203 U. S. 284, 292, 51 L. Ed. 184.

In delivering the opinion of the court in *Price v. Pennsylvania R. Co.*, 113 U. S. 218, 221, 28 L. Ed. 980, Miller, J., said: "The person thus to be carried with the mail matter, without extra charge, is no more a passenger because he is in charge of the mail, nor because no other compensation is made for his transportation, than if he had no such charge, nor does the fact that he is in the employment of the United States, and that defendant is bound by contract with the government to carry him, affect the question. It would be just the same if the company had contracted with any other person who had



of the commerce clause of the federal constitution,<sup>66</sup> or a denial to the postal clerk of the equal protection of the laws within the meaning of the fourteenth amendment to the constitution.<sup>67</sup>

### XIII. Recovery of Money Illegally Paid.

Under § 4057 of the Revised Statutes, where money has been paid out of the funds of the postoffice department under the pretense that service has been performed therefor, when, in fact it has not been performed, or as additional allowance for increased service actually rendered, when the additional allowance exceeds the sum which, according to law, might rightfully have been allowed therefor, and in all other cases where money of the department has been paid to any person in consequence of fraudulent representations, or by mistake, collusion, or misconduct of any officer or other employee in the postal service, the amount so paid, with interest thereon, may be recovered back, and the postmaster general is required to bring suit for such recovery.<sup>68</sup>

charge of freight on the train to carry him without additional compensation. The statutes of the United States which authorize this employment and direct this service do not, therefore, make the person so engaged a passenger, or deprive him of that character, in construing the Pennsylvania statute. Nor does it give to persons so employed any right, as against the railroad company, which would not belong to any other person in a similar employment, by others than the United States."

66. *Martin v. Pittsburg, etc.*, R. Co., 203 U. S. 284, 51 L. Ed. 184.

67. *Martin v. Pittsburg, etc.*, R. Co., 203 U. S. 284, 296, 51 L. Ed. 184.

68. **Recovery of money illegally paid.**—*United States v. Bank*, 15 Pet. 377, 401, 10 L. Ed. 774; *United States v. Carr*, 132 U. S. 644, 650, 33 L. Ed. 483; *United States v. Voorhees*, 135 U. S. 550, 554, 34 L. Ed. 258; *United States v. Piatt*, 157 U. S. 113, 39 L. Ed. 639; *United States v. Salisbury*, 157 U. S. 121, 39 L. Ed. 642; *Wisconsin Cent. R. Co. v. United States*, 164 U. S. 190, 41 L. Ed. 399.

**Act only affirmative of antecedent right of government.**—This statute, though somewhat changed in phraseology, is substantially the same as the act of July 2, 1836, § 17, in regard to which act it was held that it was only affirmative of the antecedent right of the government to sue. *United States v. Bank*, 15 Pet. 377, 401, 10 L. Ed. 774.

**Postmaster general excluded from determining finally any case within purview of statute.**—In construing the act of July 2, 1836, it was held that it was the duty of the postmaster general to cause a suit to be brought and that he was excluded from determining finally any case which he might suppose to arise under the statute. *United States v. Bank*, 15 Pet. 377, 401, 10 L. Ed. 774.

Where the person who was the chief clerk and treasurer of the postoffice department transferred to the department a deposit which he had made, in his own name, in a bank which had become

broken, and in consequence of such transfer received the whole value of the deposit from the department, it was held to be a case which fell within the statute, and that, therefore, the adjudication of the postmaster general, ordering the person to be credited upon the books and to receive the money, could not be considered a final adjudication, closing the transaction from judicial scrutiny. *Brown v. United States*, 9 How. 487, 13 L. Ed. 228.

The word "mistake," as used in § 405 of the Revised Statutes includes an erroneous conclusion in the construction or application of a statute. *Wisconsin Cent. R. Co. v. United States*, 164 U. S. 190, 211, 41 L. Ed. 399.

"This being so, as the duty is devolved on the postmaster general to cause suit to be brought where money has been illegally paid by reason of misconception or misapprehension of the applicable law, it follows that he must be regarded as empowered to reconsider prior decisions to determine whether such a mistake has been committed or not." *Wisconsin Cent. R. Co. v. United States*, 164 U. S. 190, 211, 41 L. Ed. 399.

**Recovery back of additional allowances to mail contractors obtained by fraudulent representations.**—An additional allowance made to a mail contractor for an expedited service ordered by the postoffice department upon a false estimate of the additional necessary expenses, which was adopted and acted on, upon the false representations of the contractor as to the additional number of men and animals required for such expedited service, may be recovered back. *United States v. Barlow*, 132 U. S. 271, 33 L. Ed. 346.

On March 15, 1878, P. contracted to carry the mail for four years from July 1, 1878, on route No. 36,107. On December 13, 1878, with the permission of the postoffice department, he sublet his contract to S. P. performed this service from July 1, 1878, until December 13, 1878, from which date the service was performed by S. The postoffice department on December 5, 1878, on agreement with

**Right to Hold Money of Claimant.**—If in the judgment of the postmaster general money has been paid without authority of law and he has money of the same claimant in his hands, he is not compelled to pay such money over and sue to recover the illegal payments, but may hold it subject to the decision of the court when the claimant sues.<sup>69</sup> In this way multiplicity of suits and circuity of action are avoided.<sup>70</sup>

#### XIV. Offenses against the Postal Laws.

**A. In General.—Venue of Offenses.**—When an offense against the postal laws is committed by means of a communication through the postoffice, the of-

P. expedited the service and allowed therefor additional compensation. Further additional allowances were made January 17, 1879, and July 15, 1879, both P. and S. consenting to them. P. procured the above allowances by means of a statement which was wholly false and fraudulent in that it alleged an increase of more "men and horses," than were necessary to perform the expedited service. By means of such fraudulent representations P. and S. received a certain sum in excess of the amount that could lawfully be paid to them, and contrary to § 3961 of the Revised Statutes. In an action to recover such excessive compensation the complaint alleged that under the above facts, P. was not served with process, nor did he appear or plead. Service of process was had upon S., who appeared and demurred. The trial court sustained the demurrer and dismissed the complaint as to both defendants. It was held that the term "stock and carriers" in § 3961 included within it "men and horses," and as the postmaster general could allow an increased compensation only in conformity with that statute, it must be assumed that he did so upon the basis of P.'s sworn statement; that the defendants in error were bound by this statement, and were stopped from asserting that it was not intended to bring the contract within the statute; that the demurrer admitted that the additional allowances had been allowed because of the fraudulent representations; and that the action of the court in sustaining the demurrer was error. *United States v. Piatt*, 157 U. S. 113, 114, 39 L. Ed. 639. See, also, *United States v. Salisbury*, 157 U. S. 121, 39 L. Ed. 642.

**Effect of participation by subordinate officers of postoffice department in mail contractor's fraud.**—Where an additional allowance made to a mail contractor for an increase of expedition in carrying the mail is induced by the fraudulent representations of the contractor as to the additional expenses required for such increase of expedition, the influence of such representations in vitiating the payment of the allowance, and authorizing the recovery of the money so paid is not affected by knowledge of their character and participation in the results sought to be obtained by any subordinate officers of the postoffice department. *United*

*States v. Barlow*, 132 U. S. 271, 279, 33 L. Ed. 346.

**Recovery back where extra allowance to contractor was founded upon mistake.**—If an extra allowance made to a mail contractor for an increase of expedition is founded upon a clear mistake of fact, not a mere error of judgment, and payments are in consequence made, the amount so paid may be recovered back. *United States v. Barlow*, 132 U. S. 271, 280, 33 L. Ed. 346.

**Facts not entitling government to recover back extra allowance paid contractor.**—The original contract of a mail contractor was for a sixty-two hour schedule, but from the time his contract went into effect he performed the service on a schedule of forty-three hours. After he had carried the mail for several months an extra allowance was made to him for an increase of expedition, on his sworn certificate that it would take 50 per cent more men and horses to perform mail service on a reduced schedule from sixty-two hours to forty-three hours in summer and fifty hours in winter. It was held that there were no such false representations by the contractor nor such mistake by the postoffice department as would, under § 4057 of the Revised Statutes, entitle the United States to recover back the extra allowance so paid to the contractor. *United States v. Voorhees*, 135 U. S. 550, 554, 34 L. Ed. 258.

**Defendants may be sued jointly.**—In an action by the United States under Revised Statutes, § 4057, against a mail contractor and one to whom he has sublet the contract, to recover back an increased allowance paid to the defendants in consequence of their false and fraudulent representations as to the number of men and horses employed by them in expediting the carriage of the mail, if both defendants were parties to the fraudulent transaction which induced the increased allowance and that fact is specifically alleged in the complaint, their being sued jointly is not error. *United States v. Piatt*, 157 U. S. 113, 119, 39 L. Ed. 639.

**69. Right to hold money of claimant.**—*Wisconsin Cent. R. Co. v. United States*, 164 U. S. 190, 211, 41 L. Ed. 399; *United States v. Carr*, 132 U. S. 644, 650, 33 L. Ed. 483.

**70. Wisconsin Cent. R. Co. v. United States**, 164 U. S. 190, 211, 41 L. Ed. 399.

fender may be tried and punished at the place where the letter is received by the person to whom it is addressed.<sup>71</sup>

**B. Particular Offenses**—1. **OBSTRUCTING OR RETARDING THE MAIL.**—Under § 3995 of the Revised Statutes,<sup>72</sup> it is an offense punishable by a fine to knowingly and willfully obstruct or retard the passage of the mail, or any carriage, horse, driver, or carrier carrying the same.<sup>73</sup> The statute applies only to those who know that the acts performed by them, obstructing or retarding the passage of the mail, or of its carrier, will have that effect, and perform them with the intention that such shall be their operation.<sup>74</sup> When, however, the acts which create the obstruction are in themselves unlawful, the intention to obstruct will be imputed to their author, although to attain other ends may have been his primary object.<sup>75</sup> The statute has no reference to acts lawful in themselves, from the execution of which a temporary delay to the mails unavoidably follows.<sup>76</sup>

**Admissibility of Evidence in Trial for Conspiracy to Obstruct the Mail.**—See the titles CONSPIRACY, vol. 3, p. 113; DECLARATIONS AND ADMISSIONS, vol. 5, p. 227.

2. **TAKING, SECRETING, OPENING, EMBEZZLING OR DESTROYING MAIL MATTER**—a. *Persons Employed in the Postal Service*—(1) *Secreting, Embezzling or Destroying Mail Matter.*—Under the express provisions of the Revised Statutes, any person employed in the postal service who secretes, embezzles, or destroys any letter, packet, bag, or mail of letters intrusted to him, or which comes into his possession, and which was intended to be conveyed by mail, which contains any pecuniary obligation or security of the government or of any officer or fiscal agent thereof, or any other article of value, or writing representing the same is guilty of a crime for which the punishment is prescribed.<sup>77</sup> It is no defense under this statute that the letter embezzled or destroyed was a decoy letter or that it was addressed to a fictitious person, known to be such.<sup>78</sup> Nor is it a defense that

**71. Venue of offenses committed by means of communication through mails.**—In re Palliser, 136 U. S. 257, 266, 34 L. Ed. 514. See post, "Attempt to Induce Postmaster to Sell Postage Stamps for Credit," XIV, B, 6; "Use for Disseminating Matter Pertaining to Lotteries," XIV, B, 8, b.

**72.** Act of March 3, 1825.

**73. Offense punishable by fine to willfully obstruct or retard mail.**—United States v. Kirby, 7 Wall. 482, 19 L. Ed. 278.

**74. What constitutes the offense.**—United States v. Kirby, 7 Wall. 482, 19 L. Ed. 278.

**75.** United States v. Kirby, 7 Wall. 482, 19 L. Ed. 278.

**76.** United States v. Kirby, 7 Wall. 482, 19 L. Ed. 278.

Thus the temporary detention of the mail, caused by the arrest of its carrier upon a bench warrant, issued by a state court, of competent jurisdiction, upon an indictment found therein for murder, is not an obstruction or retarding of the passage of the mail, or of its carrier, within the meaning of the statute. United States v. Kirby, 7 Wall. 482, 19 L. Ed. 278. See, also, Hawaii v. Mankichi, 190 U. S. 197, 213, 47 L. Ed. 1016.

**77. Secreting, embezzling or destroying mail matter.**—Revised Statutes, § 5467. United States v. Lacher, 134 U. S. 624, 625, 33 L. Ed. 1080; Montgomery v. United States, 162 U. S. 410, 40 L. Ed.

1020; Goode v. United States, 159 U. S. 663, 669, 40 L. Ed. 297; Hall v. United States, 168 U. S. 632, 637, 42 L. Ed. 607; Scott v. United States, 172 U. S. 343, 349, 43 L. Ed. 471.

**78. That letter was a decoy or addressed to a fictitious person, no defense.**—Scott v. United States, 172 U. S. 343, 349, 43 L. Ed. 471; Hall v. United States, 168 U. S. 632, 637, 42 L. Ed. 607; Goode v. United States, 159 U. S. 663, 669, 40 L. Ed. 297; Montgomery v. United States, 162 U. S. 410, 40 L. Ed. 1020.

In Goode v. United States, 159 U. S. 663, 40 L. Ed. 297, which was a prosecution under the statute of a letter carrier for embezzling a letter, Brown, J., who delivered the opinion of the court, said: "It makes no difference with respect to the duty of the carrier, whether the letter be genuine or a decoy, with a fictitious address. Coming into his possession as such a carrier, it is his duty to treat it for what it appears to be on its face—a genuine communication; to make an effort to deliver it, or, if the address be not upon his route, to hand it to the proper carrier, or put it into the list box. Certainly he has no more right to appropriate it to himself than he would have if it were a genuine letter. For the purposes of these sections a letter is a writing or document, which bears the outward semblance of a genuine communication, and comes into the possession of the employee in the regular course of his official business. His



the letter and the money enclosed therein belonged to a postoffice inspector who mailed it and who intended to intercept it and withdraw it from the mails before it reached the person to whom it was addressed.<sup>79</sup> Such a letter is intended to be conveyed by mail within the meaning of the statute.<sup>80</sup> An indictment under the statute must sufficiently describe the offense.<sup>81</sup> The fact that any letter, packet, bag, or mail of letters has been deposited in any postoffice or branch postoffice or in any other authorized depository for mail matter, or in charge of any postmaster, assistant clerk, carrier, agent, or messenger employed in any department of the postal service, is evidence that the same was "intended to be conveyed by mail" within the meaning of the statute.<sup>82</sup> In the case of a letter, this prima facie evidence is not contradicted or modified by proof that the letter was a decoy and addressed to a fictitious person.<sup>83</sup>

(2) *Stealing an Article of Value Out of a Letter or Other Mail Matter.*—Under the provisions of the Revised Statutes any person employed in the postal service who steals or takes any pecuniary obligation or security of the government or of any officer or fiscal agent thereof or any other article of value, or writing representing the same, out of any letter, packet, bag, or mail of letters which comes into his possession, either in the regular course of his official duties or in any other manner whatever, and provided the same shall not have been delivered to the party to whom it is directed, is guilty of a crime for which a punishment is prescribed.<sup>84</sup> A test or decoy letter comes within the purview of this statute.<sup>85</sup> It is not an essential element of the offense that the letter or other mail matter should have been intended to be conveyed by mail or delivered by a letter carrier, or other person employed in the postal service.<sup>86</sup> But it is essential that it should,

duties in respect to it are not relaxed by the fact or by his knowledge that it is not what it purports to be—in other words, it is not for him to judge of its genuineness." See, also, *Scott v. United States*, 172 U. S. 343, 349, 43 L. Ed. 471.

**79. That letter and enclosure belonged to inspector who intended to intercept it, no defense.**—*Scott v. United States*, 172 U. S. 343, 349, 43 L. Ed. 471; *Montgomery v. United States*, 162 U. S. 410, 40 L. Ed. 1020.

**80.** *Scott v. United States*, 172 U. S. 343, 349, 43 L. Ed. 471; *Montgomery v. United States*, 162 U. S. 410, 40 L. Ed. 1020.

**81. Indictment.**—Defendant was indicted for the crime of destroying a registered letter containing a draft. It was objected that the description of the draft as contained in the indictment was not sufficient. It was held that a full description of the draft was not essential, and that it was sufficiently described when the grand jury said that, the instrument having been destroyed, they were unable to give further description, and named the amount for which it was drawn, the drawee, its number, and place of payment. *Rosencrans v. United States*, 165 U. S. 257, 264, 41 L. Ed. 708.

In a prosecution for embezzling a letter, the indictment held to sufficiently allege that the letter embezzled was intended to be carried by a letter carrier. *In re Wight*, 134 U. S. 136, 148, 33 L. Ed. 865.

In an indictment for embezzling a letter, it is not essential to allege that the letter had not been delivered to the party

to whom it was directed. *In re Wight*, 134 U. S. 136, 148, 33 L. Ed. 865.

**82. Evidence that matter was "intended to be conveyed by mail."**—Revised Statutes, § 5468. *Scott v. United States*, 172 U. S. 343, 350, 43 L. Ed. 471. See, also, *Goode v. United States*, 159 U. S. 663, 671, 40 L. Ed. 297.

The intention to convey by mail in the case of a letter is sufficiently proved by evidence of its delivery into the jurisdiction of the postoffice department by dropping it in a letter box. *Scott v. United States*, 172 U. S. 343, 350, 43 L. Ed. 471.

**83. Evidence not contradicted or modified by proof that letter was a decoy.**—*Scott v. United States*, 172 U. S. 343, 350, 43 L. Ed. 471.

**84. Stealing an article of value out of a letter or other mail matter.**—Revised Statutes, § 5467. *Hall v. United States*, 168 U. S. 632, 42 L. Ed. 607.

**85. Decoy letter within purview of statute.**—*Hall v. United States*, 168 U. S. 632, 637, 42 L. Ed. 607.

**86. Intention that matter should be conveyed by mail not essential element of offense.**—*Hall v. United States*, 168 U. S. 632, 637, 42 L. Ed. 607.

**Averment that letter was intended to be delivered by carrier, need not be proved.**—Where the indictment contains all the necessary averments to constitute an offense under the statute, and alleges in addition that the letter, the contents of which were stolen, was intended to be delivered by a letter carrier, the latter averment being wholly unnecessary, it is not incumbent on the prosecution to prove

in some way or manner, have come under the jurisdiction and into the possession of the postoffice department.<sup>87</sup>

b. *Irrespective of Employment in the Postal Service.*—Under the Revised Statutes, any person, irrespective of whether he is employed in the postal service, who steals the mail, or steals or takes out of any mail or postoffice, branch postoffice, or other authorized depository for mail matter, any letter or packet, or who takes the mail, or any letter or packet therefrom, or from any postoffice, branch postoffice, or other authorized depository for mail matter, with or without consent of the person having custody thereof, and opens, embezzles, or destroys any such mail, letter, or package which contains any article of value, or any writing representing the same, or who, by fraud or deception, obtains, from any person having custody thereof, any such mail, letter, or packet containing any such article of value, is guilty of a crime punishable in the manner prescribed by the statute.<sup>88</sup> It is not essential to obtain a conviction under this statute that it should be shown that the letter or packet embezzled or taken, was intended to be conveyed by mail, or delivered by any person employed in the postal service. It is only necessary to show that it was properly deposited in an authorized depository for mail matter.<sup>89</sup> It is no defense in a prosecution under the statute that the letter taken was a decoy, or was addressed to a fictitious person, known to be such.<sup>90</sup> The term "branch postoffice," within the meaning of the act, includes every place within such office where letters are kept in the regular course of business, for reception, stamping, assorting, or delivery.<sup>91</sup> In the case of a letter alleged to have been taken from a branch postoffice, it is not necessary to show that such branch has been regularly established as such by law. It is enough to show that for years it has been known and used as a station of a city postoffice, and is a postoffice *de facto*.<sup>92</sup>

3. **EMBEZZLEMENT OF MONEY ORDER FUNDS.**—A person cannot be prosecuted, tried, or punished for the embezzlement of money belonging to the postal money order office, unless the indictment shall have been found within two years from the time of committing the offense.<sup>93</sup> In a prosecution for embezzling such funds, the universal rule that evidence which is irrelevant and immaterial is inadmissible, prevails.<sup>94</sup>

4. **LARCENY OF POSTAGE STAMPS.**—Postage stamps before they are issued and sold by the government are "personal property belonging to the United States," within the meaning of § 5456 of the Revised Statutes, and are, under that sec-

it in order to sustain a conviction. *Hall v. United States*, 168 U. S. 632, 638, 42 L. Ed. 607.

87. **To constitute offense, letter must have come into possession of postoffice department.**—*Hall v. United States*, 168 U. S. 632, 638, 42 L. Ed. 607.

88. **Taking, opening, embezzling or destroying mail matter.**—Revised Statutes, § 5469. *Goode v. United States*, 159 U. S. 663, 668, 40 L. Ed. 297.

89. **What must be shown to obtain conviction.**—*Goode v. United States*, 159 U. S. 663, 672, 40 L. Ed. 297.

90. **That letter was a decoy no defense.**—*Goode v. United States*, 159 U. S. 663, 669, 40 L. Ed. 297.

91. **What term "branch postoffice" includes.**—*Goode v. United States*, 159 U. S. 663, 672, 40 L. Ed. 297.

Of course, a letter thrown upon the floor, or laid upon a desk appropriated to other and different purposes, could not be said to have been deposited in the postoffice; but if it be put in any place where letters are usually kept or deposited for any purpose, it is within the act. *Goode*

*v. United States*, 159 U. S. 663, 672, 40 L. Ed. 297.

92. *Goode v. United States*, 159 U. S. 663, 672, 40 L. Ed. 297.

93. **Time within which indictment must be found.**—*United States v. Norton*, 91 U. S. 566, 23 L. Ed. 454. So held in a prosecution under the act of May 17, 1864, 13 Stat. 76, which was held not to be a revenue law within the meaning of the act of March 26, 1804, 2 Stat. 290, § 3, but to be governed as to the period within which an indictment under it could be found, by the act of April 30, 1790, 1 Stat. 119, § 32.

94. **Evidence which is irrelevant and immaterial inadmissible.**—In a prosecution of an assistant postmaster for embezzling money order funds, evidence tending to show that another person than the defendant, at a time anterior to the time of the commission of the offense charged, had committed another and different offense, and that such other person had been indicted and convicted thereof is inadmissible, it being irrelevant and immaterial. *Faust v. United States*, 163 U. S. 452, 455, 41 L. Ed. 224.



tion, the subject of larceny.<sup>95</sup>

5. SELLING OR DISPOSING OF POSTAGE STAMPS OTHERWISE THAN FOR CASH.—By act of congress it is made a misdemeanor for a postmaster, or other person connected with the postal service, entrusted with the sale or custody of postage stamps, to sell or dispose of such stamps except for cash.<sup>96</sup> The word "cash" in this statute, as in common speech, means ready money, or money in hand, either in current coin or other legal tender, or in bank bills or checks paid and received as money, and does not include promises to pay money in the future.<sup>97</sup>

6. ATTEMPT TO INDUCE POSTMASTER TO SELL POSTAGE STAMPS FOR CREDIT.—Offering money to a postmaster, or tendering him a contract for the payment of money, with intent to induce him to sell postage stamps for credit, in violation of his official duty, is, under § 5451 of the Revised Statutes, an offense punishable by fine and imprisonment.<sup>98</sup> Where the offer or tender is alleged in the indictment to have been made by a communication through the mails, the trial may be had in the United States district court for the district in which the post-office to which the letter is addressed is situated.<sup>99</sup>

7. PROCURING AND ASSISTING A MAIL CARRIER TO ROB THE MAIL.—The offense of advising, procuring and assisting a mail carrier to rob the mail<sup>1</sup> is a misdemeanor, where all are principals, and the doctrine applicable to principal and accessory in cases of felony does not apply. The offense, however, is secondary in its character, and it must sufficiently appear in the indictment that the offense alleged against the chief actor was committed. But a distinct substantive averment of that fact is not necessary.<sup>2</sup>

8. UNLAWFUL USE OF MAIL.—a. *Use for Dissemination of Obscene Writings or Publications, or Articles Intended for Indecent or Immoral Uses.*—Under the Revised Statutes of the United States,<sup>3</sup> any person who knowingly deposits,<sup>4</sup> or causes to be deposited for mailing or delivery, any obscene, lewd or

95. Postage stamps the subject of larceny.—*Jolly v. United States*, 170 U. S. 402, 42 L. Ed. 1085.

96. Selling or disposing of postage stamps otherwise than for cash.—Act of June 17, 1878, ch. 259, § 1. In re Palliser, 136 U. S. 257, 263, 34 L. Ed. 514.

97. "Cash" defined.—In re Palliser, 136 U. S. 257, 263, 34 L. Ed. 514.

98. Attempt to induce postmaster to sell postage stamps for credit.—In re Palliser, 136 U. S. 257, 264, 34 L. Ed. 514.

"An offer of a contract to pay money to a postmaster for an unlawful sale by him of postage stamps on credit is not the less within the statute, because the portion of that money which he would ultimately have the right to retain, by way of commission, from the United States, would be no greater than he would have upon a lawful sale for cash of an equal amount of postage stamps." In re Palliser, 136 U. S. 257, 264, 34 L. Ed. 514.

A person sent a letter to a postmaster, asking him whether, if he should send him from five to ten thousand circulars in addressed envelopes, he would put postage stamps on them and send them out, at the rate of fifty to one hundred daily, and promised him that, if he would do so, he would remit to him the price of the stamps. It was held that this letter was clearly a tender of a contract for the payment of money to the postmaster, with intent to induce him to sell postage

stamps for credit, in violation of his lawful duty; and therefore came within § 5451 of the Revised Statutes, making such an offense punishable. In re Palliser, 136 U. S. 257, 264, 34 L. Ed. 514.

99. Venue of offense.—In re Palliser, 136 U. S. 257, 267, 34 L. Ed. 514. See ante, "In General," XIV, A.

Thus where the offer or tender was alleged to have been made in a letter mailed in New York and addressed to a postmaster in Connecticut, it was held that the trial might be had in the United States district court for the District of Connecticut. In re Palliser, 136 U. S. 257, 267, 34 L. Ed. 514.

1. Act of March 3, 1825, § 24.

2. Procuring and assisting a mail carrier to rob the mail.—*United States v. Mills*, 7 Pet. 138, 8 L. Ed. 636.

3. Revised Statutes, § 3893, as amended by the act of September 26, 1888, ch. 1039, § 2, 25 Stat. 496.

4. Knowledge of contents of matter deposited essential element of offense.—The mere depositing in the mail of a writing, paper, or other publication of an obscene, lewd, or lascivious character is not an offense under § 3893 of the Revised Statutes if the person making the deposit was, at the time and in good faith, without knowledge, information, or notice of its contents. *Rosen v. United States*, 161 U. S. 29, 32, 40 L. Ed. 606.

Mere fact that defendant did not regard



lascivious<sup>5</sup> publication or writing, or any article intended for an indecent or immoral use, or any writing or publication giving information where or how or of whom any such things may be obtained or made,<sup>6</sup> and any person who knowingly takes the same, or causes the same to be taken from the mails for the purpose of circulating or disposing of, or aiding in the circulation or disposition of the same, is guilty of a crime punishable by fine or imprisonment, or both. This statute is constitutional.<sup>7</sup> Mailing a private sealed letter, in an envelope on which nothing appears but the name and address, but containing obscene matter, is an offense within the statute.<sup>8</sup> It is expressly provided, however, that nothing in the statute shall authorize any person to open any letter or sealed matter of the first class not addressed to himself.<sup>9</sup> It is no defense to a prosecution under the statute that the letter or publication alleged to have been mailed was sent in response to a decoy letter.<sup>10</sup> An indictment under the statute must describe

paper as within statutory prohibition, immaterial.—But if a paper charged to have been obscene, lewd, and lascivious was in fact of that character and was deposited in the mail by one who knew or had notice at the time of its contents, the offense is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails. *Rosen v. United States*, 161 U. S. 29, 41, 40 L. Ed. 606.

5. The words "obscene," "lewd" or "lascivious," as used in this statute signify that form of immorality which has relation to sexual impurity, and have the same meaning as is given them at common law in prosecution for obscene libel. *Swearingen v. United States*, 161 U. S. 446, 450, 40 L. Ed. 765.

In *Dunlop v. United States*, 165 U. S. 486, 500, 41 L. Ed. 799, the following instruction upon the subject of obscene publications was held not to be erroneous: "Now, what is (are) obscene, lascivious, lewd or indecent publications is largely a question of your own conscience and your own opinion; but it must come—before it can be said of such literature or publication—it must come up to this point: that it must be calculated with the ordinary reader to deprave him, deprave his morals, or lead to impure purposes. \* \* \* It is your duty to ascertain in the first place if they are calculated to deprave the morals; if they are calculated to lower that standard which we regard as essential to civilization; if they are calculated to excite those feelings which, in their proper field, are all right, but which, transcending the limits of that proper field, play most of the mischief in the world."

Language used in a newspaper article held not to be obscene, lewd and lascivious within the meaning of the statute. *Swearingen v. United States*, 161 U. S. 446, 451, 40 L. Ed. 765.

6. Letter conveying information as to mode of obtaining prohibited articles.—Though a letter is not in itself obscene, lewd or lascivious, yet if it conveys, and is intended to convey, information in respect to the place or person where, or of whom, articles intended for indecent or

immoral uses can be obtained, it is in violation of the statute. *Grimm v. United States*, 156 U. S. 604, 608, 39 L. Ed. 550.

In a prosecution for using the mails to give information where obscene, lewd or lascivious pictures can be obtained, it is unnecessary that unlawful intent as to any particular picture be proved. It is enough that in a certain place there could be obtained pictures of that character, either already made and for sale or distribution, or from some one willing to make them, and that the defendant, aware of this, used the mails to convey to others the like knowledge. *Grimm v. United States*, 156 U. S. 604, 609, 39 L. Ed. 550.

7. Statute constitutional.—Public Clearing House *v. Coyne*, 194 U. S. 497, 508, 43 L. Ed. 1092.

8. Private sealed letter in envelope on which appears only name and address.—*Andrews v. United States*, 162 U. S. 420, 424, 40 L. Ed. 1023.

But mailing such a letter was not an offense against the statute prior to its amendment by the act of September 26, 1888, as such a letter was not a "writing" within the meaning of the statute as it then read. *United States v. Chase*, 135 U. S. 255, 34 L. Ed. 117.

9. Letters addressed to fictitious person opened by government inspector.—Where a government inspector opened letters addressed to "Susan H. Budlong," it was held that this did not constitute a violation of this provision which would vitiate the evidence thus produced against one accused of an offense under the statute, where it appeared that Susan H. Budlong was a fictitious person. *Andrews v. United States*, 162 U. S. 420, 424, 40 L. Ed. 1023.

10. That matter was sent in response to decoy letter, no defense.—*Rosen v. United States*, 161 U. S. 29, 42, 40 L. Ed. 606; *Price v. United States*, 165 U. S. 311, 315, 41 L. Ed. 727; *Andrews v. United States*, 162 U. S. 420, 40 L. Ed. 1023.

It is no defense to a prosecution under this statute that the letter deposited in the mail was in answer to a letter written by a government detective, under an assumed name, and for the purpose of ascertaining whether the defendant was en-

the offense with sufficient particularity.<sup>11</sup> Questions relating to the admissibility or competency of evidence in prosecutions under the statute have been determined by the supreme court.<sup>12</sup> Where there is competent evidence upon which the jury would be warranted in finding a verdict of guilty it is not error for the court to refuse to direct a verdict of not guilty at the close of the testimony.<sup>13</sup>

gaged in an unlawful business; nor in such case is the detective precluded from testifying. *Andrews v. United States*, 162 U. S. 420, 423, 40 L. Ed. 1023; *Grimm v. United States*, 156 U. S. 604, 39 L. Ed. 550.

**11. Sufficiency of indictment.**—In an indictment for sending obscene matter through the mails some description of the matter may be necessary, both for identification of the offense and to enable the court to determine whether the matter was obscene, and, therefore, nonmailable, but it is unnecessary to spread the obscene matter in all its filthiness upon the record; it is enough to so far describe it that its obnoxious character may be discerned. *Grimm v. United States*, 156 U. S. 604, 608, 39 L. Ed. 550.

Whether matter is too obscene to be set forth in the record is a matter primarily to be considered by the district attorney in preparing the indictment; and, in any event, it is within the discretion of the court to say whether it is fit to be spread upon the records or not. *Dunlop v. United States*, 165 U. S. 486, 497, 41 L. Ed. 799.

Wherein an indictment for using the mails for disseminating an obscene book, the book is stated to be so obscene that it would be offensive if set forth in full, such allegation imports a sufficient degree of obscenity to render the production nonmailable and obscene under the statute. *Price v. United States*, 165 U. S. 311, 314, 41 L. Ed. 727.

An indictment for using the mails for the dissemination of an obscene book is sufficient if it charges that the book was obscene, to the knowledge of the defendant, who knowingly and willfully, with such knowledge, deposited it in the mail. *Dunlop v. United States*, 165 U. S. 486, 497, 41 L. Ed. 799.

Wherein an indictment for knowingly depositing in the mail an obscene, lewd and lascivious publication failed to distinctly charge that the accused was aware of the character of the publication, it was held that such defect should be regarded, after verdict and under the circumstances attending the trial, as one of form only, within the meaning of § 1025 of the Revised Statutes, and therefore not one of fatal consequence. *Rosen v. United States*, 161 U. S. 29, 32, 40 L. Ed. 606; *Price v. United States*, 165 U. S. 311, 315, 41 L. Ed. 727.

In an indictment charging the mailing of a letter giving information, where articles intended for an indecent or immoral use can be obtained, it is proper that such

letter should be stated so as to identify the offense. But it is not essential that everything referred to in the letter, or concerning which information is given therein, should be spread at length on the indictment. It is sufficient to allege its character and leave further disclosures to the introduction of evidence. *Grimm v. United States*, 156 U. S. 604, 609, 39 L. Ed. 550.

While the possession of obscene, lewd, or lascivious pictures constitutes no offense under the statute, it is in an indictment under the statute for using the mails for transmitting information to others of the place where such pictures can be obtained, proper to allege such possession, as a fact tending to interpret a letter conveying such information. *Grimm v. United States*, 156 U. S. 604, 608, 39 L. Ed. 550.

**12. Evidence that newspaper was daily received at postoffice in great quantities, admissible.**—In the trial of an indictment for mailing a newspaper, called the *Chicago Dispatch*, containing obscene matter, the court committed no error in permitting the government to prove that, during the three years preceding the trial, and also during the period covered by the dates of the papers, admitted in evidence, namely, July 6 to October 19, 1895, a newspaper, purporting to be the *Chicago Dispatch*, was regularly on each day, except Sunday, received in great quantities at the Chicago postoffice for mailing and delivery. *Dunlop v. United States*, 165 U. S. 486, 495, 41 L. Ed. 799.

**Evidence of customs, course of business, and duties of employees, admissible.**—In the prosecution of a case for violation of the law as to obscene publications, it was held that it was perfectly competent to prove, by government officers of the post-office department, the customs of the postoffice, the course of business therein, and the duties of employees connected with it, in order to raise the presumption that papers delivered by employees of the postoffice were delivered in the usual way after having been mailed at the postoffice in the city of publication. *Dunlop v. United States*, 165 U. S. 486, 494, 41 L. Ed. 799.

**13. When court warranted in refusing to direct verdict of not guilty.**—*Dunlop v. United States*, 165 U. S. 486, 497, 41 L. Ed. 799. See the title VERDICT.

In a prosecution for depositing and causing to be deposited in the mail a newspaper containing obscene, lewd, lascivious and indecent matter, it was held that the



b. *Use for Disseminating Matter Pertaining to Lotteries.*—There are several federal statutes making it a criminal offense to use the mail for disseminating matter pertaining to lotteries. The constitutionality of these statutes has been upheld,<sup>14</sup> and some of their provisions have received the interpretation of the supreme court.<sup>15</sup> The trial of an indictment for using the mail for disseminating matter pertaining to lotteries, in violation of § 3894 of the Revised Statutes, as amended by the act of September 19, 1890, ch. 908,<sup>16</sup> may be had in the United States district court for the district in which is situated the postoffice at which the prohibited matter was delivered to the person to whom it was addressed.<sup>17</sup>

c. *Use for Disseminating Matter Pertaining to Schemes to Defraud or to Sell Counterfeit Money.*—Section 5480 of the Revised Statutes, as amended by the act of March 2, 1889, ch. 393, in the very words as well as in manifest intent applies to any person who devises either a scheme to defraud or a scheme to sell counterfeit money or counterfeit obligations of the United States, provided the scheme is intended to be effected, and is effected, by communications through the postoffice.<sup>18</sup> Where the offense charged in the indictment is a scheme to defraud, three matters of fact must be established by the evidence: That the persons charged devised a scheme or artifice to defraud;<sup>19</sup> that they intended

evidence that the defendant who was the responsible head of the newspaper establishment, had personal knowledge of the character of the objectionable matter, was sufficient to warrant its submission to the jury, and that there was no error in the refusal of the court to direct a verdict of not guilty. *Dunlop v. United States*, 165 U. S. 486, 497, 41 L. Ed. 799.

**14. Section 3894 of the Revised Statutes as amended by act of September 19, 1890,** 26 Stat. 465, c. 908, is constitutional. In *re Rapier*, 143 U. S. 110, 133, 36 L. Ed. 93; *Horner v. United States*, No. 1, 143 U. S. 207, 213, 36 L. Ed. 126; *Horner v. United States*, 143 U. S. 570, 578, 36 L. Ed. 266. See ante, "Matter Pertaining to Lotteries or Schemes for Obtaining Money or Property by False Pretenses," VII, B, 3.

**15. By § 3894 of the Revised Statutes as amended by the act of September 19, 1890,** c. 908 (26 Stat. 465), it is made a distinct offense knowingly to cause to be delivered by mail anything forbidden by the statute to be carried by mail. *Horner v. United States*, 143 U. S. 207, 214, 36 L. Ed. 126.

A circular held to be a circular concerning a "lottery" or "similar enterprise" within the meaning of this statute. *Horner v. United States*, 147 U. S. 449, 37 L. Ed. 237.

A circular held to constitute a "list of the drawings" at a "lottery or similar scheme," within the meaning of the statute. *Horner v. United States*, 147 U. S. 449, 37 L. Ed. 237.

Generally, as to what constitutes a lottery, see the title LOTTERIES, vol. 7, p. 1070.

Under the act of March 2, 1895, ch. 191, 28 Stats. 963 it is made a criminal offense for any person to cause to be deposited in or carried by the mails, any paper, certificate or instrument purporting to be or represent a ticket, chance, share or interest in or dependent upon the event of a lottery, so-called gift concert, or

similar enterprise, offering prizes dependent upon lot or chance. To come within the statute the paper must purport to be or represent an existing chance or interest which is dependent upon the event of a future drawing of the lottery. A paper that contains nothing but figures which in fact relate to a drawing that has already been completed, does not come within the purview of the statute. *France v. United States*, 164 U. S. 676, 682, 41 L. Ed. 595.

**16.** 26 Stats. 465.

**17. Venue.**—Upon the trial of such an indictment, it was alleged that a certain circular containing a list of prizes awarded at the drawing of a lottery was mailed in New York addressed to Mrs. Schuchman, at Belleville, Illinois, and the fifth count of the indictment distinctly alleged that the accused unlawfully and knowingly caused such circular to be delivered by mail to Mrs. Schuchman, at Belleville, in the state of Illinois, and in the southern district of Illinois. It was held that the distinct and separate crime charged in such fifth count was triable in the southern district of Illinois. *Horner v. United States*, No. 1, 143 U. S. 207, 213, 36 L. Ed. 126. See ante, "In General," XIV, A.

**18. To what offenses the statute applies.**—*Streep v. United States*, 160 U. S. 128, 129, 132, 40 L. Ed. 365.

Therefore, if an indictment under the statute charges, not a scheme to defraud, but a scheme to sell counterfeit obligations of the United States, no proof of a scheme to defraud is necessary to support it. *Streep v. United States*, 160 U. S. 128, 129, 133, 40 L. Ed. 365.

**19. The term "any scheme or artifice to defraud,"** as used in the statute includes everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future. *Durland v. United States*, 161 U. S. 306, 313, 40 L. Ed. 709.



to effect this scheme, by opening or intending to open correspondence with some other persons through the postoffice establishment, or by inciting such other person to open communication with them; and that, in carrying out such scheme, such person either deposited a letter or packet in the postoffice, or took or received one therefrom.<sup>20</sup> An indictment under the statute must state the offense with sufficient particularity.<sup>21</sup> The omission to state the names of the parties intended to be defrauded and the names and addresses on the letters is satisfied by the allegation, if true, that such names and addresses are to the grand jury unknown.<sup>22</sup> Three separate offenses committed in the same six months may be joined in the same indictment, but no more, and when joined there is to be a single sentence for all.<sup>23</sup> But it is not the intention of the statute to make a single continuous offense punishable only as such, out of what, without it, would have been several distinct offenses each complete in itself.<sup>24</sup> Each letter or packet put in or taken out of a postoffice in furtherance of a fraudulent scheme or device, in violation of the statute, constitutes a separate and distinct violation of the act.<sup>25</sup> Questions relating to the admissibility of evidence in prosecutions under the statute, have been decided by the supreme court.<sup>26</sup>

9. TRANSPORTING MAILABLE MATTER ON A POST ROUTE OTHERWISE THAN IN THE MAIL.—Under § 10 of the act of March 3, 1845, it was a penal offense for

**20. Facts essential to be established.**—*Stokes v. United States*, 157 U. S. 187, 188, 39 L. Ed. 667.

**Not essential that matter should be effective in carrying out fraudulent scheme.**—To constitute the offense it is not essential that the matter mailed should be of a nature calculated to be effective in carrying out the fraudulent scheme. It is enough if, having devised a scheme to defraud, the defendant with a view of executing it deposits in the postoffice letters which he thinks may assist in carrying it into effect, although in the judgment of the jury they may be absolutely ineffective therefor. *Durland v. United States*, 161 U. S. 306, 315, 40 L. Ed. 709.

**21. Matters of fact essential to be charged in the indictment.**—See *Stokes v. United States*, 157 U. S. 187, 188, 39 L. Ed. 667.

**The scheme to defraud must be stated with such particularity as to acquaint the defendant with what he must meet on the trial.** *United States v. Hess*, 124 U. S. 483, 31 L. Ed. 516.

Indictment held to be defective in this respect. *United States v. Hess*, 124 U. S. 483, 486, 31 L. Ed. 516.

**Omission of particulars of offense not cured by verdict.**—The particulars of the offense are matters of substance and not of form, and their omission is not aided or cured by the verdict. *United States v. Hess*, 124 U. S. 483, 488, 31 L. Ed. 516.

**22. Allegation that names and addresses are unknown, sufficient.**—*Durland v. United States*, 161 U. S. 306, 314, 40 L. Ed. 709.

**Specification and identification of letters held sufficient.**—If there is a partial identification of the letters by the time and place of mailing, and the charge is that defendant "intending in and for executing such scheme and artifice to defraud and attempting so to do, placed and caused to

be placed in the postoffice," etc., it is a sufficient specification and identification of the letters, in the absence of a demand for a bill of particulars. *Durland v. United States*, 161 U. S. 306, 315, 40 L. Ed. 709.

**23. Joinder of offenses and sentence.**—In *re Henry*, 123 U. S. 372, 375, 31 L. Ed. 174; In *re De Bara*, 179 U. S. 316, 321, 45 L. Ed. 207.

**24. Statute does not create a single continuous offense.**—In *re Henry*, 123 U. S. 372, 375, 31 L. Ed. 174; In *re De Bara*, 179 U. S. 316, 321, 45 L. Ed. 207.

**25. In re Henry, 123 U. S. 372, 374, 31 L. Ed. 174.**

**Sentence that may be given where separate offenses are joined.**—Accordingly, it has been held that upon an indictment under the statute for three separate offenses committed within the same six months, the court may give a single sentence for the several offenses in excess of that which is prescribed for one offense. In *re De Bara*, 179 U. S. 316, 321, 45 L. Ed. 207.

**Conviction and sentence under indictment for separate offenses will not preclude subsequent indictment for other offenses.**—It has also been held that the fact that one has been indicted for three separate offenses committed in the same six months and convicted and sentenced thereunder, will not preclude his being subsequently indicted for other and distinct offenses committed within the same six months. In *re Henry*, 123 U. S. 372, 374, 31 L. Ed. 174.

**26. Admissibility of envelopes containing letters which were instruments of fraud.**—In a prosecution for a conspiracy to use the postoffice for fraudulent purposes if the authorship of the letters which were the instruments of the fraud is traced to defendants, the envelopes in which the letters were contained with the indorsements and writings thereon are admissible in evidence, although the hand-

any vehicle or vessel which regularly performed trips on a post route, on which the mail was carried, to transport any mailable matter, except such as the statute expressly excepted.<sup>27</sup>

**POSTHUMOUS CHILD.**—See the titles DESCENT AND DISTRIBUTION, vol. 5, p. 340; WILLS.

**POSTMASTER.**—See the title POSTAL LAWS, ante, p. 550. As to postmaster general, see the title UNITED STATES.

**POSTING RATES.**—See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 415.

**POSTNUPTIAL CONTRACTS OR SETTLEMENTS.**—See the title MARRIAGE CONTRACTS OR SETTLEMENTS, vol. 8, p. 254. -

**POSTOFFICE.**—See the title POSTAL LAWS, ante, p. 550.

**POSTPONEMENT.**—See the title CONTINUANCES, vol. 4, p. 543.

**POST ROADS.**—See the title POSTAL LAWS, ante, p. 550, and references given.

**POTTAWATOMIES.**—See the title INDIANS, vol. 6, p. 906.

**POWER.**—See the title JURISDICTION, vol. 7, p. 739. See note 1.

writing of the addresses is not shown to be that of either of the defendants. *Stokes v. United States*, 157 U. S. 187, 191, 39 L. Ed. 667.

In such case if the letters found their way into the mail the jury would be authorized to infer that they were deposited there by the defendants, which would be enough to entitle the envelopes to admission in evidence. *Stokes v. United States*, 157 U. S. 187, 192, 39 L. Ed. 667.

**Admissibility of order and railroad way bill.**—In such a prosecution it is also competent to introduce in evidence an order and railroad way bill for the purpose of proving the allegation in the indictment, that an order for shoes and an application for an agency was a part of the scheme of the conspirators. *Stokes v. United States*, 157 U. S. 187, 193, 39 L. Ed. 667.

**27. Transporting mailable matter on a post route otherwise than in the mail.**—*United States v. Bromley*, 12 How. 87, 13 L. Ed. 905.

**"Mailable matter."**—An order for goods, folded and directed as a letter but not

sealed, was "mailable matter" within the meaning of this statute. *United States v. Bromley*, 12 How. 87, 95, 13 L. Ed. 905.

**1. Power.**—The time when the Spanish government had the power to grant lands in the territory, by every reasonable intendment of the act of congress of 1824, must have been so designated with reference to the existing state of the territory, as between the United States and Spain; the right to the territory being in the United States, and the possession in Spain. The language "during the time at which Spain had the power to grant the same," was, under such circumstances, very appropriately applied to the case; it could, with no propriety, have been applied to the case, if Spain had full dominion over the territory, by the union of the right and the possession; and in this view, it is no forced interpretation of the word power, to consider it here used as importing an imperfect right, and distinguished from complete lawful authority. *Pollard v. Kibbe*, 14 Pet. 353, 354, 10 L. Ed. 490.

# POWERS.

BY A. P. WALKER.

- I. Definition, Nature and Distinctions, 590.**
- II. Creation and Validity, 590.**
  - A. Power of Appointment or Disposition, 590.
  - B. Power of Attorney, 591.
    - 1. Persons Who May Make, 591.
    - 2. Form and Requisites, 591.
      - a. Power to Convey Land, 591.
      - b. Mandate in the Spanish Law, 591.
      - c. Testimonio, 591.
      - d. Authentication and Acknowledgment, 591.
      - e. Witnesses, 592.
      - f. Recordation, 592.
    - 3. Effect of Fraud, 592.
  - C. Contract by Mortgagor That Mortgagor May Sell, 592.
- III. Revocation, 592.**
  - A. Right of Revocation, 592.
  - B. Manner of Revocation, 593.
- IV. Duration and Termination, 593.**
  - A. In General, 593.
  - B. Death of Donor, 593.
    - 1. In General, 593.
    - 2. Power Coupled with an Interest, 593.
    - 3. Power of Attorney, 593.
  - C. Death of Donee, 594.
    - 1. Death of One of Several Donees of Power, 594.
    - 2. Power Coupled with a Trust, 594.
    - 3. Power of Appointment under Will, 594.
  - D. War, 594.
- V. Construction and Operation, 594.**
  - A. Rules of Construction, 594.
  - B. Joint and Several Powers, 595.
  - C. Power Given by Several Persons Having Distinct Interests in Subject Matter, 596.
  - D. Powers Given to Different Persons, 596.
  - E. Nature and Scope of Power Granted, 596.
    - 1. Power of Appointment, 596.
    - 2. Power "to Dispose of," 596.
    - 3. Power "to Sell" or "to Sell and Exchange," 597.
    - 4. Power to Make Partition, 597.
    - 5. Power to Mortgage or Encumber, 597.
    - 6. Power to Sell or Hypothecate Personal Property, 597.
    - 7. Power to Borrow Money, Purchase Machinery, etc., 598.
    - 8. Power to Settle Claims, Receive Payment, etc., 598.
      - a. In General, 598.
      - b. Power to Trade, Sell or Collect Bond and Mortgage, Bill, Note, etc., 598.
    - 9. Power to Adjudicate Claim for Land, 598.
  - F. Interest of Donee of Power, 599.



1. Power of Appointment or Disposition, 599.
  - a. In General, 599.
  - b. Rights of Creditors, 599.
  - c. Rights of Assignee in Bankruptcy, 599.
  - d. Power of Appointment Reserved to Husband under Marriage Settlement, 599.
2. Transfer of Power of Attorney, 599.
3. Effect of Attainder of Donee, 599.

## VI. Execution, 599.

- A. Person Who May Execute, 599.
- B. Time of Execution, 600.
- C. Mode and Sufficiency of Execution, 600.
  1. In General, 600.
  2. Compliance with Requisites Prescribed by Grantor, 600.
    - a. In General, 600.
    - b. Naked Powers and Powers Coupled with an Interest or a Trust, 600.
    - c. Power of Appointment, 600.
    - d. Power of Attorney, 601.
    - e. Power to Sell and Convey, 601.
  3. Means and Instrument of Execution, 601.
    - a. In General, 601.
    - b. Power to Sell or Convey, 601.
      - (1) In General, 601.
      - (2) Mode of Sale, 601.
      - (3) Power to Execute Deed with Covenants, 601.
    - c. Power of Appointment, 602.
    - d. Instrument of Execution, 602.
      - (1) Assignment or Release, 602.
      - (2) Deed Containing Covenants, 602.
      - (3) Will, 602.
      - (4) In Whose Name Executed—Signature, 602.
      - (5) Ratification and Estoppel, 603.
- D. Intention to Execute, 603.
  1. In General, 603.
  2. Reference to Power, 605.
- E. Execution of One of Several Distinct Powers as Defeating Others, 605.
- F. Source of Title of Estate Created by Execution of Power of Appointment, 606.
- G. Evidence, 608.
  1. Presumption and Burden of Proof, 608.
  2. Recitals as Evidence of Mode of Execution, 608.
- H. Supervision of Court of Equity, 608.
- I. Power of Chancery to Compel Execution, 609.
- J. Power of Equity to Aid Defective Execution, 609.

## CROSS REFERENCES.

See the titles ATTORNEY AND CLIENT, vol. 2, p. 703; BANKRUPTCY, vol. 2, p. 792; BONDS, vol. 3, p. 382; BROKERS, vol. 3, p. 531; DEEDS, vol. 5, p. 245; ESTOPPEL, vol. 5, p. 913; EXECUTORS AND ADMINISTRATORS, vol. 6, p. 119; FACTORS AND COMMISSION MERCHANTS, vol. 6, p. 232; HUSBAND AND WIFE, vol. 6, p. 716; MORTGAGES AND DEEDS OF TRUST, vol. 8, p. 452; PAYMENT, ante, p. 319; PRINCIPAL AND AGENT; RECORDING ACTS; TRUSTS AND TRUSTEES; WILLS.

As to power of attorney authorizing holders to transfer certificates of public debt of Texas, see the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECUR-

RITIES, vol. 8, p. 650. As to payment to person acting under power of attorney for administrator who collects in one capacity and receipts in another, see the title EXECUTORS AND ADMINISTRATORS, vol. 6, p. 177. As to recovery in assumpsit of proceeds of unauthorized note received by attorney, see the title ASSUMPSIT, vol. 2, p. 643.

### I. Definition, Nature and Distinctions.

**The distinction between a power and a trust** is marked and obvious. Powers are never imperative; they leave the act to be done at the will of the party to whom they are given. Trusts are always imperative, and are obligatory upon the conscience of the party intrusted.<sup>1</sup>

**Power Coupled with an Interest.**—To constitute a power coupled with an interest, there must be an interest in the thing itself, and not merely in the execution of the power.<sup>2</sup>

**Power Coupled with a Trust.**—This subject is treated elsewhere.<sup>3</sup>

“Mandate,” “Poder” or “Procuracion” in the Spanish law, see post, “Mandate in the Spanish Law,” II, B, 2, b.

### II. Creation and Validity.

**A. Power of Appointment or Disposition.**—**Reservation in Marriage Settlement.**—A power of appointment to other uses may be reserved to the husband in a marriage settlement.<sup>4</sup>

**Powers of Appointment under Wills.**—See the titles EXECUTORS AND ADMINISTRATORS, vol. 6, p. 144; TRUSTS AND TRUSTEES; WILLS.

**Remainder Limited after Absolute Power of Disposition.**—A power of disposition conferred upon a wife by a bequest to her for her own use, benefit and disposal absolutely, remainder after her decease, to testator's son, is

**1. Definition, nature and distinctions.**—Stanley v. Colt, 5 Wall. 119, 168, 18 L. Ed. 502. See the title TRUSTS AND TRUSTEES.

A trustee in equity is regarded in the light of an instrument or agent for the cestui que trust, and the authority conferred to him is in the nature of a power. Gridley v. Wynant, 23 How. 500, 502, 16 L. Ed. 411.

Every case of a power given in a will is considered in a court of chancery as a trust for the benefit of the person for whose use the power is made, and as a devise or bequest to that person. Hunt v. Rousmanier, 8 Wheat. 174, 207, 5 L. Ed. 589; Taylor v. Benham, 5 How. 233, 12 L. Ed. 130. See the titles TRUSTS AND TRUSTEES; WILLS.

**2. Power coupled with an interest.**—Hunt v. Rousmanier, 8 Wheat. 174, 5 L. Ed. 589. See post, “Power Coupled with an Interest,” IV, B, 2.

“It is the possession of the legal estate, or a right in the subject over which the power is to be exercised, that makes the interest in question” a power coupled with an interest. Peter v. Beverly, 10 Pet. 532, 564, 9 L. Ed. 522.

“A power coupled with an interest,” is a power which accompanies or is connected with, an interest. The power and the interest are united in the same person. But if we are to understand by the word ‘interest,’ an interest in that which is to be produced by the exercise of the

power, then they are never united. The power to produce the interest must be exercised, and by its exercise is extinguished. The power ceases when the interest commences, and therefore cannot, in accurate law language, be said to be ‘coupled’ with it.” Hunt v. Rousmanier, 8 Wheat. 174, 204, 5 L. Ed. 589; Walker v. Walker, 125 U. S. 339, 342, 31 L. Ed. 769.

**Power of sale in executor.**—See the title EXECUTORS AND ADMINISTRATORS, vol. 6, p. 144.

The authority given to a collector to sell land for the nonpayment of the direct tax, “is a naked power not coupled with an interest.” Williams v. Peyton, 4 Wheat. 77, 4 L. Ed. 518; Early v. Doe, 16 How. 610, 618, 14 L. Ed. 1079. See the title TAXATION.

**3. Power coupled with a trust.**—See post, “Power Coupled with a Trust,” IV, C, 2. See the titles EXECUTORS AND ADMINISTRATORS, vol. 6, p. 144; TRUSTS AND TRUSTEES; WILLS.

**4. Reservation in marriage settlement.**—A reservation of a power of revocation or appointment to other uses to the husband in a deed to the wife does not impair the validity or efficiency of the conveyance in transferring the property to her, to hold until such power shall be executed. Jones v. Clifton, 101 U. S. 225, 25 L. Ed. 908. See Brandies v. Cochrane, 112 U. S. 344, 28 L. Ed. 760. See, also, the title MARRIAGE CONTRACTS AND SETTLEMENTS, vol. 8, p. 254.

such a power as may be conferred by a testator having only personal estate, and is such as may be conferred upon a legatee having only a life estate.<sup>5</sup>

**B. Power of Attorney**—1. PERSONS WHO MAY MAKE.—The power of attorney of a lunatic, or of one non compos mentis, is void and not voidable only.<sup>6</sup>

An infant's power of attorney is void and not voidable merely.<sup>7</sup>

**Married Women.**—See the titles HUSBAND AND WIFE, vol. 6, p. 716; SEPARATE ESTATE OF MARRIED WOMEN.

2. FORM AND REQUISITES—*a. Power to Convey Land.*—A power to convey lands must possess the same requisites, and observe the same solemnities, as are necessary in a deed directly conveying the land.<sup>8</sup>

*b. Mandate in the Spanish Law.*—The technical power called, in the Spanish law, "poder," or "procuracion," has much the same meaning as our term "power of attorney," which indicates a power or authority under seal. But the technical "poder" is not the only form by which authority may be given to act for another. A technical power, executed with all the solemnities, is but one form of a mandate (mandato, mandamiento), "a consensual contract, by which one of the parties confides the carrying on or execution of one or more matters of business to the other who takes it in his charge. \* \* \* Mandate has also the name of procuration, and the mandatary that of procurator; but the word mandate is more general and comprehends every power given to another in whatsoever mode it be, whilst procuration supposes a power given by writing." The mandate may be contracted between persons present, or absent, by words, by messengers, by public writing or private writing, and even by letter, as likewise by acts; e. g., if a person, being present, allows another to transact his business, etc.<sup>9</sup>

*c. Testimonio.*—See post, "Authentication and Acknowledgment," II, B, 2, d; "Recordation," II, B, 2, f.

*d. Authentication and Acknowledgment.*—**Authentication.**—In Texas in 1832 a letter power of attorney not formally authenticated must be proved to have been executed by the party charged or to be charged with it.<sup>10</sup>

**Proof of Handwriting.**—A power of attorney may be authenticated by proof of the handwriting of the principal and of the subscribing witnesses.<sup>11</sup>

**Acknowledgment.**—The local law may require a power of attorney to convey lands to be acknowledged as a deed is required to be in order to convey land, and if it is not so acknowledged a subsequent conveyance in pursuance thereof is void.<sup>12</sup>

5. Remainder limited after absolute power of disposition.—*Smith v. Bell*, 6 Pet. 68, 8 L. Ed. 322. See, also, *Brant v. Virginia Coal, etc., Co.*, 93 U. S. 326, 333, 23 L. Ed. 927; *Giles v. Little*, 104 U. S. 291, 296, 26 L. Ed. 745; *Roberts v. Lewis*, 153 U. S. 367, 378, 38 L. Ed. 747. See the titles REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS; WILLS.

6. Persons non compos mentis.—*Dexter v. Hall*, 15 Wall. 9, 21 L. Ed. 73.

7. Infant.—*Dexter v. Hall*, 15 Wall. 9, 21 L. Ed. 73.

8. Power to convey lands.—*Clark v. Graham*, 6 Wheat. 577, 5 L. Ed. 334.

9. Mandate in the Spanish law.—*Williams v. Conger*, 125 U. S. 397, 422, 31 L. Ed. 778.

10. Authentication.—In Texas, in 1832, a letter power of attorney, neither acknowledged, witnessed, certified to, nor written on sealed paper, nor proved before a notary; and no summons was even served on the donor to appear before an

official for the purpose of rendering it an authentic or judicial act, was nevertheless valid. The want of the formalities referred to merely affects the mode of authenticating the instrument. If it is passed before a notary public and witnesses, and is certified as a testimonio, it is called an authentic instrument and proves itself. If not thus authenticated, it must be proved to have been executed by the party to be charged with it. *Williams v. Conger*, 125 U. S. 397, 421, 31 L. Ed. 778.

11. Proof of handwriting.—*Quesnel v. Mussy*, 1 Dall. 449, 1 L. Ed. 218. See *Spencer v. Lapsley*, 20 How. 264, 15 L. Ed. 902.

**Power of attorney, authenticated before a regidor.**—See the title DOCUMENTARY EVIDENCE, vol. 5, p. 469.

12. Acknowledgment.—*Clark v. Graham*, 6 Wheat. 577, 5 L. Ed. 334.

**Ohio.**—This is the law in Ohio. *Clark v. Graham*, 6 Wheat. 577, 5 L. Ed. 334



e. *Witnesses*.—A contract by a mortgagee that the mortgagor may "sell the property named in said deeds and make titles thereto, the proceeds of the sale to go to the credit of" the mortgagee, is not a power of attorney to sell land the title to which is in the mortgagee and is not void under the Georgia code requiring an authority to execute before two witnesses.<sup>13</sup>

f. *Recordation*.—A *testimonio* executed, in 1832, by the proper Mexican authorities, of a power of attorney for the conveyance of lands, is within the recording acts of Texas.<sup>14</sup>

**Effect**.—Where a power of attorney to sell and convey lands was duly acknowledged and filed for record in the state in which the lands lay, as provided for by the law of that state, and where sales of the lands covered by the power of attorney were made by the donee of such power and properly recorded; all parties interested are charged with necessary knowledge upon those subjects from the time the conveyances were placed on record, and are held to all the consequences following its acquisition.<sup>15</sup>

3. **EFFECT OF FRAUD**.—See the title INSTRUCTIONS, vol. 7, p. 45.

**C. Contract by Mortgagee That Mortgagor May Sell**.—See ante, "Witnesses," II, B, 2, e.

### III. Revocation.

**A. Right of Revocation**.—Mere naked powers, which are to be exercised for the exclusive benefit of the grantor, are revocable by him for that very reason. But it is otherwise where a power is to be exercised in aid of rights vested in the grantee.<sup>16</sup>

**Powers coupled with an interest** are irrevocable.<sup>17</sup> The interest coupled with a power, to make it irrevocable, must be an interest in the thing itself. The power must be engrafted on an estate in the thing. The words themselves seem to import this meaning.<sup>18</sup>

**Letters of Attorney**.—As the power of one man to act for another depends on the will and license of that other, the power ceases, when the will, or this permission, is withdrawn. The general rule, therefore, is, that a letter of

13. *Witnesses*.—Woodward v. Jewell, 140 U. S. 247, 35 L. Ed. 478.

14. *Recordation*.—McPhaul v. Lapsley, 20 Wall. 264, 22 L. Ed. 344.

15. *Effect*.—Teall v. Schroder, 158 U. S. 172, 178, 39 L. Ed. 938. See the title RECORDING ACTS.

16. *Right of revocation*.—Dartmouth College v. Woodward, 4 Wheat. 518, 700, 4 L. Ed. 629; Walker v. Walker, 125 U. S. 339, 342, 31 L. Ed. 769; Hatch v. Codding-ton, 95 U. S. 48, 24 L. Ed. 339.

A power of attorney or grant of authority to "sell and negotiate" certain property is subject to revocation. Taylor v. Burns, 203 U. S. 120, 126, 51 L. Ed. 116.

**Power to sell or hypothecate bonds may be recalled or revoked**.—Hatch v. Codding-ton, 95 U. S. 48, 24 L. Ed. 339. See the title PRINCIPAL AND AGENT.

**Appointment of agent to collect claim of state against United States for a commission**.—The fund commissioners of Missouri, in pursuance of the statute authorizing and empowering them to employ agents to prosecute to final settlement certain claims of the state against the government of the United States, appointed an agent independently to prosecute such claims at his own expense before congress and the proper departments at Washington. The agent thus appointed

was to give security for the faithful performance of his duties and receive as full compensation for his services a specified rate of commission on the amount collected by him. It was held that such an agency is not irrevocable in law because of its being coupled with an interest in the thing to be collected. It is not a power coupled with an interest. Walker v. Walker, 125 U. S. 339, 342, 31 L. Ed. 769.

**Generally, as to recall of powers of an agent**, see the title PRINCIPAL AND AGENT.

17. Dartmouth College v. Woodward, 4 Wheat. 518, 700, 4 L. Ed. 629; Taylor v. Burns, 203 U. S. 120, 126, 51 L. Ed. 116; Walker v. Walker, 125 U. S. 339, 342, 31 L. Ed. 769; Hunt v. Rousmanier, 8 Wheat. 174, 204, 5 L. Ed. 589.

**Estate conveyed in trust for grantor**.—If an estate be conveyed in trust for the grantor, the estate is irrevocable in the grantee, although he can take no beneficial interest for himself. Many of the best-settled estates stand upon conveyances of this nature. Dartmouth College v. Woodward, 4 Wheat. 518, 700, 4 L. Ed. 629.

18. Walker v. Walker, 125 U. S. 339, 342, 31 L. Ed. 769; Hunt v. Rousmanier, 8 Wheat. 174, 204, 5 L. Ed. 589.

**A power of appointment reserved in a**

attorney may, at any time, be revoked by the party who makes it, and is revoked by his death. But this general rule, which results from the nature of the act, has sustained some modification.<sup>19</sup> Where a letter of attorney forms a part of a contract, and is a security for the performance of any act, it is usually made irrevocable in terms, or if not so made, is deemed irrevocable in law.<sup>20</sup>

**B. Manner of Revocation.—Power to Execute Conveyance.**—A power of attorney under which a junior deed was executed is revoked by a prior conveyance of the same land, executed by the person who gave the power.<sup>21</sup>

**Power to Prosecute Claim.**—A written power of attorney to a lawyer to prosecute a claim may revoke all prior powers executed by the donor in that behalf.<sup>22</sup>

#### IV. Duration and Termination.

**A. In General.**—It is unquestionable that a power must cease and determine, when there is nothing left for it to act upon.<sup>23</sup>

**B. Death of Donor**—1. **IN GENERAL.**—The general rule is that a power ceases with the life of the person giving it. But this rule admits of one exception, the case of a power coupled with an interest.<sup>24</sup>

2. **POWER COUPLED WITH AN INTEREST.**—If the power be coupled with an interest, it survives the person giving it, and may be executed after his death.<sup>25</sup> By the phrase "coupled with an interest," is not meant an interest in the exercise of the power, but an interest in the property on which the power is to operate.<sup>26</sup> The interest which can protect a power, after the death of a person who creates it, must be an interest in the thing itself. In other words the power must be engrafted on an estate in the thing.<sup>27</sup>

3. **POWER OF ATTORNEY.**—A power of attorney, though irrevocable during the life of the party, becomes (at law) extinct by his death.<sup>28</sup>

marriage settlement, either to a party or a stranger, to appoint uses in favor of third persons without compensation, has a right or authority which is valuable in contemplation of law although no beneficial interest can accrue to the possessor. *Dartmouth College v. Woodward*, 4 Wheat. 518, 698, 4 L. Ed. 629.

19. **Letters of attorney.**—*Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. Ed. 589. See post, "Death of Donor," IV, B.

20. *Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. Ed. 589.

Although a letter of attorney depends, from its nature, on the will of the person making it, and may, in general, be recalled at his will; yet, if he binds himself, for a consideration, in terms, or by the nature of his contract, not to change his will, the law will not permit him to change it. *Hunt v. Rousmanier*, 8 Wheat. 174, 201, 5 L. Ed. 589.

A power of attorney, forming a part of a security upon the assignment of a chose in action, is not revocable by the grantor. For it then sounds in contract, and is coupled with an interest. *Dartmouth College v. Woodward*, 4 Wheat. 518, 700, 4 L. Ed. 629.

21. **Manner of revocation—Power to execute conveyance.**—*Love v. Simms*, 9 Wheat. 515, 524, 6 L. Ed. 149.

22. **Power to prosecute claim.**—*Porter v. White*, 127 U. S. 235, 245, 32 L. Ed. 112.

23. **Duration and termination.**—*Love v.*

*Simms*, 9 Wheat. 515, 524, 6 L. Ed. 149.

24. **Death of donor.**—*Hunt v. Rousmanier*, 8 Wheat. 174, 203, 5 L. Ed. 589. See post, "Power Coupled with an Interest," IV, B, 2.

**Authority of broker to sell on commission.**—The death of the principal terminates the authority of a broker to sell on commission, which authority is not a power coupled with an interest. *Crowe v. Trickey*, 204 U. S. 228, 240, 51 L. Ed. 454; *Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. Ed. 589; *Walker v. Walker*, 125 U. S. 339, 31 L. Ed. 769.

25. **Power coupled with an interest.**—*Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. Ed. 589. See, also, *Taylor v. Benham*, 5 How. 233, 272, 12 L. Ed. 130; *Peter v. Beverly*, 10 Pet. 532, 533, 9 L. Ed. 522; *United States Bank v. Beverly*, 1 How. 134, 148, 11 L. Ed. 75.

26. *Taylor v. Burns*, 203 U. S. 120, 126, 51 L. Ed. 116; *Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. Ed. 589; *Crowe v. Trickey*, 204 U. S. 228, 51 L. Ed. 454; *Walker v. Walker*, 125 U. S. 339, 31 L. Ed. 769.

27. *Hunt v. Rousmanier*, 8 Wheat. 174, 204, 5 L. Ed. 589.

28. **Power of attorney.**—*Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. Ed. 589. See, also, *Jeffries v. Mutual Life Ins. Co.*, 110 U. S. 305, 28 L. Ed. 156; *Walker v. Walker*, 125 U. S. 339, 345, 31 L. Ed. 769. See ante, "Right of Revocation," III, A.

"The general rule, that a power of at-

**C. Death of Donee**—1. **DEATH OF ONE OF SEVERAL DONEES OF POWER.**—The general principle of the common law is that when the power given to several persons is a mere naked power to sell, not coupled with an interest, it must be executed by all, and does not survive; but when the power is coupled with an interest, it may be executed by the survivor.<sup>29</sup>

2. **POWER COUPLED WITH A TRUST.**—A power when coupled with a trust, if not executed before the death of the trustee, at law the power is extinguished, but the trust, in chancery, is held to survive.<sup>30</sup>

3. **POWER OF APPOINTMENT UNDER WILL.**—This subject is treated elsewhere.<sup>31</sup>

**D. War.**—The breaking out of war between the states in which the donor, of a power of attorney to sell land, resides and that in which the land lies, does not necessarily revoke the power.<sup>32</sup>

## V. Construction and Operation.

**A. Rules of Construction.**—Undoubtedly it is a rule that a special power of attorney is to be strictly construed, so as to sanction only such acts as are clearly within its terms,<sup>33</sup> thus verbiage and exaggerated expression will be held to au-

torney, though irrevocable by the party, during his life, is extinguished by his death, is not affected by the circumstance that testamentary powers are executed after the death of the testator. The law, in allowing a testamentary disposition of property, not only permits a will to be considered as a conveyance, but gives it an operation which is not allowed to deeds which have their effect during the life of the person who executes them. An estate given by will may take effect at a future time, or on a future contingency, and in the meantime, descends to the heir. The power is, necessarily, to be executed after the death of the person who makes it, and cannot exist during his life. It is the intention that it shall be executed after his death. The conveyance made by the person to whom it is given takes effect by virtue of the will, and the purchaser holds his title under it." *Hunt v. Rousmanier*, 8 Wheat. 174, 206, 5 L. Ed. 589.

**Power of attorney to execute conveyance.**—Death of the donor revokes a power of attorney to execute a conveyance. *Hanrick v. Patrick*, 119 U. S. 156, 174, 30 L. Ed. 396; *Hunt v. Rousmanier*, 8 Wheat. 174, 203, 5 L. Ed. 589.

**Power to collect and compromise claim.**—In *Jeffries v. Mutual Life Ins. Co.*, 110 U. S. 305, 28 L. Ed. 156, the contract was by an administrator of a deceased person's estate with a firm of attorneys, to prosecute a doubtful claim, "for a portion of the proceeds, with full power to compromise it as they should please," and the court held that such an agency was not revoked by the death of the administrator who made the contract and the appointment of another in his place. The question was as to the validity of a compromise made by the attorneys, on that authority, after the death of the first administrator. *Walker v. Walker*, 125 U. S. 339, 345, 31 L. Ed. 769.

**29. Death of one of several donees of power.**—*Peter v. Beverly*, 10 Pet. 532, 564, 9 L. Ed. 522. See, also, *Lorings v. Marsh*, 6 Wall. 337, 18 L. Ed. 802; *Fontain v. Ravenel*, 17 How. 369, 15 L. Ed. 80; *Taylor v. Benham*, 5 How. 233, 12 L. Ed. 130.

"When an executor, guardian or other trustee is invested with the rents and profits of land, for the sale or use of another, it is still an authority coupled with an interest, and survives." *Peter v. Beverly*, 10 Pet. 532, 564, 9 L. Ed. 522. As to survival of power to executors or administrators, see the title **EXECUTORS AND ADMINISTRATORS**, vol. 6, p. 144.

**Power to sell estate for payment of debts.**—A power given by will, to executors, to sell an estate for payment of its debts is, by the better opinions and authority, coupled with a trust, and capable of survivorship. *Dartmouth College v. Woodward*, 4 Wheat. 518, 699, 4 L. Ed. 629.

**30. Power coupled with a trust.**—*Fontain v. Ravenel*, 17 How. 369, 385, 15 L. Ed. 80. See *Taylor v. Benham*, 5 How. 233, 12 L. Ed. 130. See the title **TRUSTS AND TRUSTEES**.

**Power of appointment to charitable uses.**—See the title **CHARITIES**, vol. 3, p. 690.

**31. Power of appointment under wills.**—See the title **WILLS**.

**Power of appointment to charitable uses, conferred upon trustees or executors.**—See the title **CHARITIES**, vol. 3, p. 690. See, also, the title **WILLS**.

**32. War.**—*Williams v. Paine*, 169 U. S. 55, 73, 42 L. Ed. 658. See the title **HUSBAND AND WIFE**, vol. 6, p. 723.

**33. Rules of construction.**—*Holladay v. Daily*, 19 Wall. 606, 610, 22 L. Ed. 187; *LeRoy v. Beard*, 8 How. 451, 467, 12 L. Ed. 1151.

"It has been said that special powers are to be construed strictly. If by this is



thorize no more than the primary and apparent purpose of the power;<sup>34</sup> but it is also a rule of equal potency that the object of the parties is always to be kept in view, and where the language used will permit, that construction should be adopted which will carry out, instead of defeating, the purpose of the appointment. In other words the power is to be construed liberally in favor of the object to be accomplished.<sup>35</sup> Again "all powers conferred must be construed with a view to the design and object of them."<sup>36</sup> Again, if a construction be in some doubt, not only may usage be resorted to for explanation, but the agent may do what seems from the instrument plausible and correct; and though it turn out in the end to be wrong, as understood by the principal, the latter is still bound by the conduct of the agent. Because the person who deals with the agent is required like him to look to the instrument to see the extent of the power. If it be ambiguous, so as to mislead them, the injurious consequences should fall on the principal, for not employing clearer terms.<sup>37</sup> And although a grant of powers is sometimes to be construed strictly, yet it does not seem fit to fritter it away by very nice and metaphysical distinctions, when the general tenor of the whole instrument is in favor of what was done under the power, and when the grantor has reaped the benefit of it, by receiving a large price that otherwise would probably never have been paid. This he must refund when the title fails, or be accessory to what seems fraudulent.<sup>38</sup>

**Acts of Parties.**—It is competent to consider the acts of the parties, in order to remove doubt as to the construction of the words in a power.<sup>39</sup>

**Knowledge of Statutes of Other States.**—A person making a power of attorney cannot be presumptively held to a knowledge and acceptance of particular statutes of another state by reason of his having executed such instrument.<sup>40</sup>

**B. Joint and Several Powers.**—A power of attorney to two or more persons to make an acknowledgment of a deed may be joint and not several, or several as well as joint.<sup>41</sup>

meant that neither the agent, nor a third person dealing with him in that character, can claim under the power any authority which they had not a right to understand its language conveyed, and that the authority is not to be extended by mere general words beyond the object in view, the position is correct. But if the words in question touch only the particular mode in which an object, admitted to be within the power, is to be effected, and they are ambiguous, and with a reasonable attention to them would bear the interpretation on which both the agent and a third person have acted, the principal is bound, although upon a more refined and critical examination the court might be of opinion that a different construction would be more correct. *LeRoy v. Beard*, 8 How. 451, 12 L. Ed. 1151. \* \* \* Such an instrument is generally to be construed, as a plain man, acquainted with the object in view, and attending reasonably to the language used, has in fact construed it. He is not bound to take the opinion of a lawyer concerning the meaning of a word not technical, and apparently employed in a popular sense." *Very v. Levy*, 13 How. 345, 358, 11 L. Ed. 173.

**34. Verbiage and exaggerated expression.**—*Wright v. Ellison*, 1 Wall. 16, 17 L. Ed. 555; *Dolton v. Cain*, 14 Wall. 472, 20 L. Ed. 830.

A power of attorney drawn up in Span-

ish South America, and by Portuguese agents, in which throughout there is verbiage and exaggerated expression, will be held to authorize no more than its primary and apparent purpose. Hence a power to prosecute a claim in the Brazilian courts will not be held to give power to prosecute one before a commissioner of the United States at Washington; notwithstanding that the first named power is given with great superfluity; generality, and strength of language. *Wright v. Ellison*, 1 Wall. 16, 17 L. Ed. 555.

**35.** *Holladay v. Daily*, 19 Wall. 606, 609, 22 L. Ed. 187.

**Married woman's power of attorney.**—See the title HUSBAND AND WIFE, vol. 6, p. 723.

**36.** *LeRoy v. Beard*, 8 How. 451, 468, 12 L. Ed. 1151.

**37.** *LeRoy v. Beard*, 8 How. 451, 468, 12 L. Ed. 1151, citing *Schimmelpennich v. Bayard*, 1 Pet. 264, 290, 7 L. Ed. 138.

**38.** *LeRoy v. Beard*, 8 How. 451, 467, 12 L. Ed. 1151.

**39. Acts of parties.**—*LeRoy v. Beard*, 8 How. 451, 469, 12 L. Ed. 1151; *Mechanics' Bank v. Bank*, 5 Wheat. 326, 5 L. Ed. 100.

**40. Knowledge of statutes of other states.**—*Grover, etc., Sewing Machine Co. v. Radcliffe*, 137 U. S. 287, 299, 34 L. Ed. 670.

**41. Joint and several powers.**—Green-

**C. Power Given by Several Persons Having Distinct Interests in Subject Matter.**—A power of attorney created by two or more persons possessing distinct interests in real property may, of course, be so limited as to prevent a sale of the interest of either separately; but in the absence of qualifying terms, or other circumstances, thus restraining the authority of the attorney, a power to sell and convey real property, given by several parties, in general terms, is a power to sell and convey the interest of each, either jointly with the interests of the others, or by a separate instrument. The cases are numerous where a power given by several has been held invalid as to some of the parties, and yet sufficient to authorize a transfer of the title of the others. The decision of those cases has proceeded on the doctrine stated, that where a power is given by several the interest of each in the property, to which the power refers, may be separately transferred.<sup>42</sup>

**D. Powers Given to Different Persons.**—See post, "Powers to Sell or Hypothecate Personal Property," V, E, 6.

**E. Nature and Scope of Power Granted**—1. **POWER OF APPOINTMENT.**—A power of appointment to children will not authorize an appointment to grandchildren.<sup>43</sup>

**Under Wills.**—See the title **WILLS**.

**Under Marriage Settlements.**—See the title **MARRIAGE CONTRACTS AND SETTLEMENTS**, vol. 8, pp. 255, 256.

2. **POWER "TO DISPOSE OF."**—Taking the words in their ordinary sense, a general power to dispose of land or real estate and to take in return therefor such proceeds as one thinks best, will include the power of disposing of them in exchange for other lands. It would be a disposal of the lands parted with; and the lands received would be the proceeds.<sup>44</sup> The expression "to dispose of" is very broad, and signifies more than "to sell." Selling is but one mode of disposing of property. It would seem to import power to make "partition."<sup>45</sup> The

*Leaf v. Birth*, 5 Pet. 132, 139, 8 L. Ed. 72.

A power of attorney was given by C., to A. and B., to make, in his name, an acknowledgment of a deed for land in the city of Washington, before some proper officer, with a view to its registration, constituting them "the lawful attorney or attorneys" of the constituent; A. and B. severally appeared before different duly authorized magistrates, in Washington, at several times, and made a several acknowledgment, in the name of their principal. Held, that the true construction of the power is, that it vests a several as well as a joint authority in the attorneys; they are appointed "the attorney or attorneys;" and if the intention had been to give a joint authority only, the words "attorney" and "or" would have been wholly useless. To give effect, then, to all the words, it is necessary to construe them distributively, and this is done, by the interpretation before stated; they are appointed his attorneys, and each of them is appointed his attorney for the purpose of acknowledging the deed. *Greenleaf v. Birth*, 5 Pet. 132, 8 L. Ed. 72.

**42. Power given by several persons having distinct interests.**—*Holladay v. Daily*, 19 Wall. 606, 610, 22 L. Ed. 187.

A power of attorney to sell and convey real property, given by a husband and his wife, in general terms, without any provision against a sale of the interest of

either separately, or other circumstance restraining the authority of the attorney in that respect, authorizes a conveyance by the attorney of the interest of the husband by a deed executed in his name alone. *Holladay v. Daily*, 19 Wall. 606, 22 L. Ed. 187.

**43. Power of appointment.**—*Adams v. Law*, 17 How. 417, 421, 15 L. Ed. 149.

**44. Power "to dispose of."**—*Phelps v. Harris*, 101 U. S. 370, 380, 25 L. Ed. 855. See the title **WILLS**.

**Proceeds** are not necessarily money. This is a word of great generality. *Phelps v. Harris*, 101 U. S. 370, 380, 25 L. Ed. 855.

**45.** *Phelps v. Harris*, 101 U. S. 370, 380, 25 L. Ed. 855; *Hill v. Sumner*, 132 U. S. 118, 123, 33 L. Ed. 284. And see *Platt v. Union Pac. R. Co.*, 99 U. S. 48, 61, 25 L. Ed. 424.

"Now, whilst it may be true that when the words 'disposed of' are used in connection with the word 'sell,' in the phrase 'to sell and dispose of,' they may often be construed to mean a disposal by sale; it does not necessarily follow that when power is given generally, and without qualification by associated words, to dispose of property, leaving the mode of disposition to the discretion of the agent, that the power should not extend to a disposal by barter or exchange, as well as to a disposal by sale. The word is

use of land to raise money by mortgage may be intended by the phrase "dispose of," as distinguished from "sold."<sup>46</sup>

**Includes Power to Lease.**—A power to convey, assure and dispose includes a power to lease.<sup>47</sup>

**Relinquishment to State of Land Subject to Taxes.**—A power of attorney "to sell, dispose of, contract, and bargain for land, etc., and to execute deeds, contracts and bargains for the sale of the same," did not authorize a relinquishment to the state of Kentucky of the land of the constituent, under the act of the legislature of that state of 1794; which allowed persons who held lands subject to taxes, to relinquish and disclaim their title thereto, by making an entry of the tract, or the part thereof disclaimed, with the surveyor of the county.<sup>48</sup>

3. **POWER "TO SELL" OR "TO SELL AND EXCHANGE."**—**Includes Power to Partition.**—A power "to sell and exchange" lands includes the power to make partition of them.<sup>49</sup>

**Power to Sell Does Not Uphold and Exchange.**—It is a general proposition that power to sell gives authority to sell for cash only, and does not uphold a mere exchange.<sup>50</sup>

4. **POWER TO MAKE PARTITION.**—A power to make partition of an estate will not authorize a sale or exchange of it.<sup>51</sup>

5. **POWER TO MORTGAGE OR ENCUMBER.**—The power to encumber the estate "by way of mortgage or trust deed or otherwise, and renew the same," is broad enough to include the renewal and extension of an existing encumbrance as well as the creation of a new one; and this is not inconsistent with the declaration that it is to be "for the purpose of raising money to pay off any and all encumbrances now on said property."<sup>52</sup>

**Second Mortgage after Release of First.**—Where a person has power to mortgage lands, the fact that he has, under such power, mortgaged the premises in fee, does not prevent him, after a release from the mortgage, from mortgaging the premises again.<sup>53</sup>

6. **POWER TO SELL OR HYPOTHECATE PERSONAL PROPERTY.**—Two persons may be employed separately to negotiate the sale or hypothecation of bonds, and either may thus dispose of them. If a disposition be made by one, of course the other will be unable to exercise the power with which he was clothed; but, until a sale or

nomen generalissimum, and standing by itself, without qualification, has no technical signification." *Phelps v. Harris*, 101 U. S. 370, 381, 25 L. Ed. 855.

**Power to make partition.**—Where a testator devising land in Mississippi appointed a trustee with power "to dispose of all or any portion of it" that might fall to the devisees and "invest the proceeds in such manner as he might think proper for their benefit," the federal supreme court, without laying down as a general rule that the words "dispose of" import a power to make partition, holds, in view of the opinion of the supreme court of Mississippi on the precise point in a case between the same parties, although not announced under such conditions as made it *res judicata*, that the trustees had power to make partition. *Phelps v. Harris*, 101 U. S. 370, 25 L. Ed. 855.

46. *Platt v. Union Pac. R. Co.*, 99 U. S. 48, 61, 25 L. Ed. 424.

The words "disposed of" are undeniably apt words to indicate a transfer by mort-

gage. If land be conveyed to A. to enable him to raise money for a particular purpose, nobody would doubt that a mortgage would be a disposition of the land for that purpose. *Platt v. Union Pac. R. Co.*, 99 U. S. 48, 61, 25 L. Ed. 424.

47. **Includes power to lease.**—*Bowen v. Chase*, 94 U. S. 812, 820, 24 L. Ed. 184.

48. **Relinquishment to state of land subject to taxes.**—*Clarke v. Courtney*, 5 Pet. 319, 8 L. Ed. 140.

49. **Includes power to partition.**—*Phelps v. Harris*, 101 U. S. 370, 25 L. Ed. 855. See the title **PARTITION**, ante, p. 66.

50. **Power to sell does not uphold an exchange.**—*Woodward v. Jewell*, 140 U. S. 247, 253, 35 L. Ed. 478.

51. **Power to make partition.**—*Phelps v. Harris*, 101 U. S. 370, 377, 25 L. Ed. 855.

52. **Power to mortgage or encumber.**—*Warner v. Connecticut Mut. Life Ins. Co.*, 109 U. S. 357, 370, 27 L. Ed. 962.

53. **Second mortgage after release of first.**—*Williamson v. Berry*, 8 How. 493, 545, 12 L. Ed. 1170.



hypothecation is made, either may make it.<sup>54</sup>

**A power to sell a vessel as she lay locked up in the ice,** and limited to the acceptance of an offer of not less than a certain amount in cash or its equivalent, was executed with reference to the then condition of the vessel. A contract for a sale conditioned on how much the vessel might turn out to have been damaged by her environment and extrication therefrom was not within the power conferred which contemplated only a sale for a sum certain at the risk of the buyer and did not embrace an executory contract dependent on a contingency.<sup>55</sup>

**7. POWER TO BORROW MONEY, PURCHASE MACHINERY, ETC.**—A general power to borrow money includes authority to give to the lender the ordinary securities for the sum borrowed. Among these are bonds, notes, or acceptances, and collaterals.<sup>56</sup>

**8. POWER TO SETTLE CLAIMS, RECEIVE PAYMENT, ETC.**—*a. In General.*—An attorney having a power to receive payment of a claim, and to make acquittances or other sufficient discharges, has power to accept payment of a voucher which, upon its face, declared it was the last and full payment of the claim, and thereby bind his principal.<sup>57</sup> Also, a person having a power of attorney to compound and compromise a liability for his principal and obtain a release therefrom, has power to settle a claim or liability which must necessarily be settled in order to obtain such release.<sup>58</sup>

*b. Power to Trade, Sell or Collect Bond and Mortgage, Bill, Note, etc.*—**Authorizing Agreement to Receive Payment in Goods.**—Where the agreement to receive payment in goods was made by a person who acted under a power of attorney from the creditor, authorizing him to trade, sell, and dispose of notes, bills, bonds, or mortgages, and, under this power, a partial payment was received in goods, which was afterwards recognized as a payment by the creditor, the power was sufficient to authorize an agreement to receive the remaining amount, also in goods, at any time when called for within twelve months, especially as the bond had yet four years to run.<sup>59</sup>

**9. POWER TO ADJUDICATE CLAIM FOR LAND.**—Where a party, holding a patent from the United States for certain lands, authorized by a power of attorney his agent "to act upon the application and demand of any person actually owning" lots within the limits of the lands, and to execute and deliver deeds to such persons who "may apply for the same within three months from" a certain date, the "application and demand" must be made within that time; but the authority

**54. Power to sell or hypothecate personal property.**—*Hatch v. Coddington*, 95 U. S. 48, 56, 24 L. Ed. 339.

**55.** *The Eclipse*, 135 U. S. 599, 607, 34 L. Ed. 269.

**56. Power to borrow money, purchase machinery, etc.**—*Hatch v. Coddington*, 95 U. S. 48, 54, 24 L. Ed. 339.

A general power conferred upon the agent of a railroad company to borrow money on its behalf, in such sums, for such length of time, and at such a rate of interest as he may think proper, and to purchase iron rails, locomotives, machinery, etc., on such terms as he may deem advisable, and, in order so to do, to make, execute, and deliver obligations, bills of exchange, contracts, and agreements of the company, includes authority to give to the lender of the money borrowed, or to the seller of the things purchased, the ordinary securities. *Hatch v. Coddington*, 95 U. S. 48, 24 L. Ed. 339.

**57.** *Chouteau v. United States*, 95 U. S. 61, 24 L. Ed. 371.

**58.** *Runkle v. Burnham*, 153 U. S. 216, 226, 38 L. Ed. 694.

**59. Authorizing agreement to receive payment in goods.**—*Very v. Levy*, 13 How. 345, 11 L. Ed. 173.

"The power to collect and sell is the power to trade this bond and mortgage. It might be difficult to attach any general legal signification to this word. But considered in reference to the particular facts of this case, we think its meaning sufficiently clear." The parties to the letter of attorney must have had in view some agreement respecting the extinguishment of the bond, which should vary its original terms of payment; "and when he was further empowered to trade it, it is not an inadmissible interpretation that the new agreement for its extinguishment, which he was empowered to make, might be an agreement to receive specific articles in payment." *Very v. Levy*, 13 How. 345, 358, 11 L. Ed. 173.

**Trade.**—For discussion of word "trade," see *Very v. Levy*, 13 How. 345, 358, 11 L. Ed. 173.

of the agent to adjudicate the claims was not so limited.<sup>60</sup>

**F. Interest of Donee of Power**—1. **POWER OF APPOINTMENT OR DISPOSITION**—a. *In General*.—A power to dispose of land in the seisin of a third person, is, in no just sense, an estate in the land itself.<sup>61</sup>

b. *Rights of Creditors*.—Where a person has a general power of appointment, either by deed or will, and executes this power, the property appointed is deemed, in equity, part of his assets, and subject to the demands of his creditors in preference to the claims of his voluntary appointees or legatees.<sup>62</sup> That doctrine, however, has no application to a case where the complainant did not seek relief in equity as against the estate created by the exercise of the power of appointment by the donor, but claimed a lien at law (of a judgment) upon the antecedent estate, which that exercise of the power had displaced and defeated.<sup>63</sup>

c. *Rights of Assignee in Bankruptcy*.—See post, "Power of Appointment Reserved to Husband under Marriage Settlement," V, F, 1, d.

d. *Power of Appointment Reserved to Husband under Marriage Settlement*.—A reservation of a power of revocation or appointment to other uses to the husband in a deed to the wife is not an interest in the property which can be transferred to another, or sold on execution, or devised by will. The grantor can, indeed, exercise the power either by deed or will, but he cannot vest the power in any other person to be thus executed.<sup>64</sup> Nor is the power a chose in action; and it does not, therefore, constitute assets of the bankrupt which pass to his assignee.<sup>65</sup>

2. **TRANSFER OF POWER OF ATTORNEY**.—Where the donee of a power of attorney authorizing him to take possession of real estate "by himself or by a person in his confidence, to cultivate it, to sell it, to exchange it or to alienate it," indorsed or transferred it to A by the following writing: "I transfer all my powers in favor of A, in order that in my name and as my attorney he may take possession," etc., the indorsement only gave A power to take possession, and not power to sell.<sup>66</sup>

3. **EFFECT OF ATTAINDER OF DONEE**.—Even under the statutes of treason in England, powers personal to the parties did not, by an attainder, pass to the crown and such is the law in the United States.<sup>67</sup>

## VI. Execution.

**A. Person Who May Execute**.—When an authority is given jointly to several persons they must generally act jointly or their acts are invalid. This

60. **Power to adjudicate claim for land**.—*Clements v. Macheboeuf*, 92 U. S. 418, 23 L. Ed. 504.

61. **Power of appointment or disposition**.—*Carver v. Astor*, 4 Pet. 1, 92, 7 L. Ed. 761.

62. **Rights of creditors**.—*Manson v. Duncanson*, 166 U. S. 533, 546, 41 L. Ed. 1105; *Clapp v. Ingraham*, 126 Mass. 200; *Brandies v. Cochrane*, 112 U. S. 344, 28 L. Ed. 760.

This rule has been frequently applied to cases of the execution of a general power of appointment by will, of property of which the donee had never any ownership or control during his life. *Brandies v. Cochrane*, 112 U. S. 344, 352, 28 L. Ed. 760.

63. *Brandies v. Cochrane*, 112 U. S. 344, 352, 28 L. Ed. 760.

At common law a judgment against the party having a power of appointment, with the estate vested in him until and in default of appointment, was defeated by the subsequent execution of the power in favor of a mortgagee. And it was held

to be immaterial that the purchaser had notice of the judgment, or that a portion of the purchase money was set aside as an indemnity against it. The common law prevails in Illinois. *Brandies v. Cochrane*, 112 U. S. 344, 351, 28 L. Ed. 760.

64. **Power of appointment reserved to husband under marriage settlement**.—*Phelps v. Harris*, 101 U. S. 370, 25 L. Ed. 855, followed in *Brandies v. Cochrane*, 112 U. S. 344, 28 L. Ed. 760. See the title **BANKRUPTCY**, vol. 2, p. 898.

65. "It was held in *Jones v. Clifton*, 101 U. S. 225, 25 L. Ed. 908, that such a power of appointment does not pass to an assignee in bankruptcy of the person in whom the power resides." *Brandies v. Cochrane*, 112 U. S. 344, 353, 28 L. Ed. 760.

66. **Transfer of power of attorney**.—*Williams v. Conger*, 125 U. S. 397, 31 L. Ed. 778.

67. **Effect of attainder of donee**.—*Carver v. Astor*, 4 Pet. 1, 4, 92, 7 L. Ed. 761.

A power reserved to a husband and his wife, under a marriage settlement, to dis-

is a general rule for private agencies, though it is not universal in its application.<sup>68</sup>

**Married Woman.**—See the title HUSBAND AND WIFE, vol. 6, p. 724. See, also, the titles TRUSTS AND TRUSTEES; WILLS.

**B. Time of Execution.—Naked Powers and Powers Coupled with an Interest.**—See ante, "Death of Donor," IV, B.

**Power of Attorney.**—See ante, "Power of Attorney," IV, B, 3.

**Testamentary Powers.**—Testamentary powers are executed after the death of the testator. The power is, necessarily, to be executed after the death of the person who makes it, and cannot exist during his life. It is the intention that it shall be executed after his death.<sup>69</sup>

**C. Mode and Sufficiency of Execution**—1. IN GENERAL.—A substantial execution of the power is all that is required.<sup>70</sup>

**When Deed a Fraud upon Power.**—A deed in violation of the authority vested by a power, is a fraud upon the power.<sup>71</sup>

2. COMPLIANCE WITH REQUISITES PRESCRIBED BY GRANTOR—*a. In General.*—Terms and modes prescribed in settlements for the execution of powers should be followed in reason and substance, so as to insure the purposes and objects contemplated by such settlements, and so as to prevent them from being sacrificed to mere literal severity of construction.<sup>72</sup>

*b. Naked Powers and Powers Coupled with an Interest or a Trust.*—In all cases of a naked power not coupled with an interest (or a trust) the law requires that every prerequisite to the exercise of that power must precede its exercise, that the agent must pursue the power or his act will not be sustained by it.<sup>73</sup> But where a power is coupled with a trust, it is only necessary to show such a case as may, in a court of equity, make an agent or trustee liable to those for whom he acts. As much strictness is not required as there would be if the power to sell were a naked one, and not coupled with an interest or trust.<sup>74</sup>

*c. Power of Appointment.*—A power of appointment must be exercised in the mode prescribed by the instrument creating it.<sup>75</sup>

pose of the land to a certain amount, so far as it remained unexecuted by them was not, by the attainder act of 1779, transferred to the state, and could not be executed by the state. The power was personal in the parties, and to be exercised in their discretion, and not in its own nature transferable. *Carver v. Astor*, 4 Pet. 1, 4, 92, 7 L. Ed. 761.

68. *Cooley v. O'Connor*, 12 Wall. 391, 398, 20 L. Ed. 446.

69. **Testamentary powers.**—*Hunt v. Rousmanier*, 8 Wheat. 174, 206, 5 L. Ed. 589. See the title WILLS.

70. **Mode and sufficiency of execution.**—*Warner v. Connecticut Mut. Life Ins. Co.*, 109 U. S. 357, 369, 27 L. Ed. 962.

71. **When deed a fraud upon power.**—*Deputron v. Young*, 134 U. S. 241, 256, 33 L. Ed. 923.

72. **Compliance with requisites prescribed by grantor.**—*Ladd v. Ladd*, 8 How. 10, 33, 12 L. Ed. 967.

73. **Naked powers and powers coupled with an interest or trust.**—*Deputron v. Young*, 134 U. S. 241, 256, 33 L. Ed. 923; *Williams v. Peyton*, 4 Wheat. 77, 4 L. Ed. 518; *Early v. Doe*, 16 How. 610, 618, 14 L. Ed. 1079; *Taylor v. Benham*, 5 How. 233, 272, 12 L. Ed. 130; *Ventress v. Smith*, 10 Pet. 161, 9 L. Ed. 382.

74. *Taylor v. Benham*, 5 How. 233, 12 L. Ed. 130.

75. **Power of appointment.**—*Blount v. Walker*, 134 U. S. 607, 613, 38 L. Ed. 1036.

**Power required to be executed by will.**—When a will of a citizen of South Carolina prescribed the mode in which the power of appointment should be exercised, by the use of the words "by her (the donee) last will and testament duly executed," he intended a will duly executed according to the laws of South Carolina, and not a will duly executed according to the laws of any state or country in which the donee of the power might happen to be domiciled at the time of her death. *Blount v. Walker*, 134 U. S. 607, 613, 33 L. Ed. 1036.

The probate of the donee's will in North Carolina established that the will was executed according to the law of the state, where she was domiciled, but it did not establish that the will was executed according to the law of South Carolina. *Blount v. Walker*, 134 U. S. 607, 613, 33 L. Ed. 1036.

**Power of appointment under marriage settlement.**—See the title MARRIAGE CONTRACTS AND SETTLEMENTS, vol. 8, p. 256.



d. *Power of Attorney*.—An authority or power of attorney must be pursued, in order to make the act of the substitute the act of the principal.<sup>76</sup>

e. *Power to Sell and Convey*.—See post, "Power to Sell or Convey," VI, C, 3, b.

**Power of Sale Mortgage**.—See the title MORTGAGES AND DEEDS OF TRUST, vol. 8, p. 488.

**Authority to Executor or Administrator to Sell**.—See the title EXECUTORS AND ADMINISTRATORS, vol. 6, p. 144.

3. MEANS AND INSTRUMENT OF EXECUTION—*a. In General*.—A grant of a general power implies the right to execute it by appropriate means.<sup>77</sup>

*b. Power to Sell or Convey*—(1) *In General*.—Where a power to sell or convey is given in writing and not aided by language conferring a wide discretion, it still must be construed as intending to confer all the usual means, or sanction the usual manner of performing what is intrusted to the agent.<sup>78</sup> Nor is the power confined merely to "usual modes and means," but, whether the agency be special or general, the attorney may use appropriate modes and reasonable modes; such are considered within the scope of his authority.<sup>79</sup>

(2) *Mode of Sale*.—A sale under power of attorney to be valid must be in accordance with the requirements of the power.<sup>80</sup>

**Under Deed Conveying Property in Trust**.—Where, by the terms of a deed conveying real estate in trust to be sold for the benefit of the creditors of the grantor, the trustee is directed to sell the property conveyed, by public auction, the trustee is bound to conform to this mode of sale. This is the test of value, which the grantor thought proper to require; and it is not competent to the trustee to establish any other; although, by doing so, he might, in reality, promote the interest of those for whom he acted.<sup>81</sup>

**Under Power of Sale Mortgage or Deed of Trust**.—See the title MORTGAGES AND DEEDS OF TRUST, vol. 8, p. 488.

(3) *Power to Execute Deed with Covenants*.—Under a power to sell and convey, a covenant of warranty or of seisin by the agent is proper and binding on the principal where, under all the circumstances, such covenant is appropriate

76. **Power of attorney**.—Hunt v. Rousmanier, 8 Wheat. 174, 203, 5 L. Ed. 589; Curtis v. Innerarity, 6 How. 146, 161, 12 L. Ed. 380.

Where a vendor gave a power of attorney to an agent to receive a payment from the purchasers on account, and the agent gave a receipt in full for certain balances by way of adjustment and compromise, and the vendor disapproved of the acts of the agent, it was held that the payment was not good, even on account, against the vendor. Curtis v. Innerarity, 6 How. 146, 12 L. Ed. 380.

The purchasers, by making a payment in this way, upon certain terms which were not within the power of attorney, constituted the agent their agent. For two years afterwards, they insisted upon the binding force of the acts of the agent to the extent to which he had given releases, and only claimed the payment to be on account when the agent became insolvent. It was held that it was then too late. Curtis v. Innerarity, 6 How. 146, 12 L. Ed. 380.

77. **Means and instrument of execution**.—McCulloch v. Maryland, 4 Wheat. 316, 408, 4 L. Ed. 579.

78. **Power to sell or convey**.—LeRoy

v. Beard, 8 How. 451, 468, 12 L. Ed. 1151.

79. **LeRoy v. Beard**, 8 How. 451, 468, 12 L. Ed. 1151.

80. **Mode of sale**.—Morrill v. Cone, 22 How. 75, 82, 16 L. Ed. 253.

81. **Under deed conveying property in trust**.—Greenleaf v. Queen, 1 Pet. 138, 7 L. Ed. 85. See the title TRUSTS AND TRUSTEES.

**Objection on part of purchaser**.—Where property conveyed in trust, to be sold at public auction, had been sold by private contract, and the property was afterwards offered for sale, in the manner prescribed by the deed of trust, for the purpose of making a title to the private purchaser; at which time more was bid for the same than the amount for which it had been privately contracted to be sold; the purchaser, by private contract, to whom possession was delivered, at the price agreed on, cannot allege that the sale was void; since, whatever may be the liability of the trustee, to those interested in the proceeds of the sale, for the amount offered at the auction, it is not an objection, on the part of the purchaser, to release him from his contract. Greenleaf v. Queen, 1 Pet. 138, 7 L. Ed. 85.

and reasonable.<sup>82</sup> Where the power of attorney specifies the covenants to be made *eo nomine*, no question as to the extent of the power can arise, to be settled by any court. But when this last is not done, the extent of the power is to be settled by the language employed in the whole instrument, aided by the situation of the parties and of the property, the usages of the country on such subjects, the acts of the parties themselves, and any other circumstance having a legal bearing and throwing light on the question.<sup>83</sup>

c. *Power of Appointment*.—**Power of Appointment under Wills**.—See the title **WILLS**.

**Power of Appointment under Marriage Settlement**.—See the title **MARRIAGE CONTRACTS AND SETTLEMENTS**, vol. 8, pp. 255, 256.

d. *Instrument of Execution*—(1) *Assignment or Release*.—A general power of attorney authorizes the agent to execute a general assignment,<sup>84</sup> or a general release<sup>85</sup> in the name of his principal.

(2) *Deed Containing Covenants*.—See ante, "Power to Execute Deed with Covenants," VI, C, 3, b, (3).

(3) *Will*.—See ante, "Power of Appointment," VI, C, 2, c.

(4) *In Whose Name Executed—Signature*.—As a general rule a power must be executed in the name of the person who gives it.<sup>86</sup>

**82. Power to execute deed with covenants**.—*LeRoy v. Beard*, 8 How. 451, 468, 12 L. Ed. 1151, citing and quoting from *Clarke v. Courtney*, 5 Pet. 319, 8 L. Ed. 140. See *The Monte Allegre*, 9 Wheat. 616, 648, 6 L. Ed. 174.

**83.** *LeRoy v. Beard*, 8 How. 451, 12 L. Ed. 1151.

**Covenant of warranty or of seisin**.—Where a power of attorney authorized the agent "to contract for the sale of, and to sell, either in whole or in part, the lands and real estate so purchased," and "on such terms in all respects as he shall deem most advantageous," and "to execute deeds of conveyance necessary for the full and perfect transfer of all our respective right, title, etc., as sufficiently in all respects as we ourselves could do 'personally' in the premises," these expressions, aided by the situation of the parties and the property, the usages of the country on such subjects, the acts of the parties themselves, and any other circumstance having a legal bearing upon the question, must be construed as giving to the agent the power to enter into a covenant of seisin. *LeRoy v. Beard*, 8 How. 451, 12 L. Ed. 1151.

"**Terms**."—That the language of the above power of attorney is sufficient to cover the execution of such a covenant would seem naturally to be inferred, from its leaving the terms of the sale to be in all respects as the attorney shall deem most advantageous. "Terms" is an expression applicable to the conveyances and covenants to be given, as much as to the amount of, and the time of paying, the consideration. To prevent misconception, this wide discretion is reiterated. The covenants, or security as to the title, would be likely to be among the terms agreed on, as they would influence the trade essentially, and in a new and un-

settled country must be the chief reliance of the purchaser. *LeRoy v. Beard*, 8 How. 451, 460, 12 L. Ed. 1151.

The word "personally" in the above power of attorney discussed. See *LeRoy v. Beard*, 8 How. 451, 466, 12 L. Ed. 1151.

"Again, his authority to sell, 'on such terms in all respects as he may deem most eligible,' might well be meant to extend to a term or condition to make covenants of seisin or warranty, as without such he might not be able to make an eligible sale, and obtain nearly so large a price." *LeRoy v. Beard*, 8 How. 451, 466, 12 L. Ed. 1151.

**84. Assignments**.—*Paul v. Cullum*, 132 U. S. 539, 552, 33 L. Ed. 430. See the title **ASSIGNMENTS FOR BENEFIT OF CREDITORS**, vol. 2, p. 603.

**85. Release**.—A general power of attorney authorizes the agent to execute a general release in the name of his principal. *Quesnel v. Mussy*, 1 Dall. 449, 1 L. Ed. 218.

**86. In whose name executed—Signature**.—*Hunt v. Rousmanier*, 8 Wheat. 174, 203, 5 L. Ed. 589.

This general doctrine that a power must be executed in the name of a person who gives it, a doctrine founded on the nature of the transaction, is most usually engrafted in the power itself. Its usual language is, that the substitute shall do that which he is empowered to do, in the name of his principal. He is put in the place and stead of his principal, and is to act in his name. *Hunt v. Rousmanier*, 8 Wheat. 174, 203, 5 L. Ed. 589.

A power of attorney from "James B. Clarke and Eleanor his wife," to "Carey L. Clarke," for the sale of lands, is not properly or legally executed in the following form; "I, the said Carey L. Clarke, attorney as aforesaid, etc., do;" "in witness whereof, the said Carey L. Clarke, at-

If an interest or estate passes with the power, and vests in the person by whom the power is to be exercised, such person acts in his own name.<sup>87</sup>

**Wife Joined to Alienate Dower Right.**—Where the joinder of the wife in a power of attorney to convey the lands of the husband was made to alienate some supposed right of dower, and not to describe lands owned by the wife and husband jointly, instead of by the husband alone, the failure of the attorney to use the name of the wife in a bond for a deed which he gave to a purchaser cannot invalidate the bond.<sup>88</sup>

**Power to Execute Bond—Mistake in Name of Obligor.**—See the title BONDS, vol. 3, p. 387.

(5) *Ratification and Estoppel.*—**Estoppel to Disavow Act of Attorney Who Executes Quitclaim Deed.**—See the title ESTOPPEL, vol. 5, p. 975.

**Estoppel to Dispute Validity of Settlement Made under Power of Attorney to Collect and Receive Moneys, etc.**—See the title ESTOPPEL, vol. 5, p. 992.

**Agency of Attorney Insufficiently Expressed.**—See post, "Power of Equity to Aid Defective Execution," VI, J.

**D. Intention to Execute**—1. IN GENERAL.—If the donee of the power intends to execute it, and the mode be in other respects unexceptionable, that intention, however manifested, whether directly or indirectly, positively or by just implication, will make the execution valid and operative; the intention to execute the power must be apparent and clear, so that the transaction is not fairly susceptible of any other interpretation, but if it be doubtful, under all the circumstances, then that doubt will prevent it from being deemed an execution of the power.<sup>89</sup> An appointment under a power is an intent to appoint

torney as aforesaid, has hereunto subscribed his hand and seal, this 25th day of November, in the year of our Lord 1800.—Carey L. Clarke. (L. S.)" This act does not purport to be the act of the principal, but of the attorney; this may savor of refinement, since it is apparent that the party intended to pass the interest and title of his principals; but the law looks not to the intent alone, but to the fact, whether the intent has been executed in such a manner as to possess a legal validity. *Clarke v. Courtney*, 5 Pet. 319, 8 L. Ed. 140.

87. *Hunt v. Rousmanier*, 8 Wheat. 174, 205, 5 L. Ed. 589.

88. **Wife joined to alienate dower right.**—*Dolton v. Cain*, 14 Wall. 472, 479, 20 L. Ed. 830.

89. **Intention to execute.**—*Lee v. Simpson*, 134 U. S. 572, 589, 33 L. Ed. 1038; *Warner v. Connecticut Mut. Life Ins. Co.*, 109 U. S. 357, 366, 27 L. Ed. 962.

"Judge Story states, as the result of the English authorities, that three classes of cases have been held to be sufficient demonstrations of an intended execution of a power: (1) Where there has been some reference in the will, or other instrument, to the power, (2) Or a reference to the property, which is the subject on which it is to be executed; (3) Or where the provision in the will or other instrument, executed by the donee of the power, would otherwise be ineffectual, or a mere nullity; in other words, it would have no operation, except as an execution of the power." *Lee v. Simpson*, 134 U. S. 572, 590, 33 L.

Ed. 1038. The rule thus stated was referred to with approval in *Blake v. Hawkins*, 98 U. S. 315, 326, 25 L. Ed. 139, and in *Warner v. Connecticut Mut. Life Ins. Co.*, 109 U. S. 357, 366, 27 L. Ed. 962. This is the rule in New York and Illinois. Nor is the rule different under the decisions of the courts of South Carolina. *Lee v. Simpson*, 134 U. S. 572, 590, 33 L. Ed. 1038.

**Wife having power of appointment joining in deed to convey dower right.**—S., the wife of B., joined with him in a deed to H. of land of B. in trust for the use of S. during her life, and, at any time, on the written request of S. and the written consent of B., to convey it to such person as S. might request or direct in writing, with the written consent of B. Afterwards B. made a deed of the land to W. in which H. did not join, and in which B. was the only grantor, and S. was not described as a party, but which was signed by S. and bore her seal, and was acknowledged by her in the proper manner. Held, that the latter deed did not convey the legal title to the land, and was not made in execution of the power reserved to S. *Batchelor v. Brereton*, 112 U. S. 396, 28 L. Ed. 748.

If S. possessed the right to convey by grant she was not the grantor, and used no words to convey her right. See *Agricultural Bank v. Rice*, 4 How. 225, 235, 241, 11 L. Ed. 949. No intention on her part to execute the power she possessed appears in the deed. *Warner v. Connecticut Mut. Life Ins. Co.*, 109 U. S. 357,



carried out, and, if made by the last will and testament of the donee of the power, the intent, although not expressly declared, may be determined by the gifts and directions made, and if their purpose be to execute the power, the instrument must be regarded as an execution.<sup>90</sup>

27 L. Ed. 962. H. possessed the right, and was not the grantor, and was not requested or directed by S. to convey. All property which B. and S. were conveying by the deed, was presumably their own property, and any interest of S. in it, sufficient to call for her signature to that deed, was presumably an interest created by her being the wife of B., and which was supposed to grow out of his title and her marital relation, and not to have been before conveyed, irrespective of any other interest which she had in the land, or any power of appointment in respect of it. *Batchelor v. Brereton*, 112 U. S. 396, 403, 28 L. Ed. 748.

90. *Blake v. Hawkins*, 98 U. S. 315, 25 L. Ed. 139.

**Power executed by will.**—If the will contains no expressed intent to exert the power, yet, if it may reasonably be gathered from the gifts and directions made that their purpose and object were to execute it, the will must be regarded as an execution. After all, an appointment under a power is an intent to appoint carried out, and if made by will the intent and its execution are to be sought for through the whole instrument. *Blake v. Hawkins*, 98 U. S. 315, 326, 25 L. Ed. 139; *Warner v. Connecticut Mut. Life Ins. Co.*, 109 U. S. 357, 366, 27 L. Ed. 962.

Sir Edward Sugden lays down the rule, that "although a will be expressed to be made in pursuance of the power, yet if the testator appears to dispose of his own property only, the power will not be executed by the will." Sugden, *Powers* (2d Am. Ed.) 364." *Blake v. Hawkins*, 98 U. S. 315, 326, 25 L. Ed. 139.

**North Carolina.**—The English statute of Wills, 1 Vic. c. 26, so far as it relates to appointments by will, has been enacted in North Carolina. *Blake v. Hawkins*, 98 U. S. 315, 326, 25 L. Ed. 139.

A., who had a power to appoint a fund in the hands of B., made her will, wherein she declared her intention thereby to execute all powers vested in her, particularly those created in her favor by certain deeds executed in 1839, whereby she became entitled to appoint that fund. Following this declaration were various gifts of pecuniary legacies for charitable purposes, amounting to \$28,500 and also provisions for the payment of certain annuities. Special disposition and appropriation were made of her personal property, which consisted of household furniture, carriage and horses, a growing crop upon a farm, a small sum of cash in hand, some petty debts due her, and about sixty slaves, the latter constituting nearly nine-tenths of the value of the

whole. Certain real estate was also to be sold, and the proceeds applied to a specific purpose. The will declared that if it should appear at her decease that the bequests exceeded the amount of funds left, the first five only (those to charities) should be curtailed until brought within the assets. The fund in the hands of B. was not more than sufficient to pay the legacies. Held, that the will was an execution of the power, and it appointed the whole fund to her executors. *Blake v. Hawkins*, 98 U. S. 315, 25 L. Ed. 139.

The "deed of explanation" executed in 1845 was effectual, and its operation was to reduce the annuity charged upon the lands in the deed of 1839 proportionately as A. reduced the fund charged by her appointments or outlays, so as to make the annuity in each and every year equal to six per cent interest on so much of said fund as remained unappropriated or unexpended by her in each and every year respectively. *Blake v. Hawkins*, 98 U. S. 315, 25 L. Ed. 139.

A testatrix had the power to dispose of a bequest of three-fourths of her interest in a bond and mortgage debt as she pleased, by a last will and testament duly executed by her. The testatrix after referring to the bequest disposed of the entire property and estate to which she is "in any wise entitled," by bequest to her husband. It was held that the will was intended by her to be, and was, a full execution of the power. *Lee v. Simpson*, 134 U. S. 572, 33 L. Ed. 1038.

"The words 'in any wise entitled' are sufficient to cover not only property which she held in her own full right, but also property which she held in a limited right under her mother's will." *Lee v. Simpson*, 134 U. S. 572, 593, 33 L. Ed. 1038.

**Previously expressed intention.**—"It must be admitted that the avowal by the testatrix in the introductory clause of her will of her purpose thereby to execute the power was not itself an execution. It is important only as it may shed light upon the subsequent dispositions. A previously expressed intention may serve to explain language afterwards used, and show what its meaning is; but it is one thing to intend a future act, and quite another to carry out that intention." *Blake v. Hawkins*, 98 U. S. 315, 325, 25 L. Ed. 139.

"While it is true that whether a power has been executed or not is a question involving a consideration of the intent of the donee of the power, it is equally true the intention must be found in the acts or dispositions of the donee, and not alone in any previously expressed purpose."

2. REFERENCE TO POWER.—It is not necessary, however, that the intention to execute the power should appear by express terms or recitals in the instrument, but it is sufficient that it appears by words, acts or deeds demonstrating the intention.<sup>91</sup>

**E. Execution of One of Several Distinct Powers as Defeating Others.**—To a certain extent it is true, that, where several distinct powers are given in the same instrument, the execution of one of these powers superior in dignity to others will supersede and override the latter, though executed first. The execution, for example, of a power of sale will supersede all other powers, for it must necessarily do so in order to have any effect. Mr. Sugden, in illustrating the rule, says: "Thus a power of sale must defeat every limitation of the estate, whether created directly by the deed or through the medium of a power, except estates limited to persons standing in the same situation as the purchaser, for example, a lessee; for the very object of a power of sale is to enable a conveyance to a purchaser discharged of the uses of the settlement, and it is immaterial whether any particular use was really contained in the original settlement, or was introduced into it in the view of the law by the execution of

Blake *v.* Hawkins, 98 U. S. 315, 326, 25 L. Ed. 139.

91. **Reference to power.**—Lee *v.* Simpson, 134 U. S. 572, 589, 33 L. Ed. 1038; Carver *v.* Astor, 4 Pet. 1, 92, 7 L. Ed. 761; Crane *v.* Morris, 6 Pet. 598, 620, 8 L. Ed. 514, reaffirmed in Kelly *v.* Jackson, 6 Pet. 622, 8 L. Ed. 523. But see French *v.* Edwards, 13 Wall. 506, 515, 20 L. Ed. 702.

It is not necessary to a due execution of a power that it should be recited or referred to in the executing instrument of conveyance. It is sufficient that the power exists and is intended to be executed; and that intent is a matter in pais to be collected from all the circumstances of the case. Whether in point of fact such instrument was executed under the power is solely a matter of fact for the consideration of the jury. Crane *v.* Morris, 6 Pet. 598, 620, 8 L. Ed. 514, reaffirming Carver *v.* Astor, 4 Pet. 1, 98, 7 L. Ed. 761, and reaffirmed in Kelly *v.* Jackson, 6 Pet. 622, 8 L. Ed. 523.

Where taking the instrument in all its parts and looking at its entire scope and purpose it must be admitted that, notwithstanding its omission of any direct and express stipulation of that character, its meaning and legal effect are to carry into execution a power, and it cannot otherwise operate according to the intention of the parties, it must be referred to the power which alone can make it effectual in all its provisions. Warner *v.* Connecticut Mut. Life Ins. Co. 109 U. S. 357, 365, 27 L. Ed. 962.

By doing a thing which, independently of the power, would be nugatory, the donee of the power conclusively evinces an intention to execute the power; and the act if within the scope of the power, will be held to be a valid execution of it. Warner *v.* Connecticut Mut. Life Ins. Co., 109 U. S. 357, 27 L. Ed. 962.

A conveyance of property by a grantor whose only interest therein is a power of

sale, ordinarily operates as an execution of the power, although no reference to the power or owner is made in the deed. Carver *v.* Astor, 4 Pet. 1, 98, 7 L. Ed. 761.

If the parties had in a deed under power of sale under a marriage settlement recited the settlement deed and the power to convey, and had then conveyed, with the same covenants, the deed could not have been deemed in point of law, inconsistent with the power under the settlement deed but would be deemed a good execution of the power, and the covenants a mere additional security for the title. Carver *v.* Astor, 4 Pet. 1, 4, 98, 7 L. Ed. 761.

A husband and wife executed a mortgage of the wife's real estate to secure a debt of the husband. The wife died before maturity of the debt and provided by a will that her husband should hold all her estate in trust to enjoy the income thereof during his life, remainder to her children at his death. The will further provided that the said husband "may encumber the same by way of mortgage or trust deed or otherwise and renew the same for the purpose of raising money to pay off any and all encumbrances now on said property and which trust deed or mortgage so made shall be as valid as though he held an absolute estate in said property." The will still further provided that the said husband "may, in his discretion, during his life, sell and dispose of any and all of the real estate of which I may die seized or possessed, as though he held an absolute estate in the same and out of the proceeds pay any of the encumbrances upon any of the property of which I may die seized and possessed," and reinvest the remainder over and above what may be required to pay the indebtedness in such way as he may see proper. The husband was appointed sole executor of the will and of security waived. On the maturity of debt thus

a power contained in it."<sup>92</sup> But when a mere power to convey, as distinguished from a power to sell, is once executed in favor of a voluntary beneficiary, it cannot be revoked without reserving a power of revocation, and will not, therefore, be superseded by a subsequent conveyance equally voluntary, made under the same power.<sup>93</sup>

**F. Source of Title of Estate Created by Execution of Power of Appointment.**—At common law an estate created by the execution of a power takes effect in the same manner as if it had been created by the deed which raised the power; the beneficiary takes, not under the execution of the power by the donee, but by authority and under grant from the grantor, in like manner as if the power and the instrument which created it had been incorporated into

secured, the husband extended the mortgage by an instrument which did not refer to the will or the power which it conferred. It was held that the instrument extending the mortgage must be construed to be an execution of the power. *Warner v. Connecticut Mut. Life Ins. Co.*, 109 U. S. 357, 27 L. Ed. 962.

**Where a person has both a power and an interest in property**, and does not affect to convey by virtue of the power, his conveyance will be deemed to have been made by virtue of his ownership although the ownership was not coextensive with the power, and it will only operate on his own legal or equitable interest. *Shirras v. Caig*, 7 Cranch 34, 46, 3 L. Ed. 260.

A mortgage of land, made by one who has a legal and equitable title to a moiety of the property which the mortgage purports to convey, passes only his legal right, although he had a power, from the person who held the residue of the legal, but not of the equitable estate in the land, to sell and convey his right also; the mortgagor not having affected to convey any part of it under his power from the other person, although his deed purported to mortgage the whole; and the equitable title not being in the person who gave the power. *Shirras v. Caig*, 7 Cranch 34, 3 L. Ed. 260.

**92. Execution of one of several distinct powers as defeating others.**—*Bowen v. Chase*, 94 U. S. 812, 820, 24 L. Ed. 184, quoting 2 Sugd. on Powers, 47, 48 (6th Ed.).

"This rule with regard to the relative priority and dignity of different powers in the same instrument, though depending on construction and the presumed intention of the donor, is somewhat analogous to the rule adopted by the courts in construing the act of 27 Elizabeth, respecting fraudulent conveyances. It has been invariably held under that act that a conveyance to a purchaser avoids all prior voluntary conveyances of the same lands; though, as between two voluntary conveyances, or two conveyances to purchasers, the first will take the precedence. *Roberts on Fraud. Conv.*, pp. 33, 641. So, in regard to double powers, a power to sell or exchange, when exercised, overrides all other distinct powers; for

they are necessarily exclusive of all others; whereas the uses appointed under other powers may possibly be served out of the estate procured by the price of the sale, or by the exchange." *Bowen v. Chase*, 94 U. S. 812, 821, 24 L. Ed. 184.

**93.** *Bowen v. Chase*, 94 U. S. 812, 821, 24 L. Ed. 184.

Certain conveyances of land in New York creating a trust in order to give a married woman a separate and exclusive use of land free from the control of her husband, were executed in 1827 and 1828 to Michael Werckmeister by Stephen Jumel, which limited a life estate to the separate use of Eliza Brown Jumel, his wife, with a general power of appointment during her life time, and, on failure to make such appointment, to her heirs in fee simple. After the date of those conveyances, the said Eliza, by deed, bearing date November 21, 1828, duly executed, as required by the trust, made an appointment of the land, in the following words, to wit: "Now I, the said Eliza Brown Jumel, do hereby direct, order, limit, and appoint that, immediately after my demise, the said Michael Werckmeister, or his heirs, convey all and singular the said above described premises to such person or persons, and to such uses and purposes, as I, the said Eliza Brown Jumel, shall, by my last will and testament, under my hand, and executed in the presence of two or more witnesses, designate and appoint, and, for want thereof, then that he convey the same to my husband, Stephen Jumel, in case he be living, for and during his natural life, subject to an annuity, to be charged thereon, during his said natural life, of six hundred dollars, payable to Mary Jumel Powers, and, after the death of my said husband, or in case he shall not survive me, then, immediately after my own death, to her, the said Mary Jumel Bownes and her heirs in fee." Held, that, after the termination of said Eliza's separate interest for life, the appointment limited the equitable estate in the land, and vested in said Stephen and Mary immediate interests, although they did not take effect in possession until the death of said Eliza, and were subject to be defeated by the exercise of her reserved



the instrument.<sup>94</sup> Notwithstanding the common-law rule that estates created by the execution of a power take effect as if created by the original deed, for some purposes the execution of the power is considered the source of title.<sup>95</sup> It is so within the purpose of the registration acts; a person deriving title under an appointment is considered as claiming under the donee within the meaning of a covenant for the quiet enjoyment. By statute in England, for the purposes of

power of disposing of the land by her last will and testament. *Bowen v. Chase*, 94 U. S. 812, 24 L. Ed. 184.

The effect of the chapter of the Revised Statutes of New York, touching uses and trusts (1 Rev. Stat. 727), which went into operation January 1, 1830, upon the estates created by the trust and appointment, considered; but, in the view taken by the court of this case, it is not material whether they were, by the statute, turned into legal estates, or remained, as they were originally, merely equitable in their nature. *Bowen v. Chase*, 94 U. S. 812, 24 L. Ed. 184.

The appointment in favor of said Mary was a voluntary one; and as said Eliza had a power to lease and a power to convey, assure and dispose, which latter power manifestly includes a power to sell, not only by the terms used, but, in this trust, by the direction as to the disposition of the purchase money "in case of an absolute sale," sales of the land to actual purchasers for a valuable consideration were effectual, and superseded the prior appointment in favor of said Mary. It was not necessary to their validity that said Eliza, in making that appointment, should have expressly reserved a power of revocation. *Bowen v. Chase*, 94 U. S. 812, 813, 24 L. Ed. 184.

"In the present case there was a power to lease, and a power to convey, assure, and dispose. That the latter power included a power to 'sell' is not only manifest from the words, but from a subsequent passage of the trust, which directs as to the disposition of the purchase money 'in case of an absolute sale.' At the same time, the words are so general as to authorize a disposition in favor of a volunteer, or gratuitous beneficiary. Here, then, are really two distinct powers contained in one clause; and, according to the rules laid down by Mr. Sugden, the power to sell is the superior power, and will override the other power, and supersede it, if previously exercised." *Bowen v. Chase*, 94 U. S. 812, 820, 24 L. Ed. 184.

Where the subsequent appointments were voluntary, or intended merely as means of restoring the property to its original trust, or of revesting it absolutely in said Eliza, the interest of said Mary, whether it be regarded as a legal or an equitable estate, would not be thereby displaced. *Bowen v. Chase*, 94 U. S. 812, 24 L. Ed. 184.

Certain appointments, subsequent to that in favor of said Mary made by said

Eliza, who survived her husband and died intestate in 1865, declared to be voluntary, and for the purpose of revesting the title in said Eliza. *Bowen*, claiming to be her sole heir at law, has brought sundry actions of ejectment to recover the land. Said Mary died intestate in 1843. The appellees are in possession of the land, and claim, as her heirs at law, under the appointment in her favor. Held, that they are entitled to relief in a court of equity. If their estate is to be regarded as still an equitable one, their right to such relief is undoubted, no matter where, or in whom, the legal estate may be. If, by virtue of the statute, their equitable estate was converted into a legal estate, they have good cause to come into that court for the purpose of removing the cloud upon their title created by the subsequent voluntary appointments and conveyances. *Bowen v. Chase*, 94 U. S. 812, 24 L. Ed. 184.

However proper the appointment made in behalf of Mary Jumel Bownes may have been, it was, nevertheless, only a voluntary one; and the subsequent appointments can in no wise be regarded as frauds upon it. They were, or they were not, such appointments as Madame Jumel still had the power to make, and their effect is to be judged of by the nature of her power, and by that circumstance alone. *Bowen v. Chase*, 94 U. S. 812, 820, 24 L. Ed. 184.

"Had the transactions in question been real and effective sales to actual purchasers for valuable consideration, they would undoubtedly have superseded the voluntary appointment in favor of Mary Jumel Bownes. The position of the appellees' counsel that no subsequent appointment could displace this without having expressly deserved a power of revocation, cannot be maintained, for, as we have seen, a sale does have that effect." *Bowen v. Chase*, 94 U. S. 812, 821, 24 L. Ed. 184.

"The circumstance that the appointment in their favor is, in form, a direction to the trustee to convey to them, does not derogate from the vesting quality of their equitable interests in the meantime. The conveyance would be necessary for the purpose of clothing them with the legal estate." *Bowen v. Chase*, 94 U. S. 812, 818, 24 L. Ed. 184.

**94. Source of title of estate created by execution of power.**—*Chanler v. Kelsey*, 205 U. S. 466, 473, 51 L. Ed. 882.

**95.** *Chanler v. Kelsey*, 205 U. S. 466, 474, 51 L. Ed. 882.

taxation, it has been provided that the donee of the power shall be regarded, in case of a general power, as the one from whom the estate came.<sup>96</sup> Under the New York inheritance act, it is held that the execution of the power is the source of the title with respect to the liability for such succession or inheritance tax; and the decision of the state court of appeals to that effect is binding upon the federal courts. Neither is property taken without due process of law by the manner in which the state court has construed and enforced this statute; nor the contract rights of the parties violated.<sup>97</sup>

**G. Evidence.**—1. **PRESUMPTION AND BURDEN OF PROOF.**—If the validity of a deed depends upon a power the party claiming under it is as much bound to prove the existence of the power as he would be bound to prove any matter of record on which the validity of the deed might depend.<sup>98</sup> If the deed is apparently within the scope of the power, the presumption is that the agent performed his duty to his principal.<sup>99</sup> And the rule is, that he who would invalidate such a deed must impeach it by affirmative proof.<sup>1</sup> Evidence is admissible to repel the presumption that there was a bona fide execution of the trust reposed in an attorney authorized to execute a deed, but such evidence must be relevant to the issue.<sup>2</sup>

2. **RECITALS AS EVIDENCE OF MODE OF EXECUTION.**—See the title **ESTOPPEL**, vol. 5, p. 924.

**H. Supervision of Court of Equity.**—Where a power coupled with a discretion has been exercised, a court of equity, in the absence of fraud, very rarely interferes.<sup>3</sup>

**Appointment to Charitable Uses.**—See the title **CHARITIES**, vol. 3, pp. 690, 691, 694.

96. *Chanler v. Kelsey*, 205 U. S. 466, 474, 51 L. Ed. 882.

97. *Chanler v. Kelsey*, 205 U. S. 466, 478, 51 L. Ed. 882; *Orr v. Gilman*, 183 U. S. 278, 46 L. Ed. 196. See the title **SUCCESSION TAXES**.

98. **Presumption and burden of proof.**—*Deputron v. Young*, 134 U. S. 241, 256, 33 L. Ed. 923, citing *Williams v. Peyton*, 4 Wheat. 77, 4 L. Ed. 518; *Ransom v. Williams*, 2 Wall. 313, 319, 17 L. Ed. 803.

If the power is a link in his chain of title which is essential to its continuity, it is incumbent on him to preserve it. *Deputron v. Young*, 134 U. S. 241, 256, 33 L. Ed. 923; *Williams v. Peyton*, 4 Wheat. 77, 4 L. Ed. 518. See, also, *Ransom v. Williams*, 2 Wall. 313, 319, 17 L. Ed. 803.

99. *Clements v. Macheboeuf*, 92 U. S. 418, 425, 23 L. Ed. 504.

The general rule is, that the presumption in favor of the conveyance will be allowed to prevail in all cases where it was executed as matter of duty, either by an agent or trustee, if the instrument is regular on its face. Facts will not be presumed against a deed of conveyance which on its face has all the legal requisites to make it a valid instrument. *Clements v. Macheboeuf*, 92 U. S. 418, 425, 23 L. Ed. 504, citing *Polk v. Wendall*, 9 Cranch 87, 3 L. Ed. 665; *Bagnell v. Broderick*, 13 Pet. 436, 450, 10 L. Ed. 235; *Minter v. Crommelin*, 18 How. 87, 15 L. Ed. 279; *United States Bank v. Dandridge*, 12 Wheat. 64, 70, 6 L. Ed. 552.

1. *Clements v. Macheboeuf*, 92 U. S. 418, 425, 23 L. Ed. 504.

Where a party alleges that a deed executed by his attorney, under a power to convey, is invalid for matters not apparent on its face, the burden of proving them is on such party. *Clements v. Macheboeuf*, 92 U. S. 418, 23 L. Ed. 504.

The deeds of conveyance show on their face that they were executed within the limitations of the power of attorney; and in such case the presumption is that the trust reposed in the attorney was executed in good faith. Where the deed in such case is apparently valid, courts of justice will not infer anything against its validity. *Clements v. Macheboeuf*, 92 U. S. 418, 23 L. Ed. 504.

2. *Morrill v. Cone*, 22 How. 75, 82, 16 L. Ed. 253.

One of the donors of a power to sell land who did not appear to be interested in the land otherwise than by the recital in the deed executed in pursuance of the power, admitted his knowledge of the terms of the sale. The power of attorney and the deed had been on the public records for thirty-four years before suit was commenced and the property had been repeatedly sold during this period. He offered to testify that he was informed and believed that most of the purchase money had not been paid to the grantor and that security was not taken. It was held that such testimony is not admissible on the question of the validity of the deed. *Morrill v. Cone*, 22 How. 75, 82, 16 L. Ed. 253.

3. **Supervision of court of equity.**—*Markey v. Langley*, 92 U. S. 142, 154, 23 L. Ed. 701.

**I. Power of Chancery to Compel Execution.**—Chancery will not compel the execution of a mere naked power,<sup>4</sup> but it is a question how far a court of equity will compel the specific execution of a contract intended to be secured by an irrevocable power of attorney, which was revoked by operation of law, on the death of the party.<sup>5</sup>

**J. Power of Equity to Aid Defective Execution.**—Chancery has power, under equitable circumstances, to aid a defective execution of a power.<sup>6</sup>

**POWERS OF ATTORNEY.**—See the title POWERS, ante, p. 588.

**PRACTICE.**—See the title COURTS, vol. 4, p. 1143. "The word means those legal rules which direct the course of proceeding to bring parties into the court and the course of the court after they are brought in."<sup>1</sup>

**PRÆCIPE.**—See the title SUMMONS AND PROCESS. As to fees of clerks for filing, see the title CLERKS OF COURT, vol. 3, p. 860.

**PRAYER FOR PROCESS.**—See the title EQUITY, vol. 5, p. 855.

**PRAYERS FOR RELIEF.**—See the title EQUITY, vol. 5, p. 852.

**PREAMBLE.**—See the titles CONSTITUTIONAL LAW, vol. 4, pp. 132, 133, 314, 324, 459; STATUTES.

**PRECATORY TRUSTS.**—See the title WILLS.

**PRECEDENT.**—See the title STARE DECISIS.

**PRECINCT.**—See note 2.

**PREDECESSOR.**—See note 3.

**PRE-EMPTION.**—See the title PUBLIC LANDS.

**PREFECT.**—See note 4a.

**4. Power of chancery to compel execution.**—*Fountain v. Ravenel*, 17 How. 369, 15 L. Ed. 80.

**5. Hunt v. Rousmanier**, 8 Wheat. 174, 5 L. Ed. 589.

**6. Power of equity to aid defective execution.**—*Fountain v. Ravenel*, 17 How. 369, 385, 15 L. Ed. 80.

Where a ratification by an attorney of a deed of settlement is insufficient in form, because of the manner in which he expresses his agency in appending his signature to the instrument declaring the ratification, a court of equity would look beyond the form of the execution, and, having ascertained his intention in signing the instrument, will, if possible, give it the effect intended, if such ratification has been acted upon by others, and has not been objected to by the principal, when called to his attention. *Starr v. Starr*, 94 U. S. 477, 24 L. Ed. 276.

**1. Practice.**—*Kring v. Missouri*, 107 U. S. 221, 232, 27 L. Ed. 506.

**2. Precinct.**—A Wyoming act was as follows: "The county commissioners shall thereupon divide and adjust the number of miles and the amounts falling within each precinct, township or school district, in their respective counties, and cause such amounts to be entered and placed on the lists of taxable property returned by the several assessors." The court said: "Precinct is a general word and not a technical one in Wyoming; and indicates any district marked out and de-

fined. In the connection in which it stands it signifies a district inferior to a county, for it is used to denote a portion of a county; and superior to a township, for the enumeration evidently proceeds from the greater to the less—'precinct township, school district.' What tax districts are there in Wyoming inferior to a county, and superior to a township, if incorporated cities and towns are not such?" *Union Pacific R. Co. v. Cheyenne*, 113 U. S. 516, 524, 28 L. Ed. 1098.

**3. Predecessor.**—In *Page v. United States*, 127 U. S. 67, 69, 32 L. Ed. 65, it is said: "Section 51 of the Revised Statutes provides as follows: 'Whenever a vacancy occurs in either house of congress, by death or otherwise, of any member or delegate elected or appointed thereto after the commencement of the congress to which he has been elected or appointed, the person elected or appointed to fill it shall be compensated and paid from the time that the compensation of his predecessor ceased.' \* \* \* The proper construction of § 51 is that the predecessor of the person elected to fill a vacancy must be a person who was the predecessor in the same congress. If no such person is to be found, because no such person was duly elected, Page had no predecessor, in the sense of § 51, and that section does not apply to his case."

**4a. Prefect.**—See *Crespin v. United States*, 168 U. S. 208, 42 L. Ed. 438.



**PREFERENCES.**—See the titles ASSIGNMENTS FOR BENEFIT OF CREDITORS, vol. 2, p. 612; BANKRUPTCY, vol. 2, p. 929; FRAUDULENT AND VOLUNTARY CONVEYANCES, vol. 6, p. 472; INSOLVENCY, vol. 7, p. 5.

**PREFERRED STOCK.**—See the title STOCK AND STOCKHOLDERS.

**PREJUDICE.**—As ground for changing place of trial, see the titles REMOVAL OF CAUSES; VENUE. As to dismissal without prejudice, see the title DISMISSAL, DISCONTINUANCE AND NONSUIT, vol. 5, p. 356.

**PRELIMINARY EXAMINATION.**—See the title COMMITMENT AND PRELIMINARY EXAMINATION OF ACCUSED, vol. 3, p. 951.

**PRELIMINARY PROOF.**—See the titles ACCIDENT INSURANCE, vol. 1, p. 61; INSURANCE, vol. 7, p. 190.

## PREMATURE SUITS.

A bill for injunction by stockholders to enjoin a city from holding an election to decide whether it should subscribe to stock is prematurely brought, for the reason that it is founded on a contingency that a majority of the voters of the city will vote in favor of a city subscription to the stock. The complainant should wait till after the result of the election, and if it is against any subscription, no suit will be required; if in favor, it is then time enough to file the bill.<sup>1</sup> It seems that the objection that a suit is brought prematurely may be raised by plea in abatement.<sup>2</sup>

**PREMIUM.**—See the titles INSURANCE, vol. 7, p. 119; MARINE INSURANCE, vol. 8, p. 164.

**PREPONDERANCE OF EVIDENCE.**—See the title EVIDENCE, vol. 5, p. 1035.

**PREROGATIVE COURTS.**—See SURROGATE COURTS.

**PRESCRIBE.**—See note 3.

1. Bill to enjoin city from subscribing to stock.—*Memphis City v. Dean*, 8 Wall. 64, 19 L. Ed. 326. See the title MUNICIPAL, COUNTY, STATE AND FEDERAL AID, vol. 8, p. 618.

2. Manner of objecting that suit is premature.—*Memphis City v. Dean*, 8 Wall. 64, 19 L. Ed. 326. See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 12.

3. Prescribe.—Section 1908 of the Revised Statutes provides that: "The ju-

dicial power of Arizona shall be vested in a supreme court and such inferior courts as the legislative council may by law prescribe." The court said: "Something was said in argument about the use of the word **prescribe** in the organic act of Arizona, and 'establish' in that of Florida, but we attach no importance to this. The words are often used to express the same thing, and Webster classes them as synonyms." *Ex parte Lothrop*, 118 U. S. 113, 30 L. Ed. 108.

## PREScription.

### CROSS REFERENCES.

See the titles EASEMENTS, vol. 5, p. 690; FERRIES, vol. 6, p. 274; FISH AND FISHERIES, vol. 6, p. 291; LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, p. 900, and references there made; MINES AND MINERALS, vol. 8, p. 364; NAVIGABLE WATERS, vol. 8, p. 805; USAGES AND CUSTOMS; WATERS AND WATER-COURSES.

As to acquiescence in boundaries, see the title BOUNDARIES, vol. 3, pp. 485, 500. As to adverse possession, as ground for presuming grant or lease, see the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, p. 974, et seq. As to corporations by prescription, see the title CORPORATIONS, vol. 4, p. 672, et seq. As to prescriptive right of highway, see the title STREETS AND HIGHWAYS. As to prescriptive right of way generally, see the title PRIVATE WAYS. As to prescriptive title under public sale, see the titles EXECUTORS AND ADMINISTRATORS, vol. 6, p. 150, et seq.; JUDICIAL SALES, vol. 7, p. 703.

**Definition.**—Prescription is a thing of policy growing out of the experience of its necessity; and the time after which suits or actions shall be barred, has been, from a remote antiquity, fixed by every nation, in virtue of that sovereignty by which it exercises its legislation for all persons and property within its jurisdiction.<sup>1</sup> It may be positive, by which a property is acquired,<sup>2</sup> but in order for title to be acquired by prescription, the alleged possession must be open, notorious, continuous and adverse.<sup>3</sup> Or it may be negative, whereby a right is lost or forfeited.<sup>4</sup>

**Under Spanish and Civil Law.**—See note.<sup>4a</sup>

**Foundation of Doctrine.**—The foundation of the doctrine of prescription,

1. **Definition.**—McElmoyle v. Cohen, 13 Pet. 312, 10 L. Ed. 177; Metcalf v. Watertown, 153 U. S. 671, 674, 38 L. Ed. 861.

"Prescription," says Mr. Angell, in his work on Limitation of Actions, §§ 1 & 2, "is of two kinds—that is, it is either an instrument for the acquisition of property, or an instrument of an exemption only from the servitude of judicial process." Campbell v. Holt, 115 U. S. 620, 623, 29 L. Ed. 483. See the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, p. 906.

2. **"Positive, or the Roman usucapio,** is the acquisition of property, real or personal, immovable or movable, by the continued possession of the acquirer for such a time as is described by the law to be sufficient. Erskine's Inst., 556. 'Adjectio dominii per continuationem possessionis temporis legi definiti.' Dig., 3." Townsend v. Jemison, 9 How. 407, 417, 13 L. Ed. 194.

3. **Prescription by which title may be acquired.**—McGuire v. Blount, 199 U. S. 142, 147, 50 L. Ed. 125; Kirk v. Smith, 9 Wheat. 241, 6 L. Ed. 81. See the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, p. 934, et seq.

**Indian lands.**—Where the title in fee to land had passed by a treaty to an Indian, having the right to convey, there is no reason to doubt that title could be ac-

quired to such lands by prescription. Francis v. Francis, 203 U. S. 233, 51 L. Ed. 165. See the title INDIANS, vol. 6, pp. 919, et seq., 941.

4. **"Negative prescription** is the loss or forfeiture of a right, by the proprietor's neglecting to exercise or prosecute it during the whole period which the law hath declared to be sufficient to infer the loss of it. It includes the former, and applies also to all those demands which are the subject of personal actions. Erskine's Inst., 560, and 3 Burge, 26." Townsend v. Jemison, 9 How. 407, 417, 13 L. Ed. 194.

4a. **Under Spanish and civil law.**—"By the Spanish law prescription was divided into ordinary and extraordinary. The term of the ordinary prescription as to immovable property was ten years (Partidas 3, Law 18, Title 29), and the term for immovable property by the extraordinary prescription was thirty years. (Partidas 3, Law 16, Title 29.) But the requisites for the ordinary prescription were, 1st, good faith; 2d, just title; 3d, continued and uninterrupted possession for the time required by law. (Hall, p. 30; 2 White, 83; Orozoco, Legislation and Jurisprudence on Public Lands; Mexico, 1895, vol. 1, p. 300.) The just title required did not include a title which was absolutely void and derived from one who by operation of law had no power whatever to dispose of the property. (Partidas 3, Law 11, Title

is that a superior or antecedent title may be lost by the laches of the person holding it, in failing within a reasonable time to assert it effectively, and what he has lost may be gained by another by continued possession, without question of his right.<sup>5</sup> But the possession must be adverse.<sup>6</sup>

**Scope of Doctrine.**—The doctrine of prescription, in the English law, is mainly applied to incorporeal hereditaments, but in the Roman law, and the codes founded on it, is applied to property of all kinds.<sup>7</sup>

**In Cases of Nuisance.**—Prescription, whatever the length of time, has no application in cases of nuisance.<sup>8</sup>

20.)" *Hayes v. United States*, 170 U. S. 637, 649, 42 L. Ed. 1174.

The provisions in the *Partidas* as to the distinction between the ordinary and the extraordinary prescription and the requirements essential to the former were substantially common to the civil law countries. Their practical equivalent was found in the Roman law. L. 24, C. de rei Vindicat., L. 4, C. de praescript. Longi temp. They obtained in the intermediary law. They were reproduced in the Code Napoleon, Art. 265. They are also adopted in the Louisiana Code. La. C. C. 3478, et seq., to 3484. Under all these systems, in interpreting the meaning of what is meant by just title, it has invariably been held that they do not embrace a title made by one who by operation of law had absolutely no power to convey. *Hayes v. United States*, 170 U. S. 637, 650, 42 L. Ed. 1174.

Where the ordinary prescription could not apply, and the necessary time for the extraordinary prescription under the Spanish law had not run at the time of the acquisition of the territory by the United States, and as, clearly, whatever may have been the rule as to the operation of prescription against the Spanish or Mexican governments, it did not run after the treaty against the United States, it follows that the claim of prescription is without foundation. *Hayes v. United States*, 170 U. S. 637, 653, 42 L. Ed. 1174. See this case for further discussion of this subject. And see the title PUBLIC LANDS.

**5. Foundation of doctrine.**—*Campbell v. Holt*, 115 U. S. 620, 622, 29 L. Ed. 483. See the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, p. 969, et seq.

**6. Possession must be adverse.**—*District of Columbia v. Robinson*, 180 U. S. 92, 99, 45 L. Ed. 440; *McGuire v. Blount*, 199 U. S. 142, 147, 50 L. Ed. 125.

In 2 *Greenleaf on Evidence*, the learned author, after defining prescription and the period of possession which constituted it, and explaining the modern practice which has introduced "a new kind of title, namely, the presumption of a grant, made and lost in modern times; which the jury are advised or directed to find, upon evidence of enjoyment for sufficient length of time," says, "in the United States grants have been very freely. presumed, upon

proof of an adverse, exclusive and uninterrupted enjoyment for twenty years." And after stating the quality of presumption which arises, he continues: "In order, however, that the enjoyment of an easement in another's land may be conclusive of the right, it must have been adverse, that is, under a claim of title, with the knowledge and acquiescence of the owner of the land, and uninterrupted; and the burden of proving this is on the party claiming the easement. If he leaves it doubtful, whether the enjoyment was adverse, known to the owner, and uninterrupted, it is not conclusive in his favor." Sections 538 and 539. Under a different rule licenses would grow into grants of the fee and permissive occupations of land become conveyances of it. "It would shock that sense of right," Chief Justice Marshall said in *Kirk v. Smith*, 9 Wheat. 241, 286, 6 L. Ed. 81, "which must be felt equally by legislators and judges, if a possession which was permissive, and entirely consistent with the title of another, should silently bar that title." *District of Columbia v. Robinson*, 180 U. S. 92, 99, 45 L. Ed. 440. See the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, p. 934, et seq.

**"Just title" under Louisiana law.**—To entitle a party to claim the benefit of a prescription, it is made necessary by the jurisprudence of Louisiana that he should have acquired the immovable in good faith and by a just title. By the term "just title," in cases of prescription, is not meant that which has been derived from the true owner, but that which has been received from any person whom the possessor honestly believed to be the true owner, provided it were such as to transfer the ownership of the property; that is, such as by its nature would have been sufficient to transfer the ownership if it had been derived from the real owner, such as a sale, exchange, legacy, or donation. Arts. 3484 and 3485 Civil Code. *Davis v. Gaines*, 104 U. S. 386, 400, 26 L. Ed. 757, citing *Pike v. Evans*, 94 U. S. 6, 24 L. Ed. 40.

**7. Scope.**—*Campbell v. Holt*, 115 U. S. 620, 622, 29 L. Ed. 483.

**8. In cases of nuisance.**—*Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 668, 24 L. Ed. 1036. See the title NUISANCES, vol. 8, p. 933.



**PRESENCE OF ACCUSED.**—See the title CRIMINAL LAW, vol. 5, p. 114.

**PRESENCE OF THE COURT.**—See the title CONTEMPT, vol. 4, p. 535.

**PRESENTATION OF CLAIMS.**—See the titles ARMY AND NAVY, vol. 2, p. 534; ASSIGNMENTS FOR BENEFIT OF CREDITORS, vol. 2, p. 630; COUNTIES, vol. 4, p. 842; COUPONS, vol. 4, p. 859; EXECUTORS AND ADMINISTRATORS, vol. 6, p. 156; INSOLVENCY, vol. 7, p. 10; UNITED STATES.

**PRESENTMENT.**—See the titles BILLS, NOTES AND CHECKS, vol. 3, p. 315; INDICTMENTS, INFORMATIONS AND PRESENTMENTS, vol. 6, p. 966.

**PRESIDENTIAL ELECTORS.**—See the titles APPEAL AND ERROR, vol. 1, p. 697; ELECTIONS, vol. 5, p. 729; PRESIDENT OF THE UNITED STATES.

**PRESIDENT OF CORPORATIONS.**—See the titles BANKS AND BANKING, vol. 3, p. 86; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 8, p. 978.

# PRESIDENT OF THE UNITED STATES.

BY T. B. BENSON.

- I. Election, 614.**
  - A. In General, 614.
  - B. Presidential Electors, 614.
- II. Nature and Incidents of Office, 615.**
  - A. Relation of Officer and People, 615.
  - B. Privilege of Communications, 615.
- III. Powers and Duties, 615.**
  - A. Discretion, 615.
  - B. To Execute Laws, 615.
  - C. In Particular Cases, 615.
- IV. Advisory and Assistant Officers, 616.**
- V. Proclamations, 616.**
- VI. Messages, 617.**
- VII. Pardons, 617.**

## CROSS REFERENCES.

See the titles PUBLIC OFFICERS; UNITED STATES.

### I. Election.

**A. In General.**—See elsewhere.<sup>1</sup>

**B. Presidential Electors.**—Clause 2 of article 2 of the constitution provides that each state shall appoint, in such a manner as the legislature may direct, a number of electors of president and vice president of the United States, equal to the whole number of senators and representatives in congress. This clause was not amended by the fourteenth and fifteenth amendments. The appointment and mode of appointment of electors belong exclusively to each state,<sup>2</sup> with the exception of the constitutional provisions as to the number of electors and the ineligibility of certain persons, so framed that congressional and federal influence might be excluded.<sup>3</sup> The power of congress extends merely to the determination of the time of choosing the electors and the day on which they are to give their votes. A state law cannot fix a different date for the meeting of electors; but a law containing such a provision is not entirely void, and its other provisions are enforceable. The appointment of the electors may be made by the legislature or by popular vote, by general ticket or by vote in district.<sup>4</sup>

1. **President—Election.**—See the titles CIVIL RIGHTS, vol. 3, p. 830; CONSTITUTIONAL LAW, vol. 4, pp. 244, 359, 488; ELECTIONS, vol. 5, p. 721.

2. **Presidential electors.**—McPherson v. Blacker, 146 U. S. 1, 36 L. Ed. 869; In re Green, 134 U. S. 377, 278, 33 L. Ed. 951.

3. McPherson v. Blacker, 146 U. S. 1, 35, 36 L. Ed. 869.

4. "The word 'appoint' is not the most appropriate word to describe the result of a popular election. Perhaps not; but it is sufficiently comprehensive to cover that mode, and was manifestly used as convey-

ing the broadest power of determination." McPherson v. Blacker, 146 U. S. 1, 27, 36 L. Ed. 869.

The legislature possesses plenary authority to direct the manner of appointment, and may itself exercise the appointing power by joint ballot or concurrence of the two houses, or according to such mode as designated. If the legislature prescribes, as a method of appointment, choice by vote, it must necessarily be by general ticket and not by districts. In other words, the act of appointment is none the less the act of the state in its

## II. Nature and Incidents of Office.

**A. Relation of Officer and People.**—In the discharge of his constitutional duties, the president of the United States acts upon the people of the Union the same as a governor of a state, in the performance of his duties, acts upon the people of the state.<sup>5</sup>

**B. Privilege of Communications.**—See elsewhere.<sup>6</sup>

## III. Powers and Duties.

**A. Discretion.**—See elsewhere.<sup>7</sup>

**B. To Execute Laws.**—The constitution declares that the president shall take care that the laws be faithfully executed.<sup>8</sup> The executive department may constitutionally execute every law which the legislature may constitutionally make.<sup>9</sup> This duty is not limited to the enforcement of acts of congress or of treaties of the United States according to their express terms, but it includes the rights, duties and obligations growing out of the constitution itself, our international relations, and all the protection implied by the nature of the government under the constitution.<sup>10</sup> It authorizes him, even in the absence of statutory provisions, and acting through the head of one of the executive departments, to appoint or designate a deputy United States marshal and charge him with the duty of accompanying a justice of the supreme court of the United States during the time such justice is traveling to and from or within the limits of the circuit to which he is assigned for the purpose of attending to his duties as a judge of the circuit courts in such circuit, for the purpose of protecting such judge from anticipated assaults and personal violence while in the discharge of such duties.<sup>11</sup> The president cannot authorize the secretary of state to omit the performance of those duties which are enjoined by law.<sup>12</sup>

**C. In Particular Cases.**—See elsewhere.<sup>13</sup>

entirety because arrived at by districts, for the act is the act of political agencies duly authorized to speak for the state, and the combined result is the expression of the voice of the state, a result reached by direction of the legislature, to whom the whole subject is committed. *McPherson v. Blacker*, 146 U. S. 1, 25, 36 L. Ed. 869.

**5. Relation of president and people.**—*Worcester v. Georgia*, 6 Pet. 515, 571, 8 L. Ed. 483.

**6. Privilege of communications.**—See the title *LIBEL AND SLANDER*, vol. 7, p. 462.

**7. Powers and duties—Discretion.**—See the title *MANDAMUS*, vol. 8, p. 56.

**8. To execute laws—Constitutional provision.**—*In re Neagle*, 135 U. S. 1, 34 L. Ed. 55.

**9. Power extends to all constitutional acts of congress.**—*Osborn v. United States Bank*, 9 Wheat. 738, 818, 6 L. Ed. 204.

**10. Not limited to enforcement of acts of congress.**—*In re Neagle*, 135 U. S. 1, 64, 34 L. Ed. 55.

**11. Protection of supreme court justice.**—*In re Neagle*, 135 U. S. 1, 34 L. Ed. 55. See the title *HABEAS CORPUS*, vol. 6, pp. 621, 664.

**12. Direction of omission of legal duty.**—*Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60; *Kendall v. United States*, 12 Pet. 324, 608, 9 L. Ed. 1181.

**13. Powers delegated to president by congress.**—See the title *CONSTITUTIONAL LAW*, vol. 4, p. 293.

**Over ambassadors and consuls.**—See the title *AMBASSADORS AND CONSULS*, vol. 1, p. 276.

**To suspend writ of habeas corpus.**—See the title *HABEAS CORPUS*, vol. 6, p. 671.

**Appointment of officers—In general.**—See the title *PUBLIC OFFICERS*.

**Same—In army and navy.**—See the title *ARMY AND NAVY*, vol. 2, pp. 500, 525.

**Same—Ambassadors and consuls.**—See the title *AMBASSADORS AND CONSULS*, vol. 1, p. 276.

**To regulate captures at sea.**—See the title *PRIZE*.

**To make reservations from public lands.**—See the title *PUBLIC LANDS*.

**To employ secret service agents.**—See the title *UNITED STATES*.

**To establish courts in conquered territory.**—See the title *MILITARY LAW*, vol. 8, p. 356.

**To establish courts-martial.**—See the title *MILITARY LAW*, vol. 8, p. 346.

**To make treaties.**—See the title *TREATIES*.

**To commute death sentence.**—See the title *SENTENCE AND PUNISHMENT*.

**To declare neutrality.**—See the title *NEUTRALITY*, vol. 8, p. 894.

**To grant pardon.**—See the title *PARDON*, vol. 9, p. 1.



## IV. Advisory and Assistant Officers.

See elsewhere.<sup>14</sup>

## V. Proclamations.

In the English law proclamations are defined as notices publicly given of anything whereof the king thinks fit to advertise his subjects.<sup>15</sup> They issue under the great seal as a part of the king's prerogative.<sup>16</sup> As the acts of congress are silent as to proclamations, and make no provision touching the manner of their original promulgation or their subsequent printing and preservation,<sup>17</sup> no particular form is required. It is sufficient if they have such publicity as accomplishes the end to be attained.<sup>18</sup> They are signed by the president and sealed and attested by the secretary of state;<sup>19</sup> and, by the established usage, published with the laws and resolutions of congress currently in the newspapers, and in the same volume with those laws and resolutions at the end of the session.<sup>20</sup> Proclamations take effect from the time they are signed by the president and sealed with the seal of the United States.<sup>21</sup> If the existence of a proclamation is denied, the question is to be tried by the record thereof, and in such case the proper plea is nul tiel record.<sup>22</sup> The same rule of presumption is applicable to proclamations that is applied to statutes—that they had a valid existence on the

**Same—Breach of blockade.**—See the title BLOCKADE, vol. 3, p. 368.

**To permit Indians to sell land.**—See the title INDIANS, vol. 6, pp. 922, 936.

**In regard to Indian agencies.**—See the title INDIANS, vol. 6, p. 958.

**In regard to army and navy.—As commander in chief of army.**—See the title ARMY AND NAVY, vol. 2, p. 498.

**Same.—To call out militia.**—See the titles ARMY AND NAVY, vol. 2, p. 498; MILITIA, vol. 8, p. 358.

**Same.—To promulgate rules for regulation of army.**—See the title ARMY AND NAVY, vol. 2, p. 499.

**Same.—Appointment of officers.**—See the title ARMY AND NAVY, vol. 2, p. 500.

**Same.—Dismissal of officers.**—See the title ARMY AND NAVY, vol. 2, p. 525.

**Same.—To establish blockade.**—See the title BLOCKADE, vol. 3, p. 368.

**Same.—To pardon breach of blockade.**—See the title BLOCKADE, vol. 3, p. 379.

**To sign land grant.**—See the titles MANDAMUS, vol. 8, p. 64; PUBLIC LANDS.

**To sign statute.**—See the title STATUTES.

**14. Advisory and assistant officers.**—See the titles ATTORNEY GENERAL, vol. 2, p. 739; UNITED STATES.

**15. Proclamations.**—*Lapeyre v. United States*, 17 Wall. 191, 195, 21 L. Ed. 606.

**"A proclamation by the president, reserving lands from sale, is his official public announcement of an order to that effect."** *Wolsey v. Chapman*, 101 U. S. 755, 770, 25 L. Ed. 915.

**16. Issued by king under seal.**—An unauthorized issuance is a criminal offense. *Lapeyre v. United States*, 17 Wall. 191, 196, 21 L. Ed. 606.

**17. Promulgation and publication.**—Numerous acts were passed during the late war authorizing proclamations to be issued, but they are silent upon these sub-

jects. *Lapeyre v. United States*, 17 Wall. 191, 197, 21 L. Ed. 606.

**18. Wolsey v. Chapman**, 101 U. S. 755, 770, 25 L. Ed. 915.

**19. Signing and attestation.**—*Lapeyre v. United States*, 17 Wall. 191, 196, 21 L. Ed. 606.

**20. Publication.**—Publication in the newspapers is not necessary to cause them to become operative. *Lapeyre v. United States*, 17 Wall. 191, 21 L. Ed. 606.

**Presumption of publication.**—"Conceding publication to be necessary, the officer upon whom rests the duty of making it should be conclusively presumed to have promptly and properly discharged that duty." *Lapeyre v. United States*, 17 Wall. 191, 21 L. Ed. 606.

**21. Time of taking effect.**—*Lapeyre v. United States*, 17 Wall. 191, 21 L. Ed. 606; *United States v. Norton*, 97 U. S. 164, 24 L. Ed. 907. See the titles EMBARGO AND NONINTERCOURSE LAWS, vol. 5, p. 737; STATUTES.

In this regard there is no distinction between proclamations and statutes. *Lapeyre v. United States*, 17 Wall. 191, 21 L. Ed. 606.

"Acts take effect before they are printed or published. Why should not the same rule apply to proclamations? We see no solid reason for making a distinction." *Lapeyre v. United States*, 17 Wall. 191, 199, 21 L. Ed. 606.

A proclamation of the president relieving parties who had been transacting business in ignorance of it, from penalties, and restoring to them their rights of property, held, under special circumstances, by the judgment of the court, to have taken effect when it was signed by the president and sealed with the seal of the United States, officially attested. *Lapeyre v. United States*, 17 Wall. 191, 21 L. Ed. 606.

**22. Proof of proclamation.**—*Lapeyre v. United States*, 17 Wall. 191, 200, 21 L. Ed. 606.

day of their date. No inquiry upon the subject is permitted.<sup>23</sup> The courts take judicial notice of the proclamations of the president.<sup>24</sup> Proclamations may operate to cause a statute to go into effect;<sup>25</sup> but not to affect the existence of the jurisdiction of the court of claims.<sup>26</sup>

## VI. Messages.

See elsewhere.<sup>27</sup>

## VII. Pardons.

See elsewhere.<sup>28</sup>

**23. Presumption of validity.**—*Lapeyre v. United States*, 17 Wall. 191, 200, 21 L. Ed. 606. See the title STATUTES.

**24. Judicial notice of proclamations.**—See the title JUDICIAL NOTICE, vol. 7, p. 689.

**25. To cause statute to take effect.**—See the title STATUTES.

**26. To affect jurisdiction of court of**

claims.—*Austin v. United States*, 155 U. S. 416, 433, 39 L. Ed. 206.

**27. Messages—As aid to construction of statutes.**—See the title STATUTES.

**Same—Judicial notice of.**—See the title JUDICIAL NOTICE, vol. 7, p. 690.

**28. Pardons.**—See the title PARDON, ante, p. 1.

**Same—Judicial notice of.**—See the title JUDICIAL NOTICE, vol. 7, p. 689.

# PRESUMPTIONS AND BURDEN OF PROOF.

BY JOHN D. PARKER.

## I. Presumptions, 620.

- A. Definition, 620.
- B. Classification, 621.
- C. Office and Nature of Presumptions, 621.
- D. Founding One Presumption on Another, 622.
- E. Constitutionality, 622.
- F. Presumptions in Criminal Cases, 622.
  - 1. In General, 622.
  - 2. Presumption of Innocence, 623.
- G. Presumption of Death, 626.
  - 1. Absence, 626.
  - 2. Letters of Administration, 628.
  - 3. Suicide or Murder, 628.
- H. Presumption of Survivorship, 628.
- I. Destruction, Suppression or Fabrication of Evidence, 628.
- J. Presumption from Possession, 630.
  - 1. Personal Property, 630.
  - 2. Real Property, 630.
- K. Presumption of Intent, 630.
- L. Presumption of Knowledge of Law, 630.
- M. Presumption from Usual Course of Business, 630.
  - 1. In General, 630.
  - 2. The Postoffice, 631.
- N. Presumption Founded on the Instinct of Self-Preservation, 632.
- O. Presumption That Things Are Rightly Done, 632.
  - 1. In General, 632.
  - 2. Presumption That Persons Do Their Duty, 632.
    - a. In General, 632.
    - b. Public Officers, 634.
  - 3. Regularity and Validity of Judicial Proceedings, 634.
    - a. In General, 634.
    - b. Jurisdiction, 634.
    - c. Presumption on Appeal, 635.
    - d. Persons Exercising Judicial or Discretionary Authority, 635.

## II. Burden of Proof, 635.

- A. The General Rule, 635.
- B. When Party Claims Exceptional Right Given by Statute, 636.
- C. Where Party Has Peculiar Knowledge or Information, 636.
- D. Proving a Negative, 636.
- E. Shifting of the Burden, 637.
  - 1. In Civil Cases, 637.
  - 2. Where Statutes Imposing Penalties and Forfeitures Are Violated, 637.
  - 3. In Criminal Cases, 638.
- F. Refusal to Charge as to Burden of Proof, 638.

### CROSS REFERENCES.

See the titles ACKNOWLEDGMENTS, vol. 1, p. 76; ADMIRALTY, vol. 1, p. 119; ALIENS, vol. 1, p. 210; BANKS AND BANKING, vol. 3, p. 1; BILLS, NOTES AND



CHECKS, vol. 3, p. 257; CITIZENSHIP, vol. 3, p. 788; CIVIL RIGHTS, vol. 3, p. 814; CONSTITUTIONAL LAW, vol. 4, p. 1; CORPORATIONS, vol. 4, p. 621; COURTS, vol. 4, p. 861; DEDICATION, vol. 5, p. 235; DOMICILE, vol. 5, p. 473; EJECTMENT, vol. 5, p. 695; EXECUTORS AND ADMINISTRATORS, vol. 6, p. 119; INDIANS, vol. 6, p. 906; INSURANCE, vol. 7, p. 66; JUDICIAL SALES, vol. 7, p. 704; NEGLIGENCE, vol. 8, p. 873; PARTNERSHIP, ante, p. 73; PATENTS, ante, p. 136; PRIZE; PUBLIC LANDS; SEALS AND SEALED INSTRUMENTS; TAXATION; TREASON; TRUSTS AND TRUSTEES; WITNESSES.

As to presumption of payment of proceeds of sale into treasury, see the title ABANDONED AND CAPTURED PROPERTY, vol. 1, p. 4. As to presumptions and burden of proof in relation to accounts, see the title ACCOUNTS AND ACCOUNTING, vol. 1, p. 73. As to presumption that commissioner of deeds exercised his duties within proper territorial limits, see the title ACKNOWLEDGMENTS, vol. 1, p. 86. As to presumption in favor of validity of acknowledgments, see the title ACKNOWLEDGMENTS, vol. 1, p. 93. As to presumption in admiralty in favor of decision on question of facts, see the title ADMIRALTY, vol. 1, p. 192. As to presumption as to citizenship of consul, see the title AMBASSADORS AND CONSULS, vol. 1, p. 275. As to presumptions on appeal, see the title APPEAL AND ERROR, vol. 2, p. 32. As to presumptions as to awards, see the title ARBITRATION AND AWARD, vol. 2, p. 484. As to presumption of assent of creditor to assignment, see the title ASSIGNMENTS, vol. 2, p. 558. As to presumption as to acceptance of assignment for benefit of creditors, see the title ASSIGNMENTS FOR BENEFIT OF CREDITORS, vol. 2, p. 607. As to presumption of authority of attorney general, see the title ATTORNEY GENERAL, vol. 2, p. 739. As to presumption as to legitimacy, see the title BASTARDY, vol. 3, p. 204. As to whether refusal to produce the best evidence is presumptive evidence of the fact sought to be proved, see the title BEST AND SECONDARY EVIDENCE, vol. 3, p. 222. As to presumptions in reference to bills, notes and checks, see the title BILLS, NOTES AND CHECKS, vol. 3, p. 257. As to presumption of consideration in bills, notes and checks, see the title BILLS, NOTES AND CHECKS, vol. 3, p. 277. As to presumption of continuance of blockade, see the title BLOCKADE, vol. 3, p. 371. As to presumption of notice of blockade, see the title BLOCKADE, vol. 3, p. 371. As to presumption of intent to run blockade, see the title BLOCKADE, vol. 3, p. 377. As to burden on lender on bottomry bonds, see the title BOTTOMRY AND RESPONDENTIA, vol. 3, p. 459. As to burden of proof in case of loss by carriers, see the title CARRIERS, vol. 3, p. 618. As to presumptions of citizenship, see the title CITIZENSHIP, vol. 3, p. 812. As to presumption in cases of collision, see the title COLLISION, vol. 3, p. 944. As to presumption of existence of common law, see the title COMMON LAW, vol. 3, p. 966. As to burden of proving jurisdiction of federal court in suit by assignee, see the title COURTS, vol. 4, p. 972. As to presumption that case is without jurisdiction of the United States circuit courts, see the title COURTS, vol. 4, p. 991. As to effect of plea of not guilty, see the title CRIMINAL LAW, vol. 5, p. 107. As to presumptions and burden of proof in criminal cases, see the title CRIMINAL LAW, vol. 5, p. 121. As to presumptions and burden of proof in reference to deeds, see the title DEEDS, vol. 5, p. 264. As to presumption arising from dedication, see the title DEDICATION, vol. 2, p. 235. As to presumption arising from copy of agreement in hands of contracting party, see the title DOCUMENTARY EVIDENCE, vol. 5, p. 454. As to presumptions and burden of proof of domicile, see the title DOMICILE, vol. 5, p. 483. As to presumptions and burden of proof in ejectment, see the title EJECTMENT, vol. 5, p. 713. As to effect of pleading as shifting the burden, see the titles EQUITY, vol. 5, p. 805; PLEADING, ante, p. 418. As to presumption of death as authorizing administration of estates of absentees, see the title EXECUTORS AND ADMINISTRATORS, vol. 6, p. 119. As to burden of proof to impeach executors' accounts, see the title EXECUTORS AND ADMINISTRATORS, vol. 6, p. 169. As to burden of proof of notice to purchaser by equitable owner, see the title FRAUD AND DECEIT, vol. 6, p. 423. As to burden of proof to impeach conveyance for fraud, see the title FRAUDULENT

AND VOLUNTARY CONVEYANCES, vol. 6, p. 522. As to presumptions and burden of proof of fraud, see the title FRAUD AND DECEIT, vol. 6, p. 439. As to presumption and burden of proof of illegality of contract, see the title GAMBLING CONTRACTS, vol. 6, p. 542. As to burden of proof in suit against wife, see the title HUSBAND AND WIFE, vol. 6, p. 719. As to burden of proof of sanity or insanity, see the title INSANITY, vol. 6, p. 1077. As to burden of proof of suicide in suit on insurance policy, see the title INSURANCE, vol. 7, pp. 144, 193. As to presumption of validity of judicial sale, see the title JUDICIAL SALES, vol. 7, p. 733. As to presumption of jurisdiction, see the title JURISDICTION, vol. 7, p. 742. As to presumption against waiver of jury trial, see the title JURY, vol. 7, p. 764. As to presumption and burden of proof on question of limitations and adverse possession, see the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, p. 1047. As to presumption of possession of mortgaged property, see the title MORTGAGES AND DEEDS OF TRUST, vol. 8, p. 452. As to presumption of payment of mortgage, see the title MORTGAGES AND DEEDS OF TRUST, vol. 8, p. 452. As to whether presumption arises from absence of endorsement on federal bonds, see the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES, vol. 8, p. 650. As to burden of proof of negligence and contributory negligence, see the title NEGLIGENCE, vol. 8, p. 873. As to presumption and burden of proof in negligence cases, see the title NEGLIGENCE, vol. 8, p. 873. As to whether joint ownership of land raises presumption of partnership, see the title PARTNERSHIP, ante, p. 73. As to presumptions and burden of proof in patent cases, see the title PATENTS, ante, p. 136. As to presumption of payment, see the title PAYMENT, ante, p. 319. As to burden of proof in actions on contracts for carrying the mails, see the title POSTAL LAWS, ante, p. 550. As to burden of proof on contracts made by agents, see the title PRINCIPAL AND AGENT. As to presumptions and burden of proof in reference to public land, see the title PUBLIC LANDS. As to presumption of ownership of stock from appearance of name upon books, see the title STOCK AND STOCKHOLDERS. As to presumption and burden of proof that person is a stockholder, see the title STOCK AND STOCKHOLDERS. As to presumption and burden of proof as to validity of tax sales, see the title TAXATION. As to burden of proof in action on a contract against a New England town, see the title TOWNS AND TOWNSHIPS. As to presumption in reference to trespass on public lands, see the titles PUBLIC LANDS; TRESPASS. As to whether abandonment or waiver of vendor's lien will be presumed, see the title VENDORS' LIENS. As to presumptions in reference to wills, see the title WILLS.

### I. Presumptions.

**A. Definition.**—A presumption is an inference as to the existence of a fact not actually known, arising from its usual connection with another which is known.<sup>1</sup> The fact must be ascertained before the law draws its inference.<sup>2</sup>

**1. Definition.**—*Insurance Co. v. Weide*, 11 Wall. 438, 441, 20 L. Ed. 197.

"Presumptions are conclusions which the law draws from a particular state of facts." Dissenting opinion of Field, J., in *Stockwell v. United States*, 13 Wall. 531, 563, 20 L. Ed. 491.

"Presumptive evidence proceeds on the theory that the jury can infer the existence of a fact from another fact that is proved, and most usually accompanies it." *Insurance Co. v. Weide*, 11 Wall. 438, 440, 20 L. Ed. 197.

"A presumption is the expression of a process of reasoning, and most, if not all, the rules of indirect evidence may be expressed as such. We cannot go far in the

investigation of any controversy without finding ourselves compelled to infer one fact from another, but we would not therefore be justified in declaring such inferences legal axioms." *Illinois Cent. R. Co. v. Interstate Commerce Commission*, 206 U. S. 441, 459, 51 L. Ed. 1128.

**2.** *Illinois Cent. R. Co. v. Interstate Commerce Commission*, 206 U. S. 441, 460, 51 L. Ed. 1128. See, also, *Bergere v. United States*, 168 U. S. 66, 75, 42 L. Ed. 383; *Sabariego v. Maverick*, 124 U. S. 261, 284, 31 L. Ed. 430; *United States v. Ross*, 92 U. S. 281, 23 L. Ed. 707; *United States v. Carr*, 132 U. S. 644, 33 L. Ed. 483.



**B. Classification.**—There are presumptions which are conclusive, as, for example, an infant at common law under the age of seven was conclusively presumed to be incapable of committing crime.<sup>3</sup> Usually, however, presumptions are rebuttable.<sup>4</sup>

**C. Office and Nature of Presumptions.**—Presumptions are not invariable and uniform like the laws of nature.<sup>5</sup> Presumptions are indulged to supply the place of facts; they are never allowed against ascertained and established facts. When these appear, presumptions disappear.<sup>6</sup> Presumptions are sufficient to control the decision of the court if no rebutting testimony is introduced.<sup>7</sup>

**3. Conclusive presumption.**—See the title CRIMINAL LAW, vol. 5, p. 60.

"Presumptions of law are frequently absolute and conclusive, as they determine the quantity of evidence requisite for the support of any particular averment, which is not permitted to be overcome by any proof that the fact is otherwise. Such presumptions arise in respect to the intermediate proceedings in cases where lands are sold under licenses granted by courts to executors, administrators, guardians, and other officers, where they are required to advertise the sales in a particular manner, and to observe other formalities in their proceedings. Lapse of time, usually for the period of thirty years, affords a conclusive presumption in such cases, if the license and the official character of the party and the deed of conveyance are proved, that all the intermediate proceedings were correct. Were it otherwise great uncertainty of titles, and other public mischiefs, would ensue, but the rule that lapse of time, accompanied by the acquiescence of parties adversely interested, does not, in general, extend to records and public documents which are supposed always to remain in the custody of officers charged with their preservation, and which, therefore, must be proved or their loss accounted for by secondary evidence." *Improvement Co. v. Munson*, 14 Wall. 442, 450, 20 L. Ed. 867.

**4. Presumptions usually rebuttable.**—*Lawrence v. Minturn*, 17 How. 100, 15 L. Ed. 58; *Jenkins v. Pye*, 12 Pet. 241, 252, 9 L. Ed. 1070; *Maguire v. Tyler*, 8 Wall. 650, 651, 19 L. Ed. 320; *Bank v. Kennedy*, 17 Wall. 19, 27, 21 L. Ed. 551; *Cordova v. Hood*, 17 Wall. 1, 21 L. Ed. 587; *Smithsonian Institution v. Meech*, 169 U. S. 398, 407, 42 L. Ed. 793; *Reynes v. Dumont*, 130 U. S. 354, 393, 32 L. Ed. 934; *Barclay v. Howell*, 6 Pet. 498, 513, 8 L. Ed. 477.

**Matters capable of ocular or tangible proof.**—"All presumptions as to matters of fact, capable of ocular or tangible proof, such as the execution of a deed, are in their nature disputable. No conclusive character attaches to them. They may always be rebutted and overthrown." *Lincoln v. French*, 105 U. S. 614, 616, 26 L. Ed. 1189.

**Contrary presumptions.**—Presumptions may be encountered and rebutted by contrary presumptions. *Ricard v. Williams*, 7 Wheat. 59, 5 L. Ed. 398.

**5. Compared with laws of nature.**—

"There are certain departments of scientific knowledge where an entire series of facts or forms may always be inferred from the existence of any one, according to the maxim *ex pede Herclum*. The conclusion in such cases is deduced from the observed uniformity of physical nature, which by a necessity of our own minds we believe to be invariable. But this mode of reasoning has but a very limited application in the law of evidence as judicially applied to ascertain the facts and motives of human conduct. It is the foundation of the doctrine of presumptions to the extent to which they are admitted, the limits of which in its application to the circumstances of this case we have already considered. The principal fact in controversy in this case is one of that nature, which the policy of the law requires to be proved by direct evidence of a formal character. The absence of that proof cannot be supplied by argument and inference from casual and collateral circumstances." *Sabariego v. Maverick*, 124 U. S. 261, 295, 31 L. Ed. 430.

**Existence of particular facts.**—Presumptions from evidence of the existence of particular facts, are, in many cases, if not in all, mixed questions of law and fact; if the evidence be irrelevant to the fact insisted upon, or be such as cannot fairly warrant a jury in presuming it, the court is so far from being bound to instruct them that they are at liberty to presume it, that they would err in giving such an instruction. *United States Bank v. Corcoran*, 2 Pet. 121, 7 L. Ed. 368.

**6. Do not supply place of facts.**—*Lincoln v. French*, 105 U. S. 614, 616, 26 L. Ed. 1189; *Doctor v. Harrington*, 196 U. S. 579, 49 L. Ed. 606; *Galpin v. Page*, 18 Wall. 350, 366, 21 L. Ed. 959; *United States v. Ross*, 92 U. S. 281, 284, 23 L. Ed. 707; *United States v. Carr*, 132 U. S. 644, 653, 33 L. Ed. 483; *Sabariego v. Maverick*, 124 U. S. 261, 31 L. Ed. 430.

In general, presumptions can stand only whilst they are compatible with the conduct of those to whom it may be sought to apply them, and must still more give place, when in conflict with clear, distinct and convincing proof. *Fresh v. Gilson*, 16 Pet. 327, 10 L. Ed. 982.

**7. Controlling decision of court.**—*Lincoln v. French*, 105 U. S. 614, 616, 26 L. Ed. 1189.



Presumptive proof should not be disregarded.<sup>8</sup>

**D. Founding One Presumption on Another.**—One presumption cannot be founded upon another.<sup>9</sup> The only presumptions of facts which the law recognizes are immediate inferences from the facts proved.<sup>10</sup>

**E. Constitutionality.**—This subject will be found elsewhere.<sup>11</sup>

**F. Presumptions in Criminal Cases**—1. **IN GENERAL.**—As to presumptions in criminal cases, see the title *CRIMINAL LAW*, vol. 5, pp. 60, 61, 62, 63, 121, 122, 123, 124, and especially the cross references given on p. 121. The presumption of innocence is treated herein.

**8. Disregarding presumptive proof.**—Whenever evidence is offered to the jury, which is in its nature *prima facie* proof, or presumptive proof, its character, as such, ought not to be disregarded; and no court has a right to direct the jury to disregard it, or to view it under a different aspect from that in which it is actually presented to them. Whatever just influence it may derive from that character, the jury have a right to give it; and in regard to the order in which they shall consider the evidence in a cause, and the manner in which they shall weigh it, the law has submitted it to them to decide for themselves; and any interference with this right would be an invasion of their privilege to respond to matters of fact. *Crane v. Morris*, 6 Pet. 598, 8 L. Ed. 514; *Kelly v. Jackson*, 6 Pet. 622, 8 L. Ed. 523. See, generally, the title *JURY*, vol. 7, p. 748.

*Prima facie* evidence of a fact is such evidence as, in judgment of law, is sufficient to establish the fact; and if not rebutted, remains sufficient for the purpose; the jury are bound to consider it in that light, unless they are invested with authority to disregard the rules of evidence by which the liberty and estate of every citizen are guarded and supported. No judge would hesitate to set aside their verdict and grant a new trial, if, under such circumstances, without any rebutting evidence, they disregard it; it would be error on their part, which would require the remedial interposition of the court. In a legal sense, then, such *prima facie* evidence, in the absence of all controlling evidence, or discrediting circumstances, becomes conclusive of the fact, that is, it should operate upon the minds of the jury as decisive, to found their verdict as to the fact; such are understood to be the clear principles of law on this subject. *Kelly v. Jackson*, 6 Pet. 622, 8 L. Ed. 523. See, also, *Carver v. Astor*, 4 Pet. 1, 7 L. Ed. 761.

**9. Founding one presumption on another.**—*Looney v. Metropolitan R. Co.*, 200 U. S. 480, 488, 50 L. Ed. 564; *United States v. Ross*, 92 U. S. 281, 283, 23 L. Ed. 707.

"They are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliable drawn

from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed." *United States v. Ross*, 92 U. S. 281, 283, 23 L. Ed. 707.

"A presumption which the jury is to make is not a circumstance in proof; and it is not, therefore, a legitimate foundation for a presumption. There is no open and visible connection between the fact out of which the first presumption arises and the fact sought to be established by the dependent presumption." *United States v. Ross*, 92 U. S. 281, 284, 23 L. Ed. 707.

**10. Immediate inferences.**—*Manning v. Insurance Co.*, 100 U. S. 693, 25 L. Ed. 761.

"We do not question that a jury may be allowed to presume the existence of a fact in some cases from the existence of other facts which have been proved. But the presumed fact must have an immediate connection with or relation to the established fact from which it is inferred. If it has not, it is regarded as too remote. The only presumptions of fact which the law recognizes are immediate inferences from facts proved. Remarking upon this subject in *United States v. Ross* (92 U. S. 281, 284, 23 L. Ed. 707), we said: 'Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves be presumed.' Referring to the rule laid down in *Starkie on Evidence*, page 80, we added: 'It is upon this principle that courts are daily called upon to exclude evidence as too remote for the consideration of the jury. The law requires an open and visible connection between the principal or evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences. *Best on Evid.* 95. A presumption which a jury may make is not a circumstance in proof, and it is not, therefore, a legitimate foundation for a presumption. There is no open and visible connection between the fact out of which the first presumption arises and the fact sought to be established by the dependent presumption. *Douglass v. Mitchell*, 35 Pa. St. 440.'" *Manning v. Insurance Co.*, 100 U. S. 693, 697, 25 L. Ed. 761.

**11. Constitutionality.**—See the titles *CONSTITUTIONAL LAW*, vol. 4, pp. 170, 385, 448; *DUE PROCESS OF LAW*,

2. **PRESUMPTION OF INNOCENCE.**—The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.<sup>12</sup> The presumption of innocence is a presumption of law,<sup>13</sup> and

vol. 5, pp. 549, 553, 600, 661, 664, 672, 673. See, also, post, "Presumption of Innocence," I, F, 2.

12. **The principle elementary.**—*Coffin v. United States*, 156 U. S. 432, 453, 39 L. Ed. 481; *Lilienthal's Tobacco v. United States*, 97 U. S. 237, 24 L. Ed. 901; *Hopt v. Utah*, 120 U. S. 430, 30 L. Ed. 708. See, also, *United States v. Gooding*, 12 Wheat. 460, 6 L. Ed. 693.

**Created by law in favor of accused.**—"This presumption," this court has said, "is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created." *Coffin v. United States*, 156 U. S. 432, 459, 39 L. Ed. 481." *Kirby v. United States*, 174 U. S. 47, 55, 43 L. Ed. 890. See, also, *United States v. Wood*, 14 Pet. 430, 438, 10 L. Ed. 527.

"In *Coffin v. United States*, 156 U. S. 432, 460, 39 L. Ed. 481, this court, in discussing the distinction between the presumption of innocence and reasonable doubt, said: 'The fact that the presumption of innocence is recognized as a presumption of law and is characterized by the civilians as a *presumptio juris*, demonstrates that it is evidence in favor of the accused. For in all systems of law legal presumptions are treated as evidence giving rise to resulting proof to the full extent of their legal efficacy.' But in that case the charge of the court was thought not to have given due effect to the presumption of innocence, which there was no failure in this case to state, and the giving of the instruction asked would have tended to obscure what had already been made plain." *Agnew v. United States*, 165 U. S. 36, 52, 41 L. Ed. 624.

**History of the presumption.**—"Greenleaf traces this presumption to Deuteronomy, and quotes Mascardus De Probationibus to show that it was substantially embodied in the laws of Sparta and Athens. Greenl. Ev., pt. 5, § 29, note. Whether Greenleaf is correct or not in this view, there can be no question that the Roman law was pervaded with the results of this maxim of criminal administration, as the following extracts show: 'Let all accusers understand that they are not to prefer charges unless they can be proven by proper witnesses or by conclusive documents, or by circumstantial evidence which amounts to indubitable proof and is clearer than day.' Code, L. IV, T. XX, 1, l. 25. 'The noble (divus) Trajan wrote to Julius Frontinus that no man should be condemned on a criminal charge in his absence, because it was better to let the crime of a guilty person go unpun-

ished than to condemn the innocent.' Dig. L. XLVIII, tit. 19, l. 5. 'In all cases of doubt, the most merciful construction of facts should be preferred.' Dig. L. 1, tit. XVII, l. 56. 'In criminal cases the milder construction shall always be preserved.' Dig. L. 1, tit. XVII, l. 155, s. 2. 'In cases of doubt it is no less just than it is safe to adopt the milder construction.' Dig. L. 1, tit. XVII, l. 192, s. 1." *Coffin v. United States*, 156 U. S. 432, 454, 39 L. Ed. 481.

13. **Presumptio juris.**—"In *Coffin v. United States*, 156 U. S. 432, 460, 39 L. Ed. 481, this court, in discussing the distinction between the presumption of innocence and reasonable doubt, said: 'The fact that the presumption of innocence is recognized as a presumption of law and is characterized by the civilians as a *presumptio juris*, demonstrates that it is evidence in favor of the accused. For in all systems of law legal presumptions are treated as evidence giving rise to resulting proof to the full extent of their legal efficacy.' But in that case the charge of the court was thought not to have given due effect to the presumption of innocence, which there was no failure in this case to state, and the giving of the instruction asked would have tended to obscure what had already been made plain." *Agnew v. United States*, 165 U. S. 36, 52, 41 L. Ed. 624.

"Wills on Circumstantial Evidence says: 'In the investigation and estimate of criminatory evidence there is an antecedent *prima facie* presumption in favor of the innocence of the party accused, grounded in reason and justice, not less than in humanity, and recognized in the judicial practice of all civilized nations; which presumption must prevail until it be destroyed by such an overpowering amount of legal evidence of guilt as is calculated to produce the opposite belief.' Best on Presumptions declares the presumption of innocence to be a '*presumptio juris*.' The same view is taken in the article in the Criminal Law Magazine for January, 1889, to which we have already referred. It says: 'This presumption is in the nature of evidence in his favor (i. e., in favor of the accused), and a knowledge of it should be communicated to the jury. Accordingly, it is the duty of the judge in all jurisdictions, when requested, and in some when not requested, to explain it to the jury in his charge. The usual formula in which this doctrine is expressed, is that every man is presumed to be innocent until his guilt is proved beyond a reasonable doubt. The accused is entitled, if he so requests it \* \* \* to have this rule of law expounded to the jury in



the accused is entitled to stand on this presumption,<sup>14</sup> until the contrary is proved,<sup>15</sup> beyond a reasonable doubt.<sup>16</sup> It is of course a rebuttable presumption.<sup>17</sup> Circumstances may rebut the presumption.<sup>18</sup> The presumption of innocence, and the doctrine that a person accused of crime must be proved guilty beyond a reasonable doubt, are not equivalent.<sup>19</sup> A statutory provision that

this or in some equivalent form of expression." *Coffin v. United States*, 156 U. S. 432, 459, 39 L. Ed. 481.

**14. Accused entitled to stand on presumption.**—*Williams v. United States*, 168 U. S. 382, 42 L. Ed. 509; *United States v. Gooding*, 12 Wheat. 460, 6 L. Ed. 693.

**15. Until contrary is proved.**—"Innocence is presumed in a criminal case until the contrary is proved; or, in other words, reasonable doubt of guilt is in some cases of the kind ground of acquittal, where, if the probative force of the presumption of innocence were excluded, there might be a conviction." *Lilienthal's Tobacco v. United States*, 97 U. S. 237, 267, 24 L. Ed. 901.

**16. Beyond a reasonable doubt.**—"No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them, by whomsoever adduced, is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged." *Davis v. United States*, 160 U. S. 469, 493, 40 L. Ed. 499; *United States v. Gooding*, 12 Wheat. 460, 6 L. Ed. 693.

**Meaning of reasonable doubt.**—"The court, among other things, charged the jury as follows: \* \* \* 'The prisoner's guilt must be established beyond reasonable doubt. Proof beyond a reasonable doubt is such as will produce an abiding conviction in the mind to a moral certainty that the fact exists that is claimed to exist, so that you feel certain that it exists. A balance of proof is not sufficient. A juror in a criminal case ought not to condemn unless the evidence excludes from his mind all reasonable doubt; unless he be so convinced by the evidence, no matter what the class of the evidence, of the defendant's guilt, that a prudent man would feel safe to act upon that conviction in matters of the highest concern and importance to his own dearest personal interests.'" *Miles v. United States*, 103 U. S. 304, 308, 309, 312, 26 L. Ed. 481.

**17. Rebuttable presumption.**—"Greenleaf thus states the doctrine: 'As men do not generally violate the penal code, the law presumes every man innocent; but some men do transgress it, and therefore evidence is received to repel this presumption. This legal presumption of innocence is to be regarded by the jury, in every case, as matter of evidence, to the benefit of which the party is entitled.' 1 *Greenl. Ev.*, § 34." *Coffin v. United States*, 156 U. S. 432, 459, 39 L. Ed. 481.

**18. Presumption of innocence negatived.**—*The Admiral*, 3 Wall. 603, 18 L. Ed. 58.

See the title **BLOCKADE**, vol. 3, p. 374.

**Circumstantial evidence.**—"Thus, if property recently stolen be found in the possession of a certain person, it may be presumed that he stole it, and such presumption is sufficient to authorize the jury to convict, notwithstanding the presumption of his innocence. So, if a person be stabbed to death, and another, who was last seen in his company, were arrested near the spot with a bloody dagger in his possession, it would raise, in the absence of explanatory evidence, a presumption of fact that he had killed him. So, if it were shown that the shoes of an accused person were of peculiar size or shape, and footmarks were found in the mud or snow of corresponding size or shape, it would raise a presumption, more or less strong, according to the circumstances, that those marks had been made by the feet of the accused person." *Dunlop v. United States*, 165 U. S. 486, 502, 503, 41 L. Ed. 799. See the title **CRIMINAL LAW**, vol. 5, p. 121, et seq.

**Possession of fruits of crime.**—"Possession of the fruits of crime, recently after its commission, justifies the inference that the possession is guilty possession, and, though only prima facie evidence of guilt, may be of controlling weight unless explained by the circumstances or accounted for in some way consistent with innocence." *Wilson v. United States*, 162 U. S. 613, 619, 40 L. Ed. 1090.

**19. Presumption of innocence and doctrine of reasonable doubt distinguished.**—A charge that there cannot be a conviction unless proof shows guilt beyond reasonable doubt, does not so entirely embody the statement of presumption of innocence as to justify the court in refusing, when requested, to inform the jury concerning the latter. *Coffin v. United States*, 156 U. S. 432, 457, 39 L. Ed. 481; *Allen v. United States*, 164 U. S. 492, 500, 41 L. Ed. 528; *Cochran v. United States*, 157 U. S. 286, 298, 299, 39 L. Ed. 704; *Davis v. United States*, 160 U. S. 469, 487, 40 L. Ed. 499.

"In some few cases the presumption of innocence and the doctrine of reasonable doubt are seemingly treated as synonymous. *Ogletree v. State*, 28 Ala. 693; *Moorer v. State*, 44 Ala. 15; *People v. Lenon*, 79 Cal. 625, 631. In these cases, however, it does not appear that any direct question was made as to whether the presumption of innocence and reasonable doubt were legally equivalent, the language used simply implying that one was practically the same as the other, both having been stated to the jury. Some of the text-books also in the same loose way



the state need not, in a prosecution for selling liquor without a license, prove in the first instance that the defendant has not the required license, does not deprive him of the presumption of innocence.<sup>20</sup> The presumption of innocence as probative evidence is not applicable in civil cases nor in revenue seizures.<sup>21</sup> The presumption of the defendant's innocence in a criminal case cannot be said to be stronger than any presumption, except the presumption of the defendant's sanity, and the presumption of knowledge of the law.<sup>22</sup> The presumption of the

imply the identity of the two. Stephen in his *History of the Criminal Law* tells us that: "The presumption of innocence is otherwise stated by saying the prisoner is entitled to the benefit of every reasonable doubt." Vol. 1, 437. So, although Best in his work on *Presumptions* has fully stated the presumption of innocence, yet in a note to Chamberlayne's edition of that author's work on *Evidence* (Boston, 1883, p. 304, note a) it is asserted that no such presumption obtains, and that "apparently all that is meant by the statement thereof, as a principle of law, is this—if a man be accused of crime he must be proved guilty beyond reasonable doubt." *Coffin v. United States*, 156 U. S. 432, 458, 39 L. Ed. 481.

Where there is a decision of the highest court of a state that in a criminal trial it is sufficient to charge correctly in reference to a reasonable doubt and that an omission to refer to any presumption of innocence does not invalidate the proceeding, it was held by the supreme court that in the face of such a rule as to the law of the state the omission in a state trial of any reference to the presumption of innocence cannot be regarded as a denial of due process of law. *Howard v. Fleming*, 191 U. S. 126, 48 L. Ed. 121. See, generally, the title *DUE PROCESS OF LAW*, vol. 5, p. 499.

**20. Proof of negative.**—"Touching the provision that in prosecutions, by indictment or otherwise, the state need not, in the first instance, prove that the defendant has not the permit required by the statute, we may remark that, if it has any application to a proceeding like this, it does not deprive him of the presumption that he is innocent of any violation of law. It is only a declaration that when the state has proven that the place described is kept and maintained for the manufacture or sale of intoxicating liquors—such manufacture or sale being unlawful except for specified purposes, and then only under a permit—the prosecution need not prove a negative, namely, that the defendant has not the required license or permit. If the defendant has such license or permit, he can easily produce it, and thus overthrow the prima facie case established by the state." *Mugler v. Kansas*, 123 U. S. 623, 674, 31 L. Ed. 205. See post, "Proving a Negative," II, D.

**21. Civil cases and revenue.**—"Innocence is presumed in a criminal case until the contrary is proved; or, in other

words, reasonable doubt of guilt is in some cases of the kind ground of acquittal, where, if the probative force of the presumption of innocence were excluded, there might be a conviction." *Lilienthal's Tobacco v. United States*, 97 U. S. 237, 267, 24 L. Ed. 901.

"The presumption of innocence as probative evidence is not applicable in civil cases nor in revenue seizures, as, for example, when a railroad company is sued in damages for negligence, the issue depends upon the evidence, without any presumption of innocence or guilt, but the company is not put to defense until a prima facie case of negligence is made out by the plaintiff; but when such a case is made out, courts do not instruct juries that if there is reasonable doubt as to negligence they must find for the defendant, as such an instruction would be a plain error. Issues of the kind, however, must be proved at least prima facie; and if the defendant fails to overcome the prima facie case, the jury, if they deem it reasonable, may find for the plaintiff. 2 Whart. Evid., § 1245; *Gordon v. Parmelee*, 15 Gray (Mass.) 415." *Lilienthal's Tobacco v. United States*, 97 U. S. 237, 267, 268, 24 L. Ed. 901.

**Civil and criminal cases distinguished as to quantum of evidence.**—"Text writers of the highest authority state that there is a distinction between civil and criminal cases in respect to the degree of quantum of evidence necessary to justify the jury in finding their verdict. In civil cases their duty is to weigh the evidence carefully; and to find for the party in whose favor it preponderates; but in criminal trials the party accused is entitled to the legal presumption in favor of innocence, which, in doubtful cases, is always sufficient to turn the scale in his favor. 3 Greenl. Evid. (8th Ed.), § 29; 1 Taylor, Evid. (6th Ed.) 372." *Lilienthal's Tobacco v. United States*, 97 U. S. 237, 266, 24 L. Ed. 901.

**22. Strength of the presumption.**—*Dunlop v. United States*, 165 U. S. 486, 502, 41 L. Ed. 799.

"It is true that it is stated in some of the authorities that where there are conflicting presumptions, the presumption of innocence will prevail against the presumption of the continuance of life, the presumption of the continuance of things generally, the presumption of marriage and the presumption of chastity. But this is said with reference to a class of presumptions which prevail independently of

innocence of an accused attends him throughout the trial and has relation to every fact that must be established in order to prove his guilt beyond reasonable doubt.<sup>23</sup> Even in civil cases there is some presumption of innocence and right-doubt.<sup>24</sup>

**G. Presumption of Death**—1. **ABSENCE**.—Absence alone will not raise a presumption of death,<sup>25</sup> but it appears that disappearance under circumstances inconsistent with life may do so, even though exposure to some particular peril is not shown.<sup>26</sup> A person who for seven years has not been heard of by those

proof to rebut the presumption of innocence, or what may be termed abstract presumptions. Thus, in prosecutions for seduction, or for enticing an unmarried female to a house of ill-fame, it is necessary to aver and prove affirmatively the chastity of the female, notwithstanding the general presumption in favor of her chastity, since this general presumption is overridden by the presumption of the innocence of the defendant. *People v. Roderings*, 49 Cal. 9; *Commonwealth v. Whittaker*, 131 Mass. 224; *West v. State*, 1 Wis. 209; *Zabriskie v. State*, 43 N. J. Law 640; 1 Greenl. Ev., § 35. This rule, however, is confined to cases where proof of the facts raising the presumption has no tendency to establish the guilt of the defendant, and has no application where such proof constitutes a link in the chain of evidence against him." *Dunlop v. United States*, 165 U. S. 486, 503, 41 L. Ed. 799.

**23. Every fact must be established.**—*Kirby v. United States*, 174 U. S. 47, 55, 43 L. Ed. 890.

"But that presumption \* \* \* was in effect held in the court below to be of no consequence; for, as to a vital fact which the government was bound to establish affirmatively, he was put upon the defensive almost from outset of the trial by reason alone of what appeared to have been said in another criminal prosecution with which he was not connected and at which he was not entitled to be represented. In other words, the United States having secured the conviction of Wallace, Baxter and King as principal felons, the defendant charged by a separate indictment with a different crime—that of receiving the property in question with knowledge that it was so stolen and with intent to convert it to his own use or gain—was held to be presumptively or prima facie guilty so far as the vital fact of the property having been stolen was concerned, as soon as the government produced the record of such conviction and without its making any proof whatever by witnesses confronting the accused of the existence of such vital fact. We cannot assent to this view." *Kirby v. United States*, 174 U. S. 47, 55, 56, 43 L. Ed. 890.

**24. Civil and criminal cases distinguished as to quantum of evidence.**—Text writers of the highest authority state that there is a distinction between civil and criminal cases in respect to the degree

or quantum of evidence necessary to justify the jury in finding their verdict. In civil cases their duty is to weigh the evidence carefully, and to find for the party in whose favor it preponderates; but in criminal trials the party accused is entitled to the legal presumption in favor of innocence, which, in doubtful cases, is always sufficient to turn the scale in his favor. 3 Greenl. Evid. (8th Ed.), § 29; 1 Taylor, Evid. (6th Ed.) 372. *Lilienthal's Tobacco v. United States*, 97 U. S. 237, 266, 24 L. Ed. 901; *Wilkes v. Dinsman*, 7 How. 89, 130, 12 L. Ed. 618. See the title **PUBLIC OFFICERS**.

**25.** "The court also instructed the jury as follows: 'If from the evidence in this case you should come to the conclusion that Hunter has been continuously absent since December 3, 1896, without being heard from by his relatives and friends, it should have due weight with you in arriving at your verdict.' 'Absence alone cannot establish the death of Hunter, for the law presumes an individual shown to be alive and in health at the time of his disappearance continues to live. While the death of Hunter is not to be presumed from absence alone, yet it is a circumstance which should be taken into consideration with all the other evidence in the case, and the conclusion of life or death arrived at from all the facts and circumstances, including his continued absence.' To this defendant excepted, and it is now argued that there was error because the court did not call the attention of the jury to defendant's contention that Hunter's continued absence might be attributed to the desire to obtain the insurance money. But it nowhere appears that defendant requested the court to modify the instruction in that particular, and as given it was correct. The jury were not left to infer death from the mere fact of disappearance, but were specifically told that that was not in itself sufficient, and that all the facts and circumstances must be considered." *Fidelity Mut. Life Ass'n v. Mettler*, 185 U. S. 308, 317, 46 L. Ed. 922.

**26. Circumstances inconsistent with life.**—"In *Davie v. Briggs*, 97 U. S. 628, 634, 24 L. Ed. 1086, Mr. Justice Harlan said: 'If it appears in evidence that the absent person, within the seven years, encountered some specific peril, or within that period came within the range of some impending or immediate danger, which might reasonably be expected to destroy

who, had he been alive, would naturally have heard of him, is presumed to be dead; but the law raises no presumption as to the precise time of his death.<sup>27</sup> The triers of the facts may infer that he died before the expiration of the seven years, if it appears that within that period he encountered some specific peril, or

life, the court or jury may infer that life ceased before the expiration of the seven years.' But it was not thereby ruled that the inference of death might not arise from disappearance under circumstances inconsistent with a continuation of life, even though exposure to some particular peril was not shown, and the evidence indicated that Hunter came within the range of immediate danger." *Fidelity Mut. Life Ass'n v. Mettler*, 185 U. S. 308, 319, 46 L. Ed. 922.

**Evidence that person has been seen or heard from.**—"Defendant asked the court to give this instruction: 'If you believe from the evidence that William A. Hunter, Jr., has been seen or heard from by any one at any time since his disappearance, you will find for the defendant.' This the court refused, and gave the following instruction: 'The evidence of witnesses is also before you tending to show that William A. Hunter has been seen on two occasions and at two places since the date of his alleged disappearance on December 4, 1896. You should carefully consider this evidence in relation to his having been seen since the date of his alleged disappearance, and if you believe from the evidence that he was seen by the witnesses who have testified to this, then, of course, it would be your duty to find for the defendant.' There was some evidence that Hunter had been seen, but none that he had been otherwise heard from. The request of defendant was rightly rejected, and the instruction given was sufficient. The criticism that the jury may have supposed that they were instructed that they must be satisfied that he had been seen by both witnesses, or on two occasions, is without merit. It was impossible to have misunderstood what the learned judge of the circuit court intended. If, as matter of fact, Hunter was seen alive, whether once or twice, then, of course he did not die as contended by plaintiff." *Fidelity Mut. Life Ass'n v. Mettler*, 185 U. S. 308, 318, 46 L. Ed. 922.

**Necessity for moral certainty.**—"The record does not set forth the general charge of the court in full, but, among others, this instruction was given: 'While death may be presumed from the absence, for seven years, of one not heard from, where news from him, if living, would probably have been had, yet this period of seven years during which the presumption of continued life runs, and at the end of which it is presumed that life ceases, may be shortened by proof of such facts and circumstances connected with the disappearance of the person whose life is the subject of inquiry, and circumstances connected with his habits and

customs of life, as, submitted to the test of reason and experience, would show to your satisfaction by a preponderance of the evidence that the person was dead.' Defendant excepted to the giving of this instruction, and requested the court to instruct that 'the circumstances proven must exclude, to a reasonable and moral certainty, the fact that such person is still living, and each fact in the chain of facts from which the death of the party is to be inferred must be proved by competent evidence and by the same weight and force of evidence as if each one were the main fact in issue, and all the facts proven must be consistent with each other and consistent with the main facts in issue, that is, the death of the party.' The court did not err in giving the one and refusing the other instruction." *Fidelity Mut. Life Ass'n v. Mettler*, 185 U. S. 308, 316, 46 L. Ed. 922.

**27. Time for death.**—*Davie v. Briggs*, 97 U. S. 628, 24 L. Ed. 1086. See, also, *Scott v. McNeal*, 154 U. S. 34, 38 L. Ed. 896; *Cunnius v. Reading School District*, 198 U. S. 458, 471, 49 L. Ed. 1125; *Fidelity Mut. Life Ass'n v. Mettler*, 185 U. S. 308, 316, 46 L. Ed. 922.

"The general rule undoubtedly is, that 'a person shown not to have been heard of for seven years by those (if any) who, if he had been alive, would naturally have heard of him, is presumed to be dead, unless the circumstances of the case are such as to account for his not being heard of without assuming his death.' Stephen, *Law of Evid.*, c. 14, art. 99; 1 *Greenl. Evid.*, § 41; 1 *Taylor, Evid.*, § 157, and authorities cited by each author. But that presumption is not conclusive, nor is it to be rigidly observed without regard to accompanying circumstances which may show that death in fact occurred within the seven years. If it appears in evidence that the absent person, within the seven years, encountered some specific peril, or within that period came within the range of some impending or immediate danger, which might reasonably be expected to destroy life, the court or jury may infer that life ceased before the expiration of the seven years. Mr. Taylor, in the first volume of his *Treatise on the Law of Evidence* (§ 157), says, that 'although a person who has not been heard of for seven years is presumed to be dead, the law raises no presumption as to the time of his death; and, therefore, if any one has to establish the precise period during those seven years at which such person died, he must do so by evidence, and can neither rely, on the one hand, on the presumption of death, nor, on the other, upon the presumption of the continuance of



came within the range of some impending or imminent danger which might reasonably be expected to destroy life.<sup>28</sup>

2. **LETTERS OF ADMINISTRATION.**—The fact that a person has been absent and not heard from for seven years may create such a presumption of his death as, if not overcome by other proof, is such evidence of his death that the probate court may assume him to be dead and appoint an administrator of his estate.<sup>29</sup> In a suit brought by the plaintiff in his individual character, and not as administrator, to recover a debt upon a contract between him and the defendant, where the right of action depends upon the death of a third person, letters of administration upon the estate of such person granted by the proper probate court, in a proceeding to which the defendant was a stranger, afford no legal evidence of such death.<sup>30</sup>

3. **SUICIDE OR MURDER.**—In an action on an insurance policy, it was held that self-destruction was not to be presumed nor should the jury presume from the mere fact of death that the insured was murdered.<sup>31</sup>

**H. Presumption of Survivorship.**—The rule is that there is no presumption of survivorship in the case of persons who perish by a common disaster, in the absence of proof tending to show the order of dissolution. The question of actual survivorship is regarded as unascertainable, and descent and distribution take the same course as if the deaths had been simultaneous.<sup>32</sup>

**I. Destruction, Suppression or Fabrication of Evidence.**—An unfavorable presumption may arise from absence of proof easily supplied,<sup>33</sup> or

life.' These views are in harmony with the settled law of the English courts." *Davie v. Briggs*, 97 U. S. 628, 633, 24 L. Ed. 1086. See, also, *Scott v. McNeal*, 154 U. S. 34, 37, 41, 38 L. Ed. 896; *Cunnius v. Reading School District*, 198 U. S. 458, 471, 49 L. Ed. 1125.

28. **Specific peril.**—*Davie v. Briggs*, 97 U. S. 628, 24 L. Ed. 1086.

Thus where a person started to California through the country of hostile enemies and was never afterwards heard of, the court did not presume that he died at the end of seven years but inferred from the facts that he had died at an earlier date. *Davie v. Briggs*, 97 U. S. 628, 24 L. Ed. 1086.

29. **Appointment of administrator.**—*Scott v. McNeal*, 154 U. S. 34, 49, 50, 38 L. Ed. 896. See the title **EXECUTORS AND ADMINISTRATORS**, vol. 6, p. 127.

30. **Letters of administration as evidence of death.**—*Mutual Benefit Life Ins. Co. v. Tisdale*, 91 U. S. 238, 23 L. Ed. 314.

31. **Suicide or murder.**—*Travellers' Ins. Co. v. McConkey*, 127 U. S. 661, 667, 32 L. Ed. 308.

32. **Presumption of survivorship.**—*Young Women's Christian Home v. French*, 187 U. S. 401, 410, 47 L. Ed. 233.

The English case of *Underwood v. Wing*, 19 Beavan 459, is cited in the case of *Young Women's Christian Home v. French*, 187 U. S. 401, 414, 47 L. Ed. 233. In the former case a man, his wife and three children embarked for Australia, their ship foundered and all on board with the exception of one sailor perished. Both parents and the two boys were washed into the sea by the same wave but the daughter survived for half an hour. The

courts agreed in the conclusion that at common law there could be no presumption of prior decease in the absence of proof although the evidence tended to show that the husband was in good health and an able swimmer while the wife was in delicate health and their children of tender age.

33. **Evidence easily supplied.**—"On the question of fact, the court are of opinion that the evidence is not sufficient to prove the property American. The national character of the property the claimant might easily have established by his correspondence, and the examination of witnesses in Europe. No such evidence is resorted to. The bill of lading alone is resorted to, on which it is said to be shipped on account of a citizen of the United States, and consigned to Burnside, but the name of the owner is not inserted. Here again, the defect of evidence may have been supplied by evidence who this citizen was, but no such evidence is adduced. In the examination of the two clerks of John Rason & Co., of Liverpool, it is simply stated that these goods were shipped by John Richardson of Liverpool, but on whose account they do not state, nor does it appear that they were examined to that point. Upon the whole, we are of opinion that the absence of proof which might so easily have been supplied will authorize a conclusion that the property was not American." *The Aurora*, 7 Cranch 382, 388, 3 L. Ed. 378.

If, in libel under the nonimportation act, any papers, which in the course of such a transaction must have existed, are not produced, or if any others which come to light, do not correspond with the master's relation, and especially if all the wit-

from concealment.<sup>34</sup> The conduct of the party in omitting to produce that evidence in elucidation of the subject matter in dispute which is within his power, and which rests peculiarly within his own knowledge, frequently affords occasion for presumptions against him, since it raises strong suspicion that such evidence, if adduced, would operate to his prejudice.<sup>35</sup> The production of

nesses are in the power, and many of whom, in the interest and under the influence of the party, are omitted to be examined, when it is impossible that they should not be intimately acquainted with the most material circumstances, and instead of this, the chief if not only reliance of the claimant is placed on the evidence of the party, who, if the allegations of the libel be true, is himself liable to a very heavy penalty; when such a case occurs, a court must be expected to look at the proofs before it, with more than ordinary suspicion and distrust. In this case, there was an importation which *prima facie* was against law, and was in the same degree evidence of an original intention to import; the burden, then, of showing the absence of such an intention was thrown upon and assumed by the claimant. *The New York*, 3 Wheat. 59, 65, 4 L. Ed. 333.

**Record evidence of title.**—*United States v. Teschmaker*, 22 How. 392, 405, 16 L. Ed. 353.

**Failure to produce books after notice.**—Upon the trial of a cause where goods had been seized upon suspicion of being fraudulently imported, and the United States had shown sufficient ground for an opinion of the court that probable cause existed for the prosecution, and notice had been given to the claimant to produce his books and accounts relating to those goods, it was proper for the court to instruct the jury, that, if the claimant had withheld the testimony of his accounts and transactions with the parties abroad from whom he received the goods, they were at liberty to presume that, if produced, they would have operated unfavorably to his cause. *Clifton v. United States*, 4 How. 242, 11 L. Ed. 957.

**Order for further proof.**—"And where an order for further proof is made, and the party disobeys its injunctions, or neglects to comply with them, courts of prize are in the habit of considering such negligence as contumacy leading to presumptions fatal to his claim." *La Nereyda*, 8 Wheat. 108, 170, 5 L. Ed. 574. See the title PRIZE.

**34. Concealment of papers.**—"In the first place, there is a general shade of suspicion cast over the whole case by the fact that all the material papers relating to the transaction were mysteriously concealed in a billet of wood. Had there been nothing fraudulent intended, these papers ought to have been delivered along with the documentary evidence." *The Fortuna*, 3 Wheat. 236, 239, 4 L. Ed. 379. See, also, *The Pizarro*, 2 Wheat. 227, 241, 4 L. Ed. 226; *The Olinde Rodrigues*, 174 U. S. 510,

528, 43 L. Ed. 1065.

**In court of conscience.**—In a court of conscience deliberate concealment is equivalent to deliberate falsehood. When a living man speaks in such a court to enforce a dead man's contract with himself against parties who he knows are ignorant of the facts, he must be frank in his statements, unless he is willing to take the risk of presumptions against him. *Crosby v. Buchanan*, 23 Wall. 420, 23 L. Ed. 138.

**Failure to disclose facts in answer.**—"But still more important is the absolute refusal of Vint to disclose the facts in his answers when directly called upon to do so. It is true that he need not make the statements unless he chose. The law under the form of pleadings in this case did not compel him to be more specific, but it can raise presumptions against him if he is not. He may, if he pleases, rest his case upon the acknowledgment of payment expressed in his deeds, but if he does he must take the chances of being overcome by other facts and circumstances which repel the presumption arising from such evidence." *Crosby v. Buchanan*, 23 Wall. 420, 456, 23 L. Ed. 138.

**Evasive answers.**—"Infringement is an affirmative allegation made by the complainant, and the burden of proving it is upon him, unless it is admitted in the answer. Specific inquiries were made of the respondents in this case, and they did not satisfactorily answer those interrogatories. Evasive answers, under such circumstances, if not positively equivalent to admissions, afford strong presumptive evidence against the respondents." *Agawam Co. v. Jordan*, 7 Wall. 583, 609, 19 L. Ed. 177. See the title PATENTS, ante, p. 136.

**35. Peculiarly within party's knowledge.**—*Starkie's Evidence*, vol. 1, p. 54. *Kirby v. Tallmadge*, 160 U. S. 379, 383, 40 L. Ed. 463.

**Documents of title.**—*The Luminary*, 8 Wheat. 407, 409, 5 L. Ed. 647.

**Failure to produce witnesses.**—The rule even in criminal cases is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable. *Graves v. United States*, 150 U. S. 118, 121, 37 L. Ed. 1021. See, also, *The New York*, 3 Wheat. 59, 65, 4 L. Ed. 333; *Runkle v. Burnham*, 153 U. S. 216, 228, 38 L. Ed. 694. See the title CRIMINAL LAW, vol. 5, p. 124.

**Failure of accused to testify.**—As to whether a presumption arises from failure of the accused to testify, see the title CRIMINAL LAW, vol. 5, p. 131.



weaker evidence, when stronger might have been produced, lays the producer open to the suspicion that the stronger evidence would have been to his prejudice.<sup>36</sup>

**J. Presumptions from Possession**—1. **PERSONAL PROPERTY**.—In general, it may be said that possession of personal property raises a presumption of ownership.<sup>37</sup>

2. **REAL PROPERTY**.—See the title **LIMITATION OF ACTIONS AND ADVERSE POSSESSION**, vol. 7, p. 900.

**K. Presumption of Intent**.—Every man is presumed to intend the natural and probable consequences of his own act.<sup>38</sup>

**L. Presumption of Knowledge of Law**.—Every man is presumed to know the law.<sup>39</sup>

**M. Presumption from Usual Course of Business**—1. **IN GENERAL**.—A presumption may arise from custom, usage and the usual course of business.<sup>40</sup>

**36. Production of weaker evidence**.—*Runkle v. Burnham*, 153 U. S. 216, 225, 38 L. Ed. 694; *Clifton v. United States*, 4 How. 242, 11 L. Ed. 957.

The rule is that if the weaker and less satisfactory evidence is given and relied on in support of a fact when it is apparent to the court and jury that proof of a more direct and explicit character was within the power of the party, the same caution which rejects the secondary evidence will awaken distrust and suspicion of the weaker and less satisfactory and it may well be presumed if the more perfect exposition had been given it would have laid open deficiencies and objections which the more obscure and uncertain testimony was intended to conceal. 2 *Evans Pothier*, 149; *Clifton v. United States*, 4 How. 242, 246, 11 L. Ed. 957. See, generally, the title **BEST AND SECONDARY EVIDENCE**, vol. 3, p. 214.

**37. Possession of negotiable instrument**.—Possession of a negotiable instrument payable to bearer or indorsed in blank is prima facie evidence that the holder is the proper owner and lawful possessor of the same; but if the defendant prove that the instrument was fraudulent in its inception, or that it had been lost or stolen before he became the holder, the burden of proof is changed, and the onus is cast upon the plaintiff to prove that he gave value for it when he became the holder. *Collins v. Gilbert*, 94 U. S. 753, 24 L. Ed. 170; *Lilienthal's Tobacco v. United States*, 97 U. S. 237, 266, 24 L. Ed. 901.

**Possession of notes and mortgage**.—“The fact that the notes and mortgage are payable to the order of Isett & Brewster and are in their possession \* \* \* raises the legal presumption that they are their own property.” *Finley v. Isett*, 154 U. S., appx., 561, 563, 19 L. Ed. 273.

**Bill of sale of vessel accompanied by possession**.—A bill of sale of a vessel, accompanied by possession, does not constitute a good title in law; such an instrument, so accompanied, is prima facie evidence of right; but in order to constitute a full right, under the bill of sale, the transfer should be bona fide, and for a

valuable consideration. *Hozey v. Buchanan*, 16 Pet. 215, 10 L. Ed. 941.

**38. Natural and probable consequences**.—*Allen v. United States*, 164 U. S. 492, 496, 41 L. Ed. 528.

“Persons of sound mind and discretion must in general be understood to intend, in the ordinary transactions of life, that which is the necessary and unavoidable consequences of their acts, as they are supposed to know what the consequences of their acts will be in such transactions. Experience has shown the rule to be a sound one and one safe to be applied in criminal as well as civil cases. Exceptions to it undoubtedly may arise, as where the consequences likely to flow from the act are not matters of common knowledge, or where the act or the consequence flowing from it is attended by circumstances tending to rebut the ordinary probative force of the act or to exculpate the intent of the agent.” *Clarion Bank v. Jones*, 21 Wall. 325, 337, 22 L. Ed. 542.

“The general legal proposition is true that where a person does a positive act, the consequences of which he knows beforehand, that he must be held to intend those consequences. But it cannot be inferred that a man intends, in the sense of desiring, promoting, or procuring it, a result of other persons' acts, when he contributes nothing to their success or completion, and is under no legal or moral obligation to hinder or prevent them.” *Wilson v. City Bank*, 17 Wall. 473, 486, 21 L. Ed. 723.

**39. Knowledge of law**.—*United States v. Budd*, 144 U. S. 154, 163, 36 L. Ed. 384. See, also, *Banigan v. Bard*, 134 U. S. 291, 295, 33 L. Ed. 932. See the title **CRIMINAL LAW**, vol. 5, p. 67.

**40. Usual course of business**.—“This kind of presumption of fact, referable to the consideration of a jury, is well known and frequently recognized in the law. Such presumptions are founded upon the experience of human conduct in the course of trade and business, under the promptings of interest or public responsibility. ‘Under this head,’ says Mr.



2. **THE POSTOFFICE.**—When a letter is duly mailed, a presumption arises that it is delivered in the usual course of business; and when the usual course of business is for an agent of the party to receive his mail, the presumption is that the agent received it rather than the principal.<sup>41</sup> The presumption that a letter, put

Greenleaf, 'may be ranked the presumptions frequently made from the regular course of business in a public office. \* \* \* If a letter is sent by the post, it is presumed, from the known course in that department of the public service, that it reached its destination at the regular time, and was received by the person to whom it was addressed, if living at the place, and usually receiving letters there.' He adds: 'The like presumption is also drawn from the usual course of men's private offices and business, where the primary evidence of the fact is wanting.' 1 Greenleaf on Evid., § 40. In support of these propositions, the author refers to many authorities, which seem to be fully in point. The same general propositions are laid down by Mr. Taylor, in his *Treatise on Evidence*, copying, as he usually does, the language of Prof. Greenleaf. He adds the following illustrations derived from adjudged cases in England: 'If letters or notices properly directed to a gentleman be left with his servant, it is only reasonable to presume, *prima facie*, that they reached his hands. *Macgregor v. Keily*, 3 Exch. 794. The fact, too, of sending a letter to a postoffice will, in general, be regarded by a jury as presumptively proved, if it be shown to have been handed to, or left with, the clerk whose duty it was, in the ordinary course of business, to carry letters to the post, and, if he can declare that, although he has no recollection of the particular letter, he invariably took to the postoffice all letters that either were delivered to him, or were deposited in a certain place for that purpose,' referring to *Skillbeck v. Garbett*, 7 Q. B. 846; *Hetherington v. Kemp*, 4 Camp. 193; *Ward v. Lord Lonsborough*, 12 C. B. 252; *Spencer v. Thompson*, 6 Irish Law R. N. S. 537, 565. See 1 Taylor on Evid., § 148. We may also refer to the case of *Dana v. Kemble*, 19 Pick. 112, in which it was held, Chief Justice Shaw delivering the opinion, that where it was the usage of a hotel to deposit all letters left at the bar in an urn kept for that purpose, whence they were sent frequently throughout the day to the rooms of the different guests to whom they were directed, it will be presumed that a letter addressed to one of the guests and left at the bar was received by him. And in *Barker v. N. Y. Central R. Co.*, 24 N. Y. 599, it was held admissible to show the regulations of the corporation and the customs of its agents, in respect to giving notice to passengers of the necessity of their changing cars in order to reach a given station, to corroborate the testimony of the conductor in that regard; the court of ap-

peals, by Sutherland, J., remarking: 'This evidence would tend to corroborate Budd upon the principle that the business of the defendant is a sort of public business, and their employees a kind of public officers; and that the presumption is that they would perform their duties according to the regulations of the business.' " *Knickerbocker Life Ins. Co. v. Pendleton*, 115 U. S. 339, 345, 29 L. Ed. 432. See, also, *Dunlop v. United States*, 165 U. S. 486, 41 L. Ed. 799.

**Delivery of papers.**—Where a question is made whether a certain paper or other document has reached the hands of the person for whom it was intended proof of a usage to deliver such paper at the house, or of the duty of a certain messenger to deliver such papers, creates a presumption that the paper in question was actually so delivered. *Dunlop v. United States*, 165 U. S. 486, 41 L. Ed. 799. See the title **POSTAL LAWS**, ante, p. 550.

**Usage and custom of bank.**—*Knickerbocker Life Ins. Co. v. Pendleton*, 115 U. S. 339, 340, 29 L. Ed. 432.

**41. Letter duly mailed.**—*Schutz v. Jordan*, 141 U. S. 213, 220, 35 L. Ed. 705; *Kimberly v. Arms*, 129 U. S. 512, 521, 529, 32 L. Ed. 764; *Dunlop v. United States*, 165 U. S. 486, 41 L. Ed. 799.

If a letter properly directed is proved to have been either put into the postoffice or delivered to the postman, it is presumed, from the known course of business in the postoffice department, that it reached its destination at the regular time, and was received by the person to whom it was addressed. *Rosenthal v. Walker*, 111 U. S. 185, 193, 28 L. Ed. 395.

"There is no testimony as to whether the letter thus mailed was returned to the sender; and no evidence of the receipt of the letter, other than that which flows from the fact of mailing. Undoubtedly, under some circumstances, this is evidence of the receipt. In 2 Wharton on Evidence, § 1323, the rule is thus stated: 'The mailing a letter, properly addressed and stamped, to a person known to be doing business in a place where there is established a regular delivery of letters, is proof of the reception of the letter by the person to whom it is addressed. Such proof, however, is open to rebuttal, and ultimately the question of delivery will be decided on all the circumstances of the case.' In support of this proposition many authorities are cited, among them the case of *Lindenberg v. Beall*, 6 Wheat. 104, 5 L. Ed. 216. In the case of *United States v. Babcock*, 3 Dillon 571, 573, in which the

into the postoffice and properly addressed, is received by the person to whom it is addressed, is not one of law but of fact.<sup>42</sup>

**N. Presumption Founded on the Instinct of Self-Preservation.**—The instinct of self-preservation may give rise to a presumption.<sup>43</sup>

**O. Presumption That Things Are Rightly Done**—1. *IN GENERAL.*—In accordance with the maxim, *omnia presumuntur rite acta esse*, there is a presumption that things are rightly done.<sup>44</sup> Persons are presumed to have competent skill in their respective occupations.<sup>45</sup> It will be presumed that a person acted in the capacity which will give validity to his acts.<sup>46</sup>

2. *PRESUMPTION THAT PERSONS DO THEIR DUTY*—a. *In General.*—Every man is presumed to act in obedience to his duty, until the contrary appears.<sup>47</sup>

question was elaborately discussed by counsel, Judge Dillon stated the law in these words: 'Upon the subject of the admissibility of letters, by one person addressed to another, by name, at his known postoffice address, prepaid, and actually deposited in the postoffice, we concur, both of us, in the conclusion, adopting the language of Chief Justice Bigelow in *Comm. v. Jefferies*, 7 Allen 548, 563, that this "is evidence tending to show that they reached their destination, and were received by the persons to whom they were addressed." This is not a conclusive presumption, and it does not even create a legal presumption that such letters were actually received; it is evidence tending, if credited by the jury, to show the receipt of such letters;—"a fact," says Agnew, J., *Tanner v. Hughes*, 53 Penn. St. 290, "in connection with other circumstances, to be referred to the jury, under appropriate instructions, as its value will depend upon all the circumstances of the particular case." See, also, *Rosenthal v. Walker*, 111 U. S. 185, 28 L. Ed. 395. This presumption, which is not a presumption of law, but one of fact, is based on the proposition that the postoffice is a public agency charged with the duty of transmitting letters; and on the assumption that what ordinarily results from the transmission of a letter through the postoffice probably resulted in the given case. It is a probability resting on the custom of business and the presumption that the officers of the postal system discharged their duty. But no such presumption arises unless it appears that the person addressed resided in the city or town to which the letter was addressed; and in this respect the observations heretofore made as to the evidence that Harrison, the receiver, resided in St. Louis, are pertinent." *Henderson v. Carbondale Coal, etc., Co.*, 140 U. S. 25, 36, 35 L. Ed. 332.

**42. Presumption of fact.**—*Atherton v. Atherton*, 181 U. S. 155, 171, 45 L. Ed. 794; *Rosenthal v. Walker*, 111 U. S. 185, 28 L. Ed. 395; *Schutz v. Jordan*, 141 U. S. 213, 220, 35 L. Ed. 705.

**Presumption from mailing letter not conclusive.**—While the mailing of a letter creates an inference, raises a presumption that the party to whom it was addressed

received it in due course of mail, and thus acquired knowledge of the matters therein stated, such presumption is one of fact and not of law. It is not conclusive, but subject to control and limitation by other facts. *Schutz v. Jordan*, 141 U. S. 213, 220, 35 L. Ed. 705.

**43.** There is a presumption that a person killed at a railroad crossing stopped, looked and listened. The presumption is founded on a law of nature. *Baltimore, etc., R. Co. v. Landrigan*, 191 U. S. 461, 474, 48 L. Ed. 262.

**44.** "The presumption to which we are asked to resort for an answer to the question is, however, not peculiar to any system of law. It is found in the law of all civilized states, and the phrases in which the maxim is expressed are taken from the civil law, the basis of the jurisprudence of Spain as of all other European states, and imported into the common law of England as adopted by us. *Omnia præsumuntur rite esse acta* is its familiar form, but as said by Mr. Best (*Principles of Evidence*, §§ 353, 361): "The extent to which presumptions will be made in support of acts depends very much on whether they are favored or not by law, and also on the nature of the fact required to be presumed." *Sabariago v. Maverick*, 124 U. S. 261, 291, 31 L. Ed. 430. See, also, *Maricopa, etc., R. Co. v. Arizona Territory*, 156 U. S. 347, 351, 39 L. Ed. 447; *Miller v. United States*, 11 Wall. 268, 300, 20 L. Ed. 135.

**45. Competent skill.**—*Lawrence v. Minturn*, 17 How. 100, 112, 15 L. Ed. 58.

**46.** Where two characters are united in the same person, it will be presumed that he acted in the capacity which will give validity to his case. *Yeaton v. Lynn*, 5 Pet. 224, 229, 8 L. Ed. 105; *Wall v. Bissell*, 125 U. S. 382, 393, 31 L. Ed. 772. See, also, *Van Ness v. United States Bank*, 13 Pet. 17, 10 L. Ed. 38.

**47. Obedience to duty.**—*Ricard v. Williams*, 7 Wheat. 59, 108, 5 L. Ed. 398; *Turner v. Yates*, 16 How. 14, 14 L. Ed. 824; *French v. Edwards*, 21 Wall. 147, 22 L. Ed. 534. See, also, *Beard v. Burts*, 95 U. S. 434, 437, 24 L. Ed. 485.

"By the general rules of evidence, presumptions are continually made, in cases of private persons, of acts even of the most solemn nature, when those acts are



No man is presumed to do wrong or violate the law.<sup>48</sup> A presumption exists in favor of the acts of officers of corporations.<sup>49</sup>

the natural result or necessary accompaniment of other circumstances. In aid of this salutary principle, the law itself, for the purpose of strengthening the infirmity of evidence, and upholding transactions intimately connected with the public peace, and the security of private property, indulges its own presumptions. It presumes that every man, in his private and official character, does his duty, until the contrary is proved (see *Rex v. Hawkins*, 10 East. 211; *Powell v. Milbourne*, 3 Wils. 355; *Hartwell v. Root*, 19 Johns. 345); it will presume that all things are rightly done, unless the circumstances of the case overturn this presumption, according to the maxim, *omnia presumuntur rite et solemniter esse acta, donec probetur in contrarium*. Thus, it will presume that a man, acting in a public office, has been rightly appointed; that entries found in public books have been made by the proper officer; that, upon proof of title, matters collateral to that title shall be deemed to have been done; as, for instance, if a grant or feoffment has been declared on, attornment will be intended, and that deeds and grants have been accepted, which are manifestly for the benefit of the party. The books on evidence abound with instances of this kind, and many of them will be found collected in Mr. Starkie's late valuable *Treatise on Evidence*. (3 Starkie's Evid., part iv., 1234, 1241, 1248, and note 1250, etc.)" *United States Bank v. Dandridge*, 12 Wheat. 64, 69, 6 L. Ed. 552.

**Payment presumed.**—"Suppose a debtor should put into the hands of an agent a sum of money for the payment of specified demands against him, and the amount limited to such demands, and to be paid in small sums, to a numerous class of creditors scattered over various and distant parts of the country; and it should be made to appear that he had disbursed all the money thus put into his hands but that the vouchers for such payments had been destroyed by fire, without any fault of his; and he could not ascertain the names of the creditors to whom payment had been made; but that no claim had been presented to his principal, by any one of the creditors, to whom payment was to be made by the agent, after the lapse of three years; and all this, accompanied by proof, that he had faithfully discharged the duties of a like agency for several years, and regularly accounted for his disbursements; would it not afford reasonable grounds to conclude that he had disbursed all the moneys placed in his hands by his principal, for the purposes for which he received it; and protect him against a suit for any balance?" *United States v. Laub*, 12 Pet. 1, 9 L. Ed. 977.

**48. Doing wrong or violating the law.**—*United States v. Budd*, 144 U. S. 154, 163, 36 L. Ed. 384.

**Proof of dishonesty and fraud.**—The law presumes, in the absence of evidence to the contrary, that the business transactions of every man are done in good faith and for an honest purpose; and any one who alleges that such acts are done in bad faith, or for a dishonest and fraudulent purpose, takes upon himself the business of showing the same. *Jones v. Simpson*, 116 U. S. 609, 615, 29 L. Ed. 742. See the title **FRAUD AND DECEIT**, vol. 6, p. 394.

**49. Officers of corporations.**—*Fleckner v. United States Bank*, 8 Wheat. 338, 361, 5 L. Ed. 631.

If a person acts notoriously as cashier of a bank, and is recognized by the directors, or by the corporation, as an existing officer, a regular appointment will be presumed; and his acts, as cashier, will bind the corporation, although no written proof is or can be adduced of his appointment. In short, we think, that the acts of artificial persons afford the same presumptions as the acts of natural persons. Each affords presumptions, from acts done, of what must have preceded them, as matters of right, or matters of duty. *United States Bank v. Dandridge*, 12 Wheat. 64, 70, 6 L. Ed. 552. See, also, *Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 37 L. Ed. 93.

"In *United States Bank v. Dandridge*, 12 Wheat. 64, 6 L. Ed. 552, the point decided was that the approval of a cashier's bond by the board of directors of a bank, as required by statute, need not appear upon the records of the board, but might be proved by presumptive evidence, in the same manner as similar facts might be proved in the case of private persons, not acting as a corporation or as the agents of a corporation. The general doctrine was affirmed that the presumptions which, by the general rules of evidence, 'are continually made, in cases of private persons, of acts even of the most solemn nature, when those are the natural result or necessary accompaniment of other circumstances,' are equally applicable to corporations; and it was said: 'Persons, acting publicly as officers of the corporation, are to be presumed rightfully in office; acts done by the corporation, which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter. Grants and proceedings beneficial to the corporation are presumed to be accepted; and slight acts on their part, which can be reasonably accounted for only upon the supposition of such acceptance, are admitted as presumptions of the fact. If officers of the corporation openly exercise a power



b. *Public Officers*.—In general, it may be said there is a presumption in favor of the validity of acts of public officers.<sup>50</sup> Acts done, which presuppose the existence of other acts, to make them legally operative, are presumptive proofs of the latter.<sup>51</sup>

3. REGULARITY AND VALIDITY OF JUDICIAL PROCEEDINGS—*a. In General*.—In general it may be said presumptions are raised in favor of the regularity and validity of judicial proceedings.<sup>52</sup>

b. *Jurisdiction*.—See the title JURISDICTION, vol. 7, p. 738.

which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed.” *Pittsburgh, etc., R. Co. v. Keokuk, etc., Bridge Co.*, 131 U. S. 371, 382, 33 L. Ed. 157. See, also, *Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 37 L. Ed. 93.

“Touching that liability, we have to say that since the mining company had power, under its charter, to raise money in that mode, for use in its corporate business, and since an indebtedness thus created would, in the usual course of business, be evidenced by the checks of its president and secretary, the presumption should be indulged, not only that those officers, in making an overdraft, did not exceed their authority, but that the moneys thus obtained were paid over to or received by the company. But that is a mere presumption arising from the conduct of the parties, as well as from the general mode in which corporations organized for profit conduct their business. That presumption, if not, under the special circumstances of this case, conclusive, might have been overthrown by affirmative proof of want of authority, express or implied, in the president and secretary of the mining company to make overdraft checks, and by proof that the company did not receive the money paid thereon by the bank. There is, however, no such proof in this case.” *Mining Co. v. Anglo-California Bank*, 104 U. S. 192, 195, 26 L. Ed. 707. See the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 8, p. 957.

50. *Public officers*.—*Lapeyre v. United States*, 17 Wall. 191, 200, 21 L. Ed. 606; *Swaim v. United States*, 165 U. S. 553, 560, 41 L. Ed. 823; *Weyauwega v. Ayling*, 99 U. S. 112, 119, 25 L. Ed. 470; *Butler v. Maples*, 9 Wall. 766, 19 L. Ed. 322; *Hayes v. United States*, 170 U. S. 637, 646, 42 L. Ed. 1174; *Quinlan v. Green County*, 205 U. S. 410, 422, 51 L. Ed. 860. See, also, *Galt v. Galloway*, 4 Pet. 332, 343, 7 L. Ed. 876.

51. *Acts presupposing existence of other acts*.—*McNitt v. Turner*, 16 Wall. 352, 363, 21 L. Ed. 341; *United States Bank v. Dandridge*, 12 Wheat. 64, 70, 6 L. Ed. 552; *Cornett v. Williams*, 20 Wall. 226, 22 L. Ed. 254; *Sabariego v. Maverick*, 124 U. S. 261, 284, 31 L. Ed. 430; *Knox County v.*

*Ninth Nat. Bank*, 147 U. S. 91, 97, 37 L. Ed. 93; *Noñre v. United States*, 164 U. S. 657, 660, 41 L. Ed. 588. See the title PUBLIC OFFICERS.

52. *Regularity and validity*.—The acts of the court must, in the first instance, be presumed to be regular, and in conformity with settled usage; and are conclusive until reversed by a competent authority. *Williams v. United States*, 1 How. 290, 11 L. Ed. 135. See, also, *Miller v. United States*, 11 Wall. 268, 300, 20 L. Ed. 135; *Dallas County v. McKenzie*, 110 U. S. 686, 28 L. Ed. 285; *Wilkes v. Dinsman*, 7 How. 89, 12 L. Ed. 618; *Townsend v. Jemison*, 7 How. 706, 720, 12 L. Ed. 880.

“That in every instance in which a tribunal has decided upon a matter within its regular jurisdiction, its decision must be presumed proper, and is binding until it shall be regularly reversed by a superior authority, and cannot be affected, nor the rights of persons dependent upon it be impaired, by any collateral proceeding, \* \* \* has been too long settled to admit of doubt at this day, and has been repeatedly and expressly recognized in this court, as in the cases of *Thompson v. Tolmie*, 2 Pet. 157, 7 L. Ed. 381; *United States v. Arredondo*, 6 Pet. 691, 720, 8 L. Ed. 547; *Voorhees v. United States Bank*, 10 Pet. 449, 473, 9 L. Ed. 490, and *Philadelphia, etc., R. Co. v. Stimpson*, 14 Pet. 448, 458, 10 L. Ed. 535.” *Cocke v. Halsey*, 16 Pet. 71, 87, 10 L. Ed. 891.

“There is no principle of law better settled than that every act of a court of competent jurisdiction shall be presumed to have been rightly done till the contrary appears; and this rule applies as well to every judgment or decree rendered, in the various stages of their proceedings, from the initiation to their completion, as to their adjudication that the plaintiff has a right of action. Every matter adjudicated becomes a part of their record which, thenceforth, proves itself without referring to the evidence on which it has been adjudged.” *Voorhees v. United States Bank*, 10 Pet. 449, 9 L. Ed. 490.

“Ordinarily, indeed, a court before entering a consent decree will inquire whether the terms of it are for the interest of the infants. It ought in all such cases to make the inquiry, and because it is its duty so to do, it will be presumed, in the absence of any showing to the contrary, that it has performed its

c. *Presumption on Appeal*.—See the title APPEAL AND ERROR, vol. 2, p. 320, et seq.

d. *Persons Exercising Judicial or Discretionary Authority*.—As to regularity and validity of acts and decisions of commissioners of patents, see the title PATENTS; of railroad commissioners, see the title CARRIERS, vol. 3, pp. 636, 637; of county commissioners, see the title COUNTIES, vol. 4, p. 825. And see, generally, the titles PUBLIC LANDS; PUBLIC OFFICERS; etc.

## II. Burden of Proof.

**A. The General Rule.**—The general rule is that the burden of proof in civil cases lies on the party who substantially asserts the affirmative of the issue.<sup>53</sup> There are, however, certain exceptions to this general rule.<sup>54</sup> Generally, the burden is on the plaintiff.<sup>55</sup> The burden, which is simply to meet the prima

duty." *Thompson v. Maxwell Land Grant, etc., Co.*, 168 U. S. 451, 463, 42 L. Ed. 539.

The court of admiralty must be presumed to have done its duty, and to have been in possession of the things in contest, if its duty required that possession. The proceedings furnish reasons for considering this as the fact. *Jennings v. Carson*, 4 Cranch 2, 24, 2 L. Ed. 531.

Where a court having jurisdiction of the case and of the parties enters a judgment, there is a presumption that all the facts necessary to warrant the judgment have been found, if they are sufficiently averred in the pleadings. *Miller v. United States*, 11 Wall. 268, 20 L. Ed. 135.

**Pendency of action.**—And, moreover, the fact which was to be proved being merely the pendency of an action, proof that the entry was made on the docket by the proper officer, was proof that the action was pending, until the other party could show its termination. *Philadelphia, etc., R. Co. v. Howard*, 13 How. 307, 308, 14 L. Ed. 157.

**Presumption in favor of master's report.**—"As the case was referred by the court to a master to report, not the evidence merely, but the facts of the case, and his conclusions of law thereon, we think that his finding, so far as it involves questions of fact, is attended by a presumption of correctness similar to that in the case of a finding by a referee, the special verdict of a jury, the findings of a circuit court in a case tried by the court under Rev. Stat., § 649, or in an admiralty cause appealed to this court." *Davis v. Schwartz*, 155 U. S. 631, 636, 39 L. Ed. 289.

**Detention of lunatic.**—"It cannot be presumed, in the absence of all proof or allegation to that effect, that the sheriff in the discharge of this duty, after serving the writ upon the alleged lunatic, exerted his power of detention for the purpose of preventing her attendance at the hearing, or of restraining her from availing herself of any and every opportunity to defend which she might desire to resort to, or which she was capable of exerting." *Simon v. Craft*, 182 U. S. 427, 436, 45 L. Ed. 1165. See the titles INSANITY, vol.

6, p. 1072; SHERIFFS AND CONSTABLES.

**Qualification of magistrate.**—A magistrate, who is found acting as such, must be presumed to have taken the requisite oaths. *Ex parte Bollman*, 4 Cranch 75, 2 L. Ed. 554. See the title JUSTICES OF THE PEACE, vol. 7, p. 780.

**53. Burden of proof.**—*Lilienthal's Tobacco v. United States*, 97 U. S. 237, 266, 24 L. Ed. 901; *Maxwell Land Grant Co. v. Dawson*, 151 U. S. 586, 604, 38 L. Ed. 279; *The Sally Magee*, 3 Wall. 451, 18 L. Ed. 197; *Simonton v. Winter*, 5 Pet. 141, 8 L. Ed. 75. See, also, *Agawan Co. v. Jordan*, 7 Wall. 583, 597, 19 L. Ed. 177; *Hawkins v. Barney*, 5 Pet. 457, 8 L. Ed. 190; *Clarke v. Courtney*, 5 Pet. 319, 8 L. Ed. 140; *The Amistad*, 15 Pet. 518, 593, 10 L. Ed. 826.

**Party setting up title.**—The party who sets up a title must furnish the evidence necessary to support it; if the validity of a deed depend on an act in pais, the party claiming under it is as much bound to prove the performance of the act, as he would be bound to prove any matter of record on which the validity of the deed might depend. *Williams v. Peyton*, 4 Wheat. 77, 4 L. Ed. 518.

Under the 9th article of the treaty of 1794, between the United States and Great Britain, by which it is provided that British subjects, holding lands in the United States, and their heirs, so far as respects those lands, and the remedies incident thereto, should be considered as aliens, the parties must show that the title to the land for which the suit was commenced was in them, or their ancestors, at the time the treaty was made. *Harden v. Fisher*, 1 Wheat. 300, 4 L. Ed. 96.

"Whoever sets up a title under a condemnation is bound to show that the court had jurisdiction of the cause; and that the sentence has been rightly pronounced, upon the application of parties competent to ask it." *La Nereyda*, 8 Wheat. 108, 168, 5 L. Ed. 574.

**54. Exceptions to rule.**—*Maxwell Land Grant Co. v. Dawson*, 151 U. S. 586, 604, 38 L. Ed. 279.

**55. Burden on plaintiff.**—*Gumaer v.*

facie case of the government, must not be confounded with the preponderance of evidence, the establishment of which usually rests upon the plaintiff<sup>56</sup> or complainant.<sup>57</sup> In criminal proceedings, the onus probandi rests upon the prosecutor, unless a different provision is expressly made by statute.<sup>58</sup>

**B. When Party Claims Exceptional Right Given by Statute.**—When a party claims a peculiar right given by a statute, a right not common to all, and which is given only when a prescribed state of facts shall exist, it is incumbent upon him to show that such a right existed and by proof to bring himself within the exception.<sup>59</sup>

**C. Where Party Has Peculiar Knowledge or Information.**—In many cases the burden of proof is on the party within whose peculiar knowledge and means of information the fact lies. But the rule is far from being universal, and has many qualifications upon its application.<sup>60</sup>

**D. Proving a Negative.**—It may be necessary to prove a negative.<sup>61</sup>

Colorado Oil Co., 152 U. S. 88, 93, 38 L. Ed. 365; United States v. Denver, etc., R. Co., 191 U. S. 84, 48 L. Ed. 106; Philadelphia, etc., R. Co. v. Howard, 13 How. 307, 308, 14 L. Ed. 157; Moffat v. United States, 112 U. S. 24, 30, 28 L. Ed. 623.

The general rule being, that the burden of proof is on the plaintiff and the court is unable to reconcile the conflicting statements of the witnesses, and thus the principle matters upon which plaintiff's rights depend are left in doubt and uncertainty, which is not relieved by the documentary evidence of the case, the plaintiff must fail. *Gumaer v. Colorado Oil Co.*, 152 U. S. 88, 93, 38 L. Ed. 365. See, also, *United States v. Denver, etc., R. Co.*, 191 U. S. 84, 48 L. Ed. 106; *Nicholls v. Webb*, 8 Wheat. 326, 329, 5 L. Ed. 628.

**56. Burden to meet prima facie case.**—*United States v. Denver, etc., R. Co.*, 191 U. S. 84, 48 L. Ed. 106.

**57. No relief can be given by a court of equity, unless the complainant, by his allegations and proof, has shown that he is entitled to relief.** *Knox v. Smith*, 4 How. 298, 11 L. Ed. 983. See, also, *Hewitt v. Campbell*, 109 U. S. 103, 27 L. Ed. 871; *Mellon v. Delaware, etc., R. Co.*, 154 U. S. 673, 26 L. Ed. 929. See the title *EQUITY*, vol. 5, p. 883.

**58. Burden of prosecutor.**—*United States v. Gooding*, 12 Wheat. 460, 6 L. Ed. 693.

"The evidence upon which a jury is justified in returning a verdict of guilty must be sufficient to produce a conviction of guilt, to the exclusion of all reasonable doubt. Attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury. The language used in this case, however, was certainly very favorable to the accused, and is sustained by respectable authority." *Miles v. United States*, 103 U. S. 304, 312, 26 L. Ed. 481.

"For the general rule of our jurisprudence is that the party accused need not establish his innocence; but it is for the government itself to prove his guilt, before it is entitled to a verdict of conviction."

*United States v. Gooding*, 12 Wheat. 460, 471, 6 L. Ed. 693. See ante, "Presumption of Innocence," I, F, 2.

**59. Exceptional right.**—*The Edith*, 94 U. S. 518, 522, 24 L. Ed. 167.

**60. Peculiar knowledge or information.**—*Greenleaf v. Birth*, 6 Pet. 302, 312, 8 L. Ed. 406.

**61. Proving a negative.**—"It is a general rule of evidence, noticed by the elementary writers upon that subject, 1 Greenl. Ev., § 79, 'that where the subject matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party.' When a negative is averred in pleading, or plaintiff's case depends upon the establishment of a negative, and the means of proving the fact are equally within the control of each party, then the burden of proof is upon the party averring the negative; but when the opposite party must, from the nature of the case, himself be in possession of full and plenary proof to disprove the negative averment, and the other party is not in possession of such proof, then it is manifestly just and reasonable that the party which is in possession of the proof should be required to adduce it; or, upon his failure to do so, we must presume it does not exist, which of itself establishes a negative." *United States v. Denver, etc., R. Co.*, 191 U. S. 84, 92, 48 L. Ed. 106.

"Familiar instances of this are where persons are prosecuted for doing a business, such, for instance, as selling liquor without a license. It might be extremely difficult for the prosecution in this class of cases to show that the defendant had not the license required, whereas the latter may prove it without the slightest difficulty. In such cases the law casts upon the defendant not only the burden of producing his license, but of showing that it was broad enough to authorize the acts complained of." *United States v. Denver, etc., R. Co.*, 191 U. S. 84, 92, 48 L. Ed. 106.

"Mr. Roscoe says: 'When the issue involves the charge of culpable omission, it



**E. Shifting of the Burden**—1. IN CIVIL CASES.—In civil cases the burden may shift during the trial.<sup>62</sup>

2. WHERE STATUTES IMPOSING PENALTIES AND FORFEITURES ARE VIOLATED.<sup>63</sup>—It seems that under statutes imposing penalties and forfeitures, the burden of proof may shift to the defendant.<sup>64</sup>

is incumbent on the party making the charge to prove it, although he must prove a negative, for the other party shall be presumed to be innocent until proved to be guilty.' Roscoe, Evid. 52, cited 15 Pick. 317, where the issue was upon the materiality of a fact not communicated to the underwriter." *Arthur v. Unkart*, 96 U. S. 118, 122, 24 L. Ed. 768.

"Mr. Greenleaf (Greenl. Evid., § 80) thus lays down the rule: 'So where the negative allegation involves a criminal neglect of duty, official or otherwise, or fraud, or the wrongful violation of actual lawful possession of property, the party making the allegation must prove it; for in these cases the presumption of law, which is always in favor of innocence and quiet possession, is in favor of the party charged;' and many instances are cited." *Arthur v. Unkart*, 96 U. S. 118, 123, 24 L. Ed. 768.

"It is, indeed, sometimes said that a negative is incapable of proof, but this is not a maxim of the law. In the language of an eminent text writer: 'When the negative ceases to be a simple one—when it is qualified by time, place, or circumstance—much of this objection is removed; and proof of a negative may very reasonably be required when the qualifying circumstances are the direct matter in issue, or the affirmative is either probable in itself, or supported by a presumption, or peculiar means of proof are in the hands of the party asserting the negative.' Best on the Law of Evidence, Am. Ed., Boston, 1883, § 270. So, also, *Ibid.*, § 273: 'When a presumption is in favor of the party who asserts the negative it only affords an additional reason for casting the burden of proof on his adversary; it is when a presumption is in favor of the party who asserts the affirmative that its effect becomes visible, as the opposite side is then bound to prove his negative.' Also, *Ibid.*, § 276: 'This appears from the case of *Doe d. Bridger v. Whitehead*, 8 A. & E. 571, which was an ejectment by a landlord against a tenant on an alleged forfeiture by breach of a covenant in his lease to insure against fire in some office in or near London, in which it was contended that it lay on the defendant to show that he had insured, that being a fact within his peculiar knowledge. The argument *ab inconvenienti* was strongly urged, viz., that the plaintiff could not bring persons from every insurance office in or near London to show that no such insurance had been effected by the defendant, and *R. v. Turner* (5 M. & S. 206), *The Apothecaries' Co. v. Bentley*

(*Ryan & Moody*, 159), and some other cases of that class, were cited. But Lord Denman, C. J., in delivering judgment, said: "I do not dispute the cases on the game laws which have been cited; but there the defendant is in the first instance shown to have done an act which was unlawful unless he was qualified, and then the proof of qualification is thrown upon the defendant. Here the plaintiff relies on something done or permitted by the lessee, and takes upon himself the burden of proving that fact. The proof may be difficult where the matter is peculiarly within the defendant's knowledge, but that does not vary the rule of law." And in the same case *Littledale, J.*, said: "In the cases cited as to game, the defendant had to bring himself within the protection of the statutes; and a like observation applies to *The Apothecaries' Co. v. Bentley*. But here, where a landlord brings an action to defeat the estate granted to the lessee, the onus of proof ought to lie on the plaintiff." And this ruling has been upheld by subsequent cases. *Toleman v. Portbury*, L. R. 5 Q. B. 288; *Wedgwood v. Hart*, 2 Jurist, N. S. 288; *Price v. Worwood*, 4 H. & N. 512." *Colorado Coal, etc., Co. v. United States*, 123 U. S. 307, 317, 31 L. Ed. 182. See, also, *United States v. American Bell Tel. Co.*, 167 U. S. 224, 242, 42 L. Ed. 144.

**62. In civil cases.**—*Lilienthal's Tobacco v. United States*, 97 U. S. 237, 266, 24 L. Ed. 901.

As a cause for reversing a judgment it was shown by the defendant's affidavit that the debt had been proved before the justice by the plaintiff's oath alone. It was objected that the exception to the judgment could not be supported by the mere showing of the defendant's affidavit. In the opinion it was said, with respect to the mode of establishing the exception to the judgment, the affidavit of the defendant, though not conclusive, must, at least, be deemed sufficient for throwing the onus probandi, if other evidence was produced, upon his adversary. *Vansciver v. Bolton*, 2 Dall. 111, 1 L. Ed. 312.

**63.** See the title EVIDENCE, vol. 5, p. 1044. See, also, the title CRIMINAL LAW, vol. 5, p. 67.

**64.** Where the onus probandi is thrown on the claimant, in an instance of revenue cause, by a *prima facie* case, made out on the part of the prosecutor, and the claimant fails to explain the difficulties of the case, by the production of papers and other evidence, which must be in his possession, or under his control, condemnation follows, from the defects of testi-

3. IN CRIMINAL CASES.—In criminal cases the true rule is that the burden of proof never shifts; that in all cases, before conviction can be had, the jury must be satisfied from the evidence, beyond a reasonable doubt, of the affirmative of the issue presented in the accusation that the defendant is guilty in the manner and form as charged in the indictment.<sup>65</sup> When, however, a *prima facie* case has been made out, the necessity of adducing evidence in rebuttal then devolves on the accused.<sup>66</sup>

**F. Refusal to Charge as to Burden of Proof.**—A court having fairly submitted to a jury the evidence in a case, and charged as favorably to a party as he could properly have asked, may, in the exercise of its discretion, refuse a request by that party to charge as to which side the burden of proof belongs.<sup>67</sup>

### PRESUMPTIVE NOTICE.—See note 1.

mony on the part of the claimant. *The Luminary*, 8 Wheat. 407, 5 L. Ed. 647.

Under the revenue law governing importations of sugar, if the sugar were entered by a false denomination, then they are subject to forfeiture, unless the party can bring himself within the exceptions of the proviso of the 84th section. And here the *onus probandi* rests on him to extract the case from the penal consequences of an infraction of the law. *Barlow v. United States*, 7 Pet. 404, 410, 8 L. Ed. 728. See the title **REVENUE LAWS**.

**Sale of liquor to Indians.**—Where an information was filed by the United States against sundry goods and merchandise, seized as forfeited under the provisions of the acts of congress of March 30, 1802, ch. 273, and the 6th of May, 1822, ch. 58, for regulating trade and intercourse with Indian tribes, it was said: "The second bill states, that upon the motion of the district attorney, the court instructed the jury that if they should believe, from the evidence, that Wallace, as an Indian trader, did carry ardent spirits into the Indian country, and that the same were found therein, among any part of his goods, it is *prima facie* evidence of his having violated the acts of congress, on which this prosecution is founded, so as to throw the burden of proof upon the defendant. \* \* \* The instruction to which the second exception was taken, having been passed over without objection by the counsel for the plaintiff in error, it becomes unnecessary for the court to notice it, otherwise than to say, that it meets our entire approbation." *American Fur Co. v. United States*, 2 Pet. 358, 363, 365, 7 L. Ed. 450.

65. **Burden never shifts.**—*Lilienthal's Tobacco v. United States*, 97 U. S. 237, 266, 24 L. Ed. 901.

"Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime." *Davis v. United States*, 160 U. S. 469, 487, 40 L.

Ed. 499. See the title **INSANITY**, vol. 6, p. 1077.

A charge, which said substantially that the burden of proof had shifted under the circumstances of the case, and that therefore it was incumbent on the accused to show the lawfulness of their acts, is error. *Coffin v. United States*, 156 U. S. 432, 461, 39 L. Ed. 481.

66. **Necessity of adducing evidence.**—In a criminal trial, the burden of proof is on the government, and the defendant is entitled to the benefit of a reasonable doubt. It may be that certain presumptions follow from the testimony introduced by the government. It may also be that those presumptions are conclusive in the absence of contradictory or explanatory testimony, and, in that aspect of the case, that the defendant must introduce something to weaken the otherwise conclusive force of such presumption; but whenever testimony thus contradicting or explaining is introduced, it becomes a part of the burden resting upon the government to make the case so clear that there is no reasonable doubt as to the inferences and presumptions claimed to flow from the evidence. *Potter v. United States*, 155 U. S. 438, 448, 39 L. Ed. 214.

"Undoubtedly, in criminal cases, the burden of establishing guilt rests on the prosecution from the beginning to the end of the trial. But when a *prima facie* case has been made out, as conviction follows unless it be rebutted, the necessity of adducing evidence then devolves on the accused." *Agnew v. United States*, 165 U. S. 36, 49, 41 L. Ed. 624.

67. **Refusal to charge as to burden of proof.**—*Chicopee Bank v. Philadelphia Bank*, 8 Wall. 641, 19 L. Ed. 422.

1. **Presumptive notice.**—In *Brush v. Ware*, 15 Pet. 93, 96, 10 L. Ed. 672, it is said: "**Presumptive notice** is where the law imputes to a purchaser the knowledge of a fact, of which the exercise of common prudence and ordinary diligence must have apprized him. As where a purchaser cannot make out a title, but by a deed which leads him to another fact, whether by description of the parties, recital or otherwise, he will be deemed *connasant* thereof." See the title **NOTICE**, vol. 8, p. 930.

**PRETERMITTED CHILD.**—See the title WILLS.

**PREVAILING PARTY.**—As to right of to costs, see the titles APPEAL AND ERROR, vol. 2, p. 424; COSTS, vol. 4, p. 805.

**PREVIOUSLY PATENTED.**—See note 1.

**PRICES.**—See the title EVIDENCE, vol. 5, p. 1027.

**PRIMA FACIE.**—See the title EVIDENCE, vol. 5, p. 1010. And see SUFFICIENT.

**PRIMARY AND SECONDARY EVIDENCE.**—See the title BEST AND SECONDARY EVIDENCE, vol. 3, p. 214.

**PRINCIPAL AND ACCESSORY.**—See the title ACCOMPLICES AND ACCESSORIES, vol. 1, p. 63.

1. **Previously patented.**—See Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1, 39 L. Ed. 601. See, also, the title PATENTS, ante, p. 136.



# PRINCIPAL AND AGENT.

BY JOSEPH W. TIMBERLAKE.

- I. Definitions and Distinctions, 645.**
- II. Classification of Agencies, 645.**
- III. Capacity of Parties, 646.**
  - A. Who May Be Principal, 646.
    - 1. In General, 646.
    - 2. Corporation, 646.
    - 3. Married Women, 646.
    - 4. Government, 646.
    - 5. Partner, 646.
  - B. Who May Be Agent, 646.
    - 1. Bank, 646.
    - 2. Carrier, 646.
    - 3. Partner, 646.
    - 4. Husband, 647.
- IV. Effect of War on Creation of Agency, 647.**
- V. Manner of Conferring Authority, 647.**
  - A. Authority Expressly Conferred, 647.
  - B. Authority Conferred by Implication, 648.
  - C. Manner of Conferring Authority in Particular Instances, 648.
    - 1. Agent of Private Corporation, 648.
    - 2. Agent to Abandon to Underwriter, 649.
    - 3. Agent to Sell and Convey Lands, 649.
    - 4. Appointment of Person as "Exclusive Vendor," 649.
- VI. Nature and Extent of Agent's Authority, 650.**
  - A. In General, 650.
  - B. Powers Expressly Granted, 650.
  - C. Powers Implied from Those Granted, 650.
  - D. Powers Implied from Usage and Custom, 651.
  - E. Instructions as Limiting Authority, 651.
  - F. Effect of Holding Out Agent as Clothed with Authority, 651.
  - G. Agent Must Act in Way Usual in Line of Business in Which He Is Acting, 652.
  - H. Duty of Third Persons to Ascertain Agent's Authority, 652.
    - 1. Special Agency, 652.
    - 2. General Agency, 652.
  - I. Construction of Authority, 653.
    - 1. In General, 653.
    - 2. To Buy and Sell Personalty, 654.
    - 3. To Sell and Convey Real Estate, 655.
    - 4. To Collect and Receive Payment, 656.
      - a. In General, 656.
      - b. Medium and Manner of Payment, 658.
    - 5. To Issue or Accept Commercial Paper, 658.
  - J. Authority of Public Agents, 659.
  - K. Effect of Recall of Authority, 659.
  - L. Proof of Authority, 659.
    - 1. Necessity and Burden of Proof, 659.
    - 2. Manner of Proof, 660.
  - M. Province of Court and Jury, 660.

**VII. Manner of Executing Authority, 660.**

- A. In General, 660.
- B. As Dependent upon Whether Contract Sealed or Unsealed, 660.
  - 1. Contracts under Seal, 660.
  - 2. Contracts Not under Seal, 661.
- C. Agent of Corporation, 662.
- D. Power Not Coupled with an Interest, 662.
- E. Where Authority Given Jointly to Several Persons, 662.
- F. Law with Respect to Which Authority Executed, 662.
- G. Defective Execution Aided in Equity, 662.
- H. Proof of Manner of Executing Authority, 663.

**VIII. Delegation of Authority by Agent, 663.**

- A. Power of Agent to Delegate Authority, 663.
- B. Adoption of Acts of Subagent, 664.
- C. Liability of Principal for Acts of Subagent, 664.
- D. Notice to Subagent as Notice to Principal, 664.
- E. Liability of Subagent to Principal, 664.

**IX. Rights, Duties and Liabilities, 664.**

- A. As between Principal and Agent, 664.
  - 1. Duties and Liabilities of Agent to Principal, 664.
    - a. Duty to Follow Instructions, 664.
      - (1) General Rule, 664.
      - (2) Where Departure from Instructions Permissible, 665.
      - (3) Liability of Agent for Failure to Follow Instructions, 665.
    - b. Care and Diligence Required of Agents, 666.
    - c. Good Faith in Dealing with Principal, 667.
      - (1) In General, 667.
      - (2) Agent to Sell Purchasing for Himself, 667.
        - (a) In General, 667.
        - (b) Officers Buying Corporate Property at Sacrifice, 669.
        - (c) Attorney Buying Property Sold for Client, 669.
        - (d) Auctioneer Buying Property, 669.
      - (3) Agent to Convey Conveying to Himself, 670.
      - (4) Agent to Buy Purchasing for Himself, 670.
      - (5) Agent to Buy Purchasing from Himself, 670.
      - (6) Agent to Locate Land Locating It for Himself, 670.
      - (7) Acting as Agent of Both Buyer and Seller, 670.
      - (8) Gifts and Purchases from Principal, 670.
        - (a) Gifts, 670.
        - (b) Purchases, 671.
      - (9) Acquiring Title to Principal's Property Through Defect in Title, 671.
      - (10) Using Principal's Funds or Property, 671.
    - d. Liability of Subagent to Principal, 672.
    - e. Accounting, 672.
    - f. Action by Principal against Agent, 672.
  - 2. Liability of Principal to Agent, 673.
    - a. Compensation or Commissions, 673.
      - (1) Right to Compensation, 673.
        - (a) In General, 673.
        - (b) Necessity for Faithful Performance of Duties, 674.

- (c) Where Transaction Illegal or Contrary to Public Policy, 674.
- (2) Amount, 675.
- (3) Actions for Compensation, 676.
- (4) Compensation of Agent of Captors of Prize, 677.
- b. Reimbursement for Advances, Expenses, and Disbursements, 677.
  - (1) General Rule, 677.
  - (2) Exception to Rule Where Transaction Illegal, 678.
  - (3) Action for Reimbursement, 678.
- c. Lien of Agent, 678.
- B. As between Principal or Agent and Third Persons, 679.
  - 1. Liability of Principal to Third Persons, 679.
    - a. In General, 679.
    - b. Contracts, 680.
      - (1) Disclosed Principal, 680.
        - (a) In General, 680.
        - (b) Where Credit Given to Agent, 681.
      - (2) Undisclosed Principal, 681.
      - (3) Money Collected and Paid Over to Principal, 682.
      - (4) Where Agent Exceeds Authority, 682.
    - c. Torts, 683.
      - (1) In General, 683.
      - (2) Where Principal Receives Benefit of Tortious Act, 683.
      - (3) Extent of Liability, 683.
        - (a) Compensatory Damages, 683.
        - (b) Exemplary or Punitive Damages, 684.
      - (4) Liability in Particular Instances, 684.
    - d. Liability of Principal for Acts of Subagent, 685.
  - 2. Liability of Agent to Third Persons, 685.
    - a. Contracts, 685.
      - (1) Private Agents, 685.
        - (a) In General, 685.
        - (b) Principal Disclosed, 686.
        - (c) Principal Undisclosed, 686.
      - (2) Public Agents, 687.
    - b. Money Collected and Paid Over to Principal, 688.
    - c. Actions by Third Persons against Agent, 689.
  - 3. Liability of Third Persons to Principal, 689.
    - a. On Contracts Made with Agent, 689.
      - (1) Principal Disclosed, 689.
      - (2) Principal Undisclosed, 690.
    - b. Property Wrongfully Transferred by Agent, 690.
      - (1) In General, 690.
      - (2) Pledge of Principal's Property, 691.
  - 4. Liability of Third Persons to Agent, 690.
  - 5. Declarations or Admissions of Agent as Binding Principal, 692.
  - 6. Notice to Agent as Notice to Principal, 692.
    - a. General Rule, 692.
    - b. Time of Acquiring Knowledge, 693.
    - c. Principal Not Charged with Notice of Agent's Secret or Confidential Information, 693.
    - d. Principal on Whom Agent Commits Fraud Not Charged with Notice, 694.
    - e. Notice to Subagent as Notice to Principal, 694.
    - f. Notice of Particular Matters, 694.



- (1) Notice of Prior Liens, Trusts or Frauds, 694.
- (2) Notice of Prior Unrecorded Conveyance, 694.
- (3) Knowledge of Agent to Procure Insurance Touching Subject Matter, 695.
- (4) Knowledge of Conditions upon Which License Granted, 695.
- (5) Knowledge of Navigation under License from or Trading with Enemy, 695.
- (6) Knowledge of Defect in Construction of Pier, 696.

**X. Criminal Liability for Acts of Agent, 696.**

**XI. Ratification of Unauthorized Acts of Agent, 696.**

- A. In General, 696.
- B. Who May Ratify, 696.
- C. What Acts May Be Ratified, 696.
- D. What Constitutes Ratification, 697.
  1. Definition, 697.
  2. Elements, 697.
    - a. Knowledge of Facts by Principal, 697.
    - b. Consideration, 698.
    - c. Acts Capable of Being Ratified, 698.
  3. Express Ratification, 698.
  4. Implied Ratification, 698.
    - a. In General, 698.
    - b. Acceptance or Retention of Benefits of Agent's Acts, 699.
    - c. Failure to Repudiate Agent's Act, 699.
      - (1) General Rule, 699.
      - (2) Time of Repudiating Agent's Act, 700.
    - d. Action on Contract by Principal, 701.
  5. Partial Ratification, 701.
  6. Province of Court and Jury, 701.
- E. Effect of Ratification, 702.
  1. General Rule, 702.
  2. Exception to Rule, 703.

**XII. Termination of Agency, 703.**

- A. Modes of Terminating Agency, 703.
  1. Death of Principal, 703.
    - a. In General, 703.
    - b. Effect of Death of Person Giving Power of Attorney, 704.
      - (1) General Rule, 704.
      - (2) Exception to Rule, 705.
  2. Express Revocation of Authority, 706.
    - a. In General, 706.
    - b. Power to Revoke Letter of Attorney, 707.
      - (1) General Rule, 707.
      - (2) Exception to General Rule, 707.
  3. Destruction of Subject Matter, 708.
  4. Effect of War, 708.
- B. Effect of Termination, 712.

**CROSS REFERENCES.**

See the titles ACCOUNTS AND ACCOUNTING, vol. 1, p. 70; ACTIONS, vol. 1, p. 96; ALIENS, vol. 1, p. 210; ALTERATION OF INSTRUMENTS, vol. 1, p. 261; ASSUMPSIT, vol. 2, p. 636; ATTORNEY AND CLIENT, vol. 2, p. 703; BILL OF LADING, vol. 3, p. 232; BILLS, NOTES AND CHECKS, vol. 3, p. 257; BONDS, vol. 3, p.

382; CARRIERS, vol. 3, p. 556; CONTRACTS, vol. 4, p. 552; COURTS, vol. 4, p. 861; COVENANTS, vol. 5, p. 5; DAMAGES, vol. 5, p. 157; DECLARATIONS AND ADMISSIONS, vol. 5, p. 214; DEEDS, vol. 5, p. 245; DOCUMENTARY EVIDENCE, vol. 5, p. 431; EVIDENCE, vol. 5, p. 1104; EXEMPLARY DAMAGES, vol. 6, p. 193; FRAUD AND DECEIT, vol. 6, p. 394; HUSBAND AND WIFE, vol. 6, p. 716; INSURANCE, vol. 7, p. 66; INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 269; LIBEL AND SLANDER, vol. 7, p. 857; LIENS, vol. 7, p. 890; MALICIOUS PROSECUTION, vol. 7, p. 1080; NEGLIGENCE, vol. 8, p. 873; PAROL EVIDENCE, ante, p. 12; PARTNERSHIP, ante, p. 73; PAYMENT, ante, p. 319; POWERS, ante, p. 588; PRIZE; RECEIPTS; SALES; SEALS AND SEALED INSTRUMENTS; SEPARATE ESTATE OF MARRIED WOMEN; TAXATION; TORTS; TRUSTS AND TRUSTEES; UNITED STATES; USAGES AND CUSTOMS; WARRANTS; WHARVES AND WHARFINGERS.

As to questions of agency relating to auctioneers, see the title AUCTIONS AND AUCTIONEERS, vol. 2, p. 743; relating to bailees, see the title BAILMENTS, vol. 2, pp. 782, 788; relating to sales by officers under order of court or executions, see the titles JUDICIAL SALES, vol. 7, p. 704; SHERIFFS', CONSTABLES' AND MARSHALS' SALES; relating to brokers, see the title BROKERS, vol. 2, p. 531; relating to factors and commission merchants, see the title FACTORS AND COMMISSION MERCHANTS, vol. 6, p. 232; relating to agents or officers of private corporations, see the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 8, p. 957; relating to agents and officers of municipal corporations, see the title MUNICIPAL CORPORATIONS, vol. 8, p. 546; relating to officers and agents of banks, see the title BANKS AND BANKING, vol. 3, p. 1; relating to agents and officers of the public generally, see the title PUBLIC OFFICERS; relating to officers and agents of the departments of the national government, see the titles ARMY AND NAVY, vol. 2, p. 294; UNITED STATES; relating to the collection of commercial paper by banks, see the title BANKS AND BANKING, vol. 3, p. 1; relating to insurance, see the titles INSURANCE, vol. 7, p. 66; MARINE INSURANCE, vol. 8, p. 149; relating to the location of public lands, see the title PUBLIC LANDS; relating to the collection of revenue, see the titles REVENUE LAWS; TAXATION; relating to usury, see the title USURY; relating to salvage, see the title SALVAGE; relating to admiralty jurisdiction, see the title ADMIRALTY, vol. 1, p. 119; relating to officers, masters of vessels and pilots, see the titles COLLISION, vol. 3, p. 870; MASTERS OF VESSELS, vol. 8, p. 300; PILOTS, ante, p. 399; SHIPS AND SHIPPING; TOWAGE, TUGS AND TOWS. As to questions of agency concerning the relation of owner and master of a vessel engaged in the slave trade, see the title SLAVERY AND INVOLUNTARY SERVITUDE; concerning the relation of attorney and client, see the title ATTORNEY AND CLIENT, vol. 2, p. 703; concerning the relation of master and servant, see the title MASTER AND SERVANT, vol. 8, p. 275. As to the admissibility of declarations and admissions of an agent as evidence against the principal, see the titles DECLARATIONS AND ADMISSIONS, vol. 5, p. 214; DOCUMENTARY EVIDENCE, vol. 5, p. 431. As to the confession of an agent as binding his principal, see the title CONFESSIONS, vol. 3, pp. 1009, 1015. As to the agent's testifying concerning matters communicated to him as agent, see the title PRIVILEGED COMMUNICATIONS. As to consignee being owner's agent to transfer bill of lading, see the title BILL OF LADING, vol. 3, pp. 232, 240. As to contract made by an agent on Sunday, see the title SUNDAYS AND HOLIDAYS. As to acts of agent subjecting a vessel to condemnation as a prize and the liability of an owner of a privateer for conduct of agents, officers and crew, see the title PRIZE. As to taxation of an agent engaged in interstate or foreign commerce, and other questions of agency relating to such commerce, see the titles INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 269; TAXATION. As to payment of taxes by an agent, see the titles REVENUE LAWS; TAXATION. As to service of process upon an agent, see the titles FOREIGN CORPORATIONS, vol. 6, pp. 305, 317, 332; SUMMONS AND PROCESS.

## I. Definitions and Distinctions.

**An agent** is one who undertakes to transact some business, or manage some affair, for another, by the authority and on account of the latter, and to render an account of it.<sup>1</sup>

**General Agent.**—See post, "Classification of Agencies," II.

**Special Agent.**—See post, "Classification of Agencies," II.

**A trustee is not an agent.** An agent represents and acts for his principal, who may be either a natural or artificial person. A trustee may be defined generally as a person in whom some estate, interest or power in or affecting property is vested for the benefit of another. When an agent contracts in the name of his principal, the principal contracts and is bound, but the agent is not. When a trustee contracts as such, unless he is bound no one is bound, for he has no principal. The trust estate cannot promise; the contract is therefore the personal undertaking of the trustee.<sup>2</sup>

## II. Classification of Agencies.

Agencies are general, special, and universal.<sup>3</sup>

**A general agency** is one created by power given to do acts of a class.<sup>4</sup> Authority to make purchases from any persons with whom the agent may choose to deal, or to make an indefinite number of purchases, is a general agency.<sup>5</sup> And it is none the less a general agency because it does not extend over the whole business of the principal.<sup>6</sup>

**A special agency** is created by power given to do individual acts only. The purpose of a special agency is a single transaction, or a transaction with designated persons. It does not leave the agent any discretion as to the person with whom he may contract for the principal, if he be empowered to make more than one contract.<sup>7</sup>

1. Definition of agent.—Bouv. Law Dict.; *Knights of Pythias v. Withers*, 177 U. S. 260, 268, 44 L. Ed. 762. See, also, *Taylor v. Davis*, 110 U. S. 330, 334, 28 L. Ed. 163.

2. Agent distinguished from trustee.—*Taylor v. Davis*, 110 U. S. 330, 334, 28 L. Ed. 163. See, generally, the title TRUSTS AND TRUSTEES.

3. Classification of agencies.—In general.—*Story's Agency*, § 21; *Hoffman v. Hancock, etc., Ins. Co.*, 92 U. S. 161, 23 L. Ed. 539; *Bronson v. Chappell*, 12 Wall. 681, 20 L. Ed. 436; *LeRoy v. Beard*, 8 How. 451, 467, 12 L. Ed. 1151; *Butler v. Maples*, 9 Wall. 766, 19 L. Ed. 822. See, also, *United States v. Babbitt*, 1 Black 55, 61, 17 L. Ed. 94.

The same considerations fix the category of the agency and the limits of the authority conferred. *Bronson v. Chappell*, 12 Wall. 681, 20 L. Ed. 436.

4. General agency.—*Butler v. Maples*, 9 Wall. 766, 19 L. Ed. 822.

Each partner, by virtue of the relation he bears to the firm, is constituted the general agent for his copartners, as to all matters within the scope of the partnership dealings. *Kimbro v. Bullitt*, 22 How. 256, 16 L. Ed. 313. See, generally, the title PARTNERSHIP, vol. 9, p. 73.

5. General authority as to persons to be dealt with and number of transactions.—*Butler v. Maples*, 9 Wall. 766, 19 L. Ed. 822.

An authority to an agent to buy cotton

in a certain region and its vicinity, and to buy generally from whomsoever the agent, not his principals, might determine—one having in view not merely a single transaction or a number of specified transactions, but a class of purchasers and a department of business—makes a general agency to buy the cotton there, and if the agent, holding himself out as the general agent, purchases there under his power, he may bind his principal in violation of special instructions not communicated to his vendors, and of which they had neither knowledge nor reason to suspect the existence. *Butler v. Maples*, 9 Wall. 766, 19 L. Ed. 822.

6. Agency need not extend over whole business of principal.—*Butler v. Maples*, 9 Wall. 766, 19 L. Ed. 822.

A man may have many general agents—one to buy cotton, another to buy wheat, and another to buy horses. So he may have a general agent to buy cotton in one neighborhood, and another general agent to buy cotton in another neighborhood. Therefore an authority to an agent to buy cotton in a certain region and its vicinity, unrestricted as to the persons with whom the agent may deal and as to the number of transactions, constitutes a general agency. *Butler v. Maples*, 9 Wall. 766, 19 L. Ed. 822.

7. Special agency.—*Butler v. Maples*, 9 Wall. 766, 19 L. Ed. 822.

A special agent is one employed for the performance of one specific act, or cer-



Whether an agency is general or special is wholly independent of the question whether the power to act within the scope of the authority given is unrestricted, or whether it is restrained by instructions or conditions imposed by the principal relative to the mode of its exercise.<sup>8</sup>

### III. Capacity of Parties.

**A. Who May Be Principal**—1. **IN GENERAL**.—A principal whom an agent represents and for whom he acts, may be either a natural or an artificial person.<sup>9</sup>

2. **CORPORATION**.—A corporation may appoint an agent, whose acts and contracts, within the scope of his authority, will be binding on the corporation.<sup>10</sup>

3. **MARRIED WOMEN**.—As to the power of a married woman to appoint an agent or attorney, see the titles **HUSBAND AND WIFE**, vol. 6, pp. 716, 722; **SEPARATE ESTATE OF MARRIED WOMEN**.

4. **GOVERNMENT**.—The government can speak and act only through agents, or more properly, officers.<sup>11</sup>

5. **PARTNER**.—One of two partners has authority to appoint an agent to act for both, in matters relative to their joint interest.<sup>12</sup>

**B. Who May Be Agent**—1. **BANK**.—Where an instrument payable at a bank is lodged with the bank for collection, the bank becomes the agent of the payee to receive payment.<sup>13</sup> But where such instrument is not so lodged with the bank, whatever the bank receives from the maker to apply upon the instrument, it receives as his agent, not as the agent of the payee.<sup>14</sup>

2. **CARRIER**.—A carrier is considered in law an agent or servant of the owner, and the possession of the agent is the possession of the owner.<sup>15</sup>

3. **PARTNER**.<sup>16</sup>—Each partner is the agent of his copartners, in all transactions relating to the partnership business.<sup>17</sup>

tain specific acts only. *General Interest Ins. Co. v. Ruggles*, 12 Wheat. 408, 6 L. Ed. 674; *The Monte Allegre*, 9 Wheat. 616, 6 L. Ed. 174.

Authority to buy for a principal a single article of merchandise by one contract, or to buy several articles from a person named, is a special agency. *Butler v. Maples*, 9 Wall. 766, 19 L. Ed. 822.

The relation between the owner and master of a vessel, is a special agency, in which the master is a special agent for navigating the vessel only. *General Interest Ins. Co. v. Ruggles*, 12 Wheat. 408, 6 L. Ed. 674. See the title **MASTERS OF VESSELS**, vol. 8, p. 300.

8. *Butler v. Maples*, 9 Wall. 766, 19 L. Ed. 822.

9. **Who may be principal**—In general.—*Taylor v. Davis*, 110 U. S. 330, 335, 28 L. Ed. 163.

10. **Who may be principal**—Corporation.—*Bank v. Patterson*, 7 Cranch 290, 3 L. Ed. 351.

A corporation can act only by its agents. *Jones v. Guaranty, etc., Co.*, 101 U. S. 622, 25 L. Ed. 1030. See, generally, the titles **CORPORATIONS**, vol. 4, p. 621; **OFFICERS AND AGENTS OF PRIVATE CORPORATIONS**, vol. 8, p. 957.

11. **Government**.—The *Floyd Acceptances*, 7 Wall. 666, 19 L. Ed. 169. See, generally, the titles **PUBLIC OFFICERS; STATES; UNITED STATES**.

12. **Partner**.—One partner can devolve over the right of using the firm name,

without the knowledge and concurrence of the other. One of two partners may give an authority to a clerk, under the firm name of the house, and the clerk may, in consequence thereof, accept bills, and sign or endorse notes, in the name of the company. It was said by McKean, Chief Justice, that this case could not be properly compared with the case of an attorney, without power of substitution, for the attorney cannot exceed the letter of his authority, being nothing more than an agent himself; but each partner is a principal, and it is implied in the very nature of their connection, that each has a right to depute and appoint a clerk to act for both, in matters relative to their joint interest. *Tillier v. Whitehead*, 1 Dall. 269, 1 L. Ed. 131. See, generally, the title **PARTNERSHIP**, ante, p. 73.

13. **Who may be agent**—Bank as agent of payee.—*Ward v. Smith*, 7 Wall. 447, 19 L. Ed. 297. See, generally, the title **BANKS AND BANKING**, vol. 3, p. 1.

14. **Bank as agent of maker**.—*Ward v. Smith*, 7 Wall. 447, 19 L. Ed. 297.

15. **Carrier**.—*New Jersey Steam Nav. Co. v. Merchant's Bank*, 6 How. 344, 12 L. Ed. 465. See, generally, the title **CARRIERS**, vol. 3, p. 556.

16. See, generally, the title **PARTNERSHIP**, ante, p. 73.

17. **Partner**.—*Wheeler v. Sage*, 1 Wall. 518, 17 L. Ed. 646.

One partner, by virtue of the relation he bears to the firm, is constituted a general agent for another, as to all

4. HUSBAND.—As to the management of a married woman's separate property through the agency of her husband, see the title *SEPARATE ESTATE OF MARRIED WOMEN*.

#### IV. Effect of War on Creation of Agency.<sup>18</sup>

An agency cannot be created during hostilities, for the purpose of commercial intercourse between the citizens of belligerent states. Therefore a citizen of one government or state has no power to appoint an agent, for any purpose, to act in the territory of another government or state after hostilities have actually commenced or during the existence of war, between such governments or states.<sup>19</sup> The reason for the rule is that while the war lasts, nothing which depends on commercial intercourse between the citizens of the belligerent states or governments is permitted. The person being prohibited from trading directly with the enemy, any act of intercourse cannot be treated as lawful, when made for him by an agent appointed after his own disability to deal at all with the enemy was created.<sup>20</sup> However, an agency created before the war began may continue for some purposes and under some circumstances during the existence of the war.<sup>21</sup>

#### V. Manner of Conferring Authority.

A. Authority Expressly Conferred.—Authority to act for another may be, and usually is, expressly conferred.<sup>22</sup> In some instances this authority is

matters within the scope of the partnership dealings, and has conferred upon him, by virtue of that relation, all authorities necessary for carrying on the partnership, and all such as are usually exercised in the business in which they are engaged. *Kimbro v. Bullitt*, 22 How. 256, 16 L. Ed. 313.

18. See, generally, the titles *ALIENS*, vol. 1, p. 210; *STATES*; *WAR*.

19. Effect of war on creation of agency.—In general.—*United States v. Grossmayer*, 9 Wall. 72, 19 L. Ed. 627; *Montgomery v. United States*, 15 Wall. 395, 21 L. Ed. 97; *Insurance Co. v. Davis*, 95 U. S. 425, 24 L. Ed. 453. See post, "Effect of War," XII, A, 4.

E. E., a resident of Macon, Ga., was indebted, when the late rebellion broke out, to G., a resident of New York, for goods sold and money lent, and while the war was in progress a correspondence on the subject was maintained through the medium of a third person, who passed back and forth several times between Macon and New York. The communication between the parties resulted in G. requesting E. E. to remit the amount due him in money or sterling exchange, or, if that were not possible, to invest the sum in cotton and hold it for him until the close of the war. In pursuance of this direction, E. E. purchased cotton for G., and informed him of it; G. expressing himself satisfied with the arrangement. The cotton was afterwards shipped as G.'s to one A. E., at Savannah, who stored it there in his own name, in order to prevent its seizure by the rebel authorities. It remained in store in this manner until the capture of Savannah in December, 1864, by the armies of the United States, when it was reported to the United States military forces as

G.'s cotton, and taken by them and sent to New York and sold. G. now preferred a claim in the court of claims for the residue of the proceeds, asserting that he was within the protection of the Captured and Abandoned Property Act. That court considering that the purchase by E. E. for G. was not a violation of the War Intercourse Acts, decided that he was so, and gave judgment in his favor. On appeal by the United States, the judgment of the court of claims was reversed, and it was held if E. E. be considered the agent of G. to buy the cotton, the act appointing him was illegal because it was done by means of a direct communication through a messenger during the war, and that it was not necessary to make the act unlawful that G. should have communicated personally with E. E., business intercourse through a middleman, which resulted in establishing the agency, being equally within the condemnation of the law, and that as G. was prohibited during the war from having any dealings with E. E., it followed that nothing which both or either of them did, could have the effect to vest in G. the title to the cotton question, and that not being the owner of the property he had no claim against the United States. *United States v. Grossmayer*, 9 Wall. 72, 19 L. Ed. 627.

20. Reason for rule.—*United States v. Grossmayer*, 9 Wall. 72, 19 L. Ed. 627; *Montgomery v. United States*, 15 Wall. 395, 21 L. Ed. 97; *Insurance Co. v. Davis*, 95 U. S. 425, 24 L. Ed. 453.

21. Continuance of agency during war.—See post, "Effect of War," XII, A, 4.

22. Authority expressly conferred.—*Angle v. North-Western, etc., Ins. Co.*, 92 U. S. 330, 23 L. Ed. 556.

Liability for the acts of another may be created by a direct authority given for

required to be in writing.<sup>23</sup> while in others, a verbal authority is sufficient.<sup>24</sup>

**B. Authority Conferred by Implication.**—Where written evidence of the appointment of an agent is not required, an agency may be created or implied from circumstances.<sup>25</sup> These circumstances may be the acts of the agent and their recognition, or acquiescence, by the principal.<sup>26</sup>

**C. Manner of Conferring Authority in Particular Instances**—1. **AGENT OF PRIVATE CORPORATION.**—Anciently it was held to be the rule that corporations could not do anything without deed. Later it came to be established, that though they could not contract directly, except under their corporate seal, yet they might, by mere vote, or other corporate act, not under corporate seal, appoint an agent, whose acts and contracts, within the scope of his authority, would be binding on the corporation.<sup>27</sup> Whatever may be the original correctness of the ancient doctrine of common law that a corporation can only act through the instrumentality of its corporate seal, as applied to corporations existing by the common law, it has no application to corporations created by statute, whose charters contemplate the business of the corporation to be transacted exclusively by a special

their performance. *Fresh v. Gilson*, 16 Pet. 327, 10 L. Ed. 982.

**23. Written authority.**—*Bronson v. Chappell*, 12 Wall. 681, 20 L. Ed. 436.

A power to convey lands must possess the same requisites, and observe the same solemnities as are necessary in a deed directly conveying the lands. *Clark v. Graham*, 6 Wheat. 577, 5 L. Ed. 334. See, also, *Nicholson v. Mifflin*, 2 Dall. 246, 1 L. Ed. 367. See the title **DEEDS**, vol. 5, p. 245.

**24. Verbal authority.**—*Sheets v. Selden*, 2 Wall. 177, 17 L. Ed. 822.

Verbal authority is sufficient to authorize a person to act as agent of a lessor in the collection of rent or in demanding its payment. *Sheets v. Selden*, 2 Wall. 177, 17 L. Ed. 822.

**25. Appointment implied from circumstances.**—*Bronson v. Chappell*, 12 Wall. 681, 20 L. Ed. 436; *Angle v. North-Western, etc., Ins. Co.*, 92 U. S. 330, 23 L. Ed. 556.

Where a collector, in whose behalf money has been deposited by the debtor with a third person, receives notice of that fact from the third person, the notice will convert such third person into an agent for, and debtor to, the creditor. *Hinkle v. Wanzer*, 17 How. 353, 15 L. Ed. 173.

**26. Adoption of acts of agent by principal.**—*Bronson v. Chappell*, 12 Wall. 681, 20 L. Ed. 436; *Angle v. North-Western, etc., Ins. Co.*, 92 U. S. 330, 23 L. Ed. 556.

"Where one, without objection, suffers another to do acts which proceed upon the ground of authority from him, or by his conduct adopts and sanctions such acts after they are done, he will be bound, although no previous authority exist, in all respects as if the requisite power had been given in the most formal manner. If he has justified the belief of a third party that the person assuming to be his agent was authorized to do what was done, it is no answer for him to say that

no authority had been given, or that it did not reach so far, and that the third party had acted upon a mistaken conclusion. He is estopped to take refuge in such a defense. If a loss is to be borne, the author of the error must bear it. If business has been transacted in certain cases it is implied that the like business may be transacted in others. The inference to be drawn is that everything fairly within the scope of the powers exercised in the past may be done in the future, until notice of revocation or disclaimer is brought home to those whose interests are concerned. Under such circumstances the presence or absence of authority in point of fact is immaterial to the rights of third persons whose interests are involved. The seeming and reality are followed by the same consequences. In either case the legal result is the same." *Bronson v. Chappell*, 12 Wall. 681, 683, 20 L. Ed. 436.

Liability for the acts of others may flow from their adoption, or in some instances, from acquiescence in those acts; but presumptions can stand only whilst they are compatible with the conduct of those to whom it may be sought to apply them, and must still more give place, when in conflict with clear, distinct and convincing proof. *Fresh v. Gilson*, 16 Pet. 327, 10 L. Ed. 982.

If a power in an agent to sell be implied, it must be implied from the antecedent course of business and relations of the parties, as principal and agent. *Tiernan v. Jackson*, 5 Pet. 580, 8 L. Ed. 234. See post, "Powers Implied from Those Granted," VI, C; "Ratification of Unauthorized Acts of Agent," XI.

**27. Manner of conferring authority—Agent of private corporation.**—*Bank v. Patterson*, 7 Cranch 299, 3 L. Ed. 351; *United States Bank v. Dandridge*, 12 Wheat. 64, 6 L. Ed. 552; *Mechanics' Bank v. Bank*, 5 Wheat. 326, 5 L. Ed. 100. See the titles **CORPORATIONS**, vol. 4, p.



body or board of directors. Such corporations may authorize an act to be done by an agent by a mere vote of the board of directors, and acts done by an agent under authority so conferred is as binding upon the corporation as if it had passed under the corporate seal.<sup>28</sup> This rule has been applied to banks and other commercial corporations created by statute.<sup>29</sup>

2. AGENT TO ABANDON TO UNDERWRITER.—The agent who makes insurance for his principal, has authority to abandon to an underwriter without a formal letter of attorney.<sup>30</sup>

3. AGENT TO SELL AND CONVEY LANDS.—To authorize an agent to sell land, his authority must be in writing.<sup>31</sup> A power of attorney to convey lands must possess the same requisites, and observe the same solemnities, as are necessary in a deed directly conveying the lands.<sup>32</sup>

4. APPOINTMENT OF PERSON AS "EXCLUSIVE VENDOR."—An agency may be created by the appointment of a person as "exclusive vendor" of articles of merchandise belonging to another.<sup>33</sup>

621; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 8, p. 957.

28. Corporations created by statute.—*Fleckner v. United States Bank*, 8 Wheat. 338, 5 L. Ed. 631, following *Bank v. Patterson*, 7 Cranch 299, 3 L. Ed. 351; *Mechanics' Bank v. Bank*, 5 Wheat. 326, 5 L. Ed. 100.

The acts of the board of directors of a corporation, evidenced by a written vote, are as completely binding upon the corporation, and as complete authority to their agents, as the most solemn acts done under the corporate seal. *Fleckner v. United States Bank*, 8 Wheat. 338, 5 L. Ed. 631.

29. Banks and other commercial corporations.—*Fleckner v. United States Bank*, 8 Wheat. 338, 5 L. Ed. 631; *Bank v. Patterson*, 7 Cranch 299, 3 L. Ed. 351; *Mechanics' Bank v. Bank*, 5 Wheat. 326, 5 L. Ed. 100.

"In respect to banks, from the very nature of their operations in discounting notes, in receiving deposits, in paying checks, and other ordinary and daily contracts, it would be impracticable to affix the corporate seal as a confirmation of each individual act. And if a general authority for such purposes, under the corporate seal, would be binding upon the corporation, because it is the mode prescribed by the common law, must not the like authority, exercised by agents appointed in the mode prescribed by the charter, and to whom it is exclusively given by the charter, be of as high and solemn a nature to bind the corporation? To suppose otherwise is to suppose that the common law is superior to the legislative authority, and that the legislature cannot dispense with forms or confer authorities which the common law attaches to general corporations. Where corporations have no specific mode of acting prescribed, the common-law mode of acting may be properly inferred; but every corporation created by statute may act as the statute prescribes, and the

common law cannot control by implication that which the legislature has expressly sanctioned. Indeed, this very point has been repeatedly under the consideration of this court; and in the case of *Bank v. Patterson*, 7 Cranch 299, 3 L. Ed. 351, and *Mechanics' Bank v. Bank*, 5 Wheat. 326, 5 L. Ed. 100, principles were established which settle the point, that the corporation may be bound by contracts not authorized or excluded under its corporate seal, and by contracts made in the ordinary discharge of the official duty of its agents and officers." *Fleckner v. United States Bank*, 8 Wheat. 338, 5 L. Ed. 631. See the title BANKS AND BANKING, vol. 3, p. 1.

30. Agent to abandon to underwriter.—*Chesapeake Ins. Co. v. Stark*, 6 Cranch 268, 3 L. Ed. 220.

"The agent who made the insurance might certainly be credited, and in transactions of this kind, always is credited, when he declares that, by the order of his principal, he abandons to the underwriters. In this case, the jury find that the abandonment was made for the plaintiff; and this finding establishes that fact." *Chesapeake Ins. Co. v. Stark*, 6 Cranch 268, 3 L. Ed. 220. See the title MARINE INSURANCE, vol. 8, p. 149.

31. Agent to sell lands.—*Nicholson v. Mifflin*, 2 Dall. 246, 1 L. Ed. 367. See the title DEEDS, vol. 5, p. 245.

32. Requisites of power of attorney to convey lands.—*Clark v. Graham*, 6 Wheat. 577, 5 L. Ed. 334. See the title DEEDS, vol. 5, p. 245.

33. "Exclusive vendor."—*Willcox, etc., Sewing Machine Co. v. Ewing*, 141 U. S. 627, 35 L. Ed. 882.

A person was appointed as "exclusive vendor" of another's machines within a particular territory, with peculiar privileges granted to and peculiar restrictions imposed upon the former. One clause of the contract prohibited the person appointed from soliciting trade, directly or indirectly, in the territory "of other agents;" another provided that he

## VI. Nature and Extent of Agent's Authority.

**A. In General.**—The general rule is, that a principal is bound by the act of his agent no further than he authorizes that agent to bind him.<sup>34</sup> But the extent of the power given to an agent is decided as well from facts as from express delegation.<sup>35</sup>

**B. Powers Expressly Granted.**—An agent, of course, has power to do any act within the scope of the authority expressly conferred upon him.<sup>36</sup>

**C. Powers Implied from Those Granted.**—A grant of power to act for another, carries with it by implication, the power to employ all the usual, ordinary and necessary means to effectuate the beneficial exercise of the power expressly granted.<sup>37</sup> But an implied authority has its limitations as well as that which is

would bind "all subvendors or agents" to sustain the established retail prices of the company; and still another imposed restrictions upon the sale of his "appointment or agency." It was held that the person so appointed was none the less an agent because of his appointment as "exclusive vendor," and that the agreement constituted him the sole agent for the sale of machines within a certain territory. *Willcox, etc., Sewing Machine Co. v. Ewing*, 141 U. S. 627, 35 L. Ed. 882.

**34. General rule as to liability of principal.**—See post, "Liability of Principal to Third Persons," IX, B, 1; "Where Agent Exceeds Authority," IX, B, 1, b, (4).

**35. Extent of agent's authority.**—In *general*.—*Parsons v. Armor*, 3 Pet. 413, 7 L. Ed. 724.

In the estimate or application of such facts, the law has regard to public security, and often implies the rule "that he who trusts must pay;" so also, collusion with an agent to get a debt paid, through the intervention of one in failing circumstances, has been held to make the principal liable, on the ground of immoral dealing. *Parsons v. Armor*, 3 Pet. 413, 7 L. Ed. 724.

**36. Nature and extent of agent's authority.**—**Powers expressly granted.**—*Angle v. North-Western, etc., Ins. Co.*, 92 U. S. 330, 23 L. Ed. 556; *Parsons v. Armor*, 3 Pet. 413, 7 L. Ed. 724.

**37. Powers implied from those granted.**—*Angle v. North-Western, etc., Ins. Co.*, 92 U. S. 330, 23 L. Ed. 556; *Ventress v. Smith*, 10 Pet. 161, 9 L. Ed. 382; *Boyle v. Zacharie*, 6 Pet. 635, 8 L. Ed. 527; *LeRoy v. Beard*, 8 How. 451, 467, 12 L. Ed. 1151.

An agent has power to do an act for the benefit of his principal, and indispensable to carry out the purpose of the agency, and naturally implied from the relation of the parties. *Boyle v. Zacharie*, 6 Pet. 635, 8 L. Ed. 527.

A person who is manager of the whole concern, for the proprietors of the tan yard, with power to buy hides and sell leather, has power to charge them for skins and hides, received by him in the course of business. *Barry v. Foyles*, 1 Pet. 311, 7 L. Ed. 157. See the title

DOCUMENTARY EVIDENCE, vol. 5, pp. 431, 460.

**Implied authority to fill in blanks in negotiable instruments.**—See the title ALTERATION OF INSTRUMENTS, vol. 1, pp. 261, 268.

**Where a power to sell or convey is given in writing and not aided by language conferring a wide discretion, it must be construed as intending to confer all the usual means, or sanction the usual manner of performing what is intrusted to the agent.** Nor is the power confined merely to "usual modes and means," but, whether the agency be special or general, the attorney may use appropriate modes and reasonable modes; such are considered within the scope of his authority. *LeRoy v. Beard*, 8 How. 451, 467, 12 L. Ed. 1151.

**Authority given by church trustees to one of their number to pay insurance premiums, carries with it authority to procure the policy of insurance.** *Insurance Co. v. Chase*, 5 Wall. 509, 18 L. Ed. 524. See, generally, the titles INSURANCE, vol. 7, p. 66; RELIGIOUS SOCIETIES.

**The right to sue is necessarily implied in the authority to collect the goods, chattels, rights, and credits.** *Ventress v. Smith*, 10 Pet. 161, 9 L. Ed. 382.

**Authority to lay out and fix upon the plan of a town and survey it, includes the power to determine the width of the respective streets and alleys, the size and form of the lots, to mark out the public grounds, and to determine on everything so far as relates to the town, and its beauty, convenience and value.** *Barclay v. Howell*, 6 Pet. 498, 8 L. Ed. 477.

**A power of attorney to adjust a contract and to obtain the principal's release from all liability thereon necessarily implies a power in the agent to settle a liability which must necessarily be settled in order to obtain the principal's release.** *Runkle v. Burnham*, 153 U. S. 216, 226, 38 L. Ed. 694.

**An authority to subscribe to the stock of a railroad company does not authorize an agent to subscribe to the stock of a different company.** *Bates County v.*

express.<sup>38</sup>

**D. Powers Implied from Usage and Custom.**—Where a principal authorizes an agent, engaged in an established market or trade, to deal in that trade, he confers authority upon the agent to deal according to any well-established usage in such market or trade.<sup>39</sup> Where the authority of the agent is left to be inferred by the public from powers usually exercised by the agent, it is enough if the transaction in question involves precisely the same general powers, though applied to a new subject matter.<sup>40</sup>

**E. Instructions as Limiting Authority.**—Special instructions limiting the authority of a general agent, whose powers would otherwise be coextensive with the business intrusted to him, must be communicated to the party with whom he deals, or the principal will be bound to the same extent as though such special instructions were not given.<sup>41</sup>

**F. Effect of Holding Out Agent as Clothed with Authority.**—If an owner of personal property authorizes an agent to assume the apparent right to sell it, an innocent purchaser may safely buy from the agent, and his purchase will bind the principal, though in fact there was no real authority to sell, but the principal is not bound unless he has held out the agent to the public as clothed with such authority.<sup>42</sup>

Winters, 97 U. S. 83, 91, 24 L. Ed. 933.

**Power to superintend the building of a house** or other work includes the power to make the necessary contracts therefor. *Henderson Bridge Co. v. McGrath*, 134 U. S. 260, 274, 33 L. Ed. 934.

**An authority to loan money at a legal rate of interest** does not include, by implication, the authority to loan at an illegal rate. An authority to violate the law will never be presumed. *Call v. Palmer*, 116 U. S. 98, 102, 29 L. Ed. 559. See the title USURY.

**An authority to recover a principal's interest in real estate**, and for that purpose to do all such acts, and take such proceedings, and use all such lawful ways and means as he should deem necessary to assert and establish the principal's right, does not warrant a conveyance of such interest or a gift of it. *Hanrick v. Patrick*, 119 U. S. 156, 173, 175, 30 L. Ed. 396.

**38. Limitation of implied authority.**—*Angle v. North-Western, etc., Ins. Co.*, 92 U. S. 330, 23 L. Ed. 556.

Where a party to a negotiable instrument entrusts it to another for use as such, with blanks not filled up, such instrument so delivered carries on its face an implied authority to complete the same by filling up the blanks; but the authority implied from the existence of the blanks would not authorize the person entrusted with the instrument to vary or alter the material terms of the instrument by erasing what is written or printed as part of the same, nor to pervert the scope and meaning of the same by filling the blanks with stipulations repugnant to what was plainly and clearly expressed in the instrument before it was so delivered. *Angle v. North-Western, etc., Ins. Co.*, 92 U. S. 330, 23 L. Ed. 556.

**39. Powers implied from usage and**

**custom.**—*Bibb v. Allen*, 149 U. S. 481, 37 L. Ed. 817.

This is true especially when such usage is known to the principal, and is fair in itself, and does not change in any essential particular the contract between the principal and agent, or involves no departure from the instructions of the principal; provided, the transaction for which the agent is employed is legal in its character, and does not violate any rule of law, good morals, or public policy. *Bibb v. Allen*, 149 U. S. 481, 37 L. Ed. 817. See the titles BROKERS, vol. 3, p. 531; ILLEGAL CONTRACTS, vol. 6, p. 737; USAGES AND CUSTOMS.

**40. Merchants' Bank v. State Bank**, 10 Wall. 604, 19 L. Ed. 1008.

**41. Instructions as limiting authority.**—*Insurance Co. v. McCain*, 96 U. S. 84, 24 L. Ed. 653; *Insurance Co. v. Wilkinson*, 13 Wall. 222, 20 L. Ed. 617. See post, "Liability of Principal to Third Persons," IX, B, 1.

Were the law otherwise, the door would be open to the commission of gross frauds. Good faith requires that the principal should be held by the acts of one whom he has publicly clothed with apparent authority to bind him. *Story, Agency*, §§ 126, 127, and cases there cited. *Insurance Co. v. McCain*, 96 U. S. 84, 24 L. Ed. 653; *Butler v. Maples*, 9 Wall. 766, 19 L. Ed. 822; *The Schooner Freeman*, 18 Wall. 182, 15 L. Ed. 341. See post, "Effect of Holding Out Agent as Clothed with Authority," VI, F.

**42. Effect of holding out agent as clothed with authority.**—*Thatcher v. Kaucher*, 131 U. S., appx. cxlvi, 24 L. Ed. 511. See, also, *Merchants' Bank v. State Bank*, 10 Wall. 604, 19 L. Ed. 1008. See post, "Liability of Principal to Third Persons," IX, B, 1.

There must be some evidence either of permission from the principal to sell or



**G. Agent Must Act in Way Usual in Line of Business in Which He Is Acting.**—Within the sphere of the authority conferred, the act of the agent is as binding upon the principal as if it were done by the principal himself.<sup>43</sup> But it is an elementary principle, applicable alike to all kinds of agency, that whatever an agent does can be done only in the way usual in the line of business in which he is acting. There is an implication to this effect arising from the nature of his employment, and it is as effectual as if it had been expressed in the most formal terms. It is present whenever his authority is called into activity, and prescribes the manner as well as the limit of its exercise.<sup>44</sup>

**H. Duty of Third Persons to Ascertain Agent's Authority**—1. **SPECIAL AGENCY.**—In the case of a special agency, created by persons acting *en autre droit*, a person dealing with the agent is bound to inquire into the extent of his authority and to see whether the agent acts within the scope of it.<sup>45</sup>

2. **GENERAL AGENCY.**—In the case of a general agency, a person dealing with of consent to the agent representing himself to have such authority. *Thatcher v. Kaucher*, 131 U. S., appx. cxlvi, 24 L. Ed. 511.

No person can be allowed to hold out another as his agent and then disavow responsibility for his acts. *Insurance Co. v. McCain*, 96 U. S. 84, 86, 24 L. Ed. 653.

The *Freedman's Savings and Trust Company*, chartered by an act of congress approved March 3, 1865 (13 Stat. 510), being, during a financial crisis, pressed for means, its agent, with the knowledge and consent of its trustees, borrowed of A. moneys which were applied to its use. A note therefor was signed by the actuary of the institution, who subsequently transferred to A., in satisfaction thereof, certain securities belonging to the company. That officer was held out to the public as competent to make such an exchange, and there was no departure in this instance from the established usage. No fraud was committed, and the transaction was advantageous to the institution. On the failure of the company, the commissioners appointed to wind up its affairs filed their bill, praying that A. be decreed to deliver to them said securities. Held, that the commissioners are not entitled to relief. *Creswell v. Lanahan*, 101 U. S. 347, 25 L. Ed. 853. See, also, *Mechanics' Bank v. State Bank*, 10 Wall. 604, 19 L. Ed. 1008.

If the principal has, by his declarations or conduct, authorized the opinion that he has given more extensive powers to his agent than were in fact given, he cannot be permitted to avail himself of the imposition, and to protest bills, the drawing of which his conduct had sanctioned. *Schimmelpennich v. Bayard*, 1 Pet. 264, 7 L. Ed. 138.

The principle is well settled that when the owner of property in any form clothes another with the apparent title or power of disposition, and third parties are thereby induced to deal with him, they shall be protected. *Cowdrey v. Vandenberg*, 101 U. S. 572, 575, 25 L. Ed. 923. See ante, "Instructions as Limiting Authority," VI, E; post, "Duty of Third

Persons to Ascertain Agent's Authority," VI, H.

**43. Act of agent within authority binding upon principal.**—See post, "In General," IX, B, 1, a.

**44. Agent must act in way usual in line of business in which he is acting.**—*Hoffman v. Hancock, etc.*, Ins. Co., 92 U. S. 161, 23 L. Ed. 539. See post, "Liability of Principal to Third Persons," IX, B, 1.

**45. Duty of third person to ascertain agent's authority—Special agency.**—*Owings v. Hull*, 9 Pet. 607, 9 L. Ed. 246; *Butler v. Maples*, 9 Wall. 766, 19 L. Ed. 822. See post, "Liability of Principal to Third Persons," IX, B, 1; "Where Agent Exceeds Authority," IX, B, 1, b, (4).

Although a person transacting business with, an agent, on the credit of his principal, is bound to know the extent of the agent's authority, yet if the principal has, by his declarations or conduct, authorized the opinion that he had given more extensive powers to his agent than were in fact given, he cannot be permitted to avail himself of the imposition and to protest bills, the drawing of which his conduct had sanctioned. *Schimmelpennich v. Bayard*, 1 Pet. 264, 7 L. Ed. 138. See ante, "Effect of Holding Out Agent as Clothed with Authority," VI, F.

Agents, held out as such by their principals for certain defined purposes, well known to the public, cannot bind their principals by any acts done outside of the scope of their authority, as defined by the well-known purposes of their agency. Masters of vessels are authorized to sign bills of lading, and the instruments when duly executed in the usual course of business bind the owners of the vessel if the goods were laden on board or were actually delivered into the custody of the master, but it is well-settled law that the owners are not liable, if the party to whom the bill of lading was given had no goods or the goods described in the bill of lading were never put on board nor delivered into the custody of the master. Like principles are applied in all cases where the authority of the agent is limited and

the agent is not bound to see whether the agent acts within the scope of his powers.<sup>47</sup>

**I. Construction of Authority**<sup>48</sup>—1. IN GENERAL.—A special power is to be strictly construed, so as to sanction only such acts as are clearly within its terms,<sup>49</sup> but the object of the parties is always to be kept in view, and where the language used will permit, that construction should be adopted which will carry out, instead of defeating, the purpose of the appointment.<sup>50</sup> If the construction of an agent's authority be in some doubt, not only may usage be resorted to for explanation, but the agent may do what seems from the instrument plausible and correct; and though it turn out in the end to be wrong, as understood by the principal, the latter is still bound by the conduct of the agent.<sup>51</sup> A general power of attorney is sufficient to authorize an agent to give a general release in the name of his principal.<sup>52</sup> A power of attorney given to two persons, in which they are referred to as "the lawful attorney or attorneys" of the constituent, vests a several as well as a joint authority in the attorneys.<sup>53</sup>

the limitations as defined by the purposes of the agency are well known to the public. *Merchants' Bank v. State Bank*, 10 Wall. 604, 19 L. Ed. 1008.

Every person who deals with or through an agent assumes all the risk of a lack of authority in the agent to do what he does. Negotiable paper is no more protected against this inquiry than any other. *Anthony v. County of Jasper*, 101 U. S. 693, 25 L. Ed. 1005.

In regard to notes and bills issued or accepted by an agent, acting under a general or special power, the rule is that, in each case the person dealing with the agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that the paper on which he relies comes within the power under which the agent acts. And this applies to every person who takes the paper afterwards; for it is to be kept in mind that the protection which commercial usage has thrown around negotiable paper cannot be used to establish the authority by which it was originally issued. *Marsh v. Fulton County*, 10 Wall. 676, 19 L. Ed. 1040. See, also, *Merchants' Bank v. State Bank*, 10 Wall. 604, 19 L. Ed. 1008. See, generally, the title **BILLS, NOTES AND CHECKS**, vol. 3, p. 257.

**47. General agency.**—*Owings v. Hull*, 9 Pet. 607, 9 L. Ed. 246.

**48. Construction of authority.**—See, generally, the titles **INTERPRETATION AND CONSTRUCTION**, vol. 7, p. 257; **POWERS**, ante, p. 538.

**49. Special powers strictly construed.**—*Holladay v. Daily*, 19 Wall. 606, 22 L. Ed. 187; *Very v. Levy*, 13 How. 345, 14 L. Ed. 173. See, also, *Morrill v. Cone*, 22 How. 75, 16 L. Ed. 253.

By this is meant that neither the agent nor a third person dealing with him in that character, can claim under the power any authority which they had not a right to understand its language conveyed, and the authority is not to be extended by mere general words beyond the object in view. *Very v. Levy*, 13 How. 345, 358,

14 L. Ed. 173, citing *LeRoy v. Beard*, 8 How. 451, 12 L. Ed. 1151.

If the words in question touch only the particular mode in which an object, admitted to be within the power, is to be affected and they are ambiguous, and with a reasonable attention to them would bear the interpretation on which both the agent and the third person has acted, the principal is bound, although upon the more refined and critical examination the court might be of opinion that a different construction would be more correct. *Very v. Levy*, 13 How. 345, 358, 14 L. Ed. 173, citing *LeRoy v. Beard*, 8 How. 451, 12 L. Ed. 1151.

**50. Intention of parties controls.**—*Holladay v. Daily*, 19 Wall. 606, 22 L. Ed. 187.

**51.** *LeRoy v. Beard*, 8 How. 451, 468, 12 L. Ed. 1151.

**52. General power of attorney.**—*Quesnel v. Mussy*, 1 Dall. 449, 1 L. Ed. 218.

**53. Joint and several power of attorney.**—*Greenleaf v. Birth*, 5 Pet. 132, 8 L. Ed. 72.

A power of attorney was given by C., to A. and B., to make, in his name, an acknowledgment of a deed for land in the city of Washington, before some proper officer, with a view to its registration, constituting them "the lawful attorney or attorneys" of the constituent; A. and B. severally appeared before different duly-authorized magistrates, in Washington, at several times, and made a several acknowledgment, in the name of their principal. Held, that the true construction of the power is that it vests a several as well as a joint authority in the attorneys; they are appointed "the attorney or attorneys;" and if the intention had been to give a joint authority only, the words "attorney" and "or" would have been wholly useless. To give effect, then, to all the words, it is necessary to construe them distributively, and this is done by the interpretation before stated; they are appointed his attorneys, and each of them is appointed his attorney for the purpose of acknowledging the

2. **TO BUY AND SELL PERSONALTY.**—Authority to buy one class of goods would not be authority to buy another and entirely different class, and authority to buy in the usual course of business would not be authority to buy outside of that course of business,<sup>54</sup> and an authority to sell for a certain price and on certain terms, is not satisfied by an agreement to sell for the price named, but on terms different from those specified.<sup>55</sup> But where an agent was authorized to buy on the best possible terms, not paying an average of more than a certain sum per pound, this contemplated his agreeing to pay in some cases more than the sum specified.<sup>56</sup> A general power to borrow money and to purchase property includes authority to give to the lender of the money, or to the seller of the property the ordinary securities. Among these are banknotes, or acceptances and collaterals.<sup>57</sup> Where an agent buys an article for his principal and the price goes down, another agent of the same principal has no authority to repudiate the contract unless specially directed to do so.<sup>58</sup> If one person constitutes another his "general and special agent to do and transact all manner of business," this does not necessarily authorize the agent to sell stocks or other property of the principal.<sup>59</sup> By the common law, an agent for sale has no power to pledge, whether the owner has intrusted him with the possession of the goods themselves, or with the symbol of them, as by consigning them to him by a bill of lading in which he is consignee or indorsee.<sup>60</sup> Authority, without restriction to an agent to sell, carries with it authority to warrant.<sup>61</sup> An agent who is authorized to negotiate an arrangement with a third person to accept consignments of goods from his principal and to sell the same on the latter's account, has no authority after the consignments are received, to withdraw them, or to exonerate the person receiving the consignments from his obligation to account to the principal for the sales.<sup>62</sup>

deed. *Greenleaf v. Birth*, 5 Pet. 132, 8 L. Ed. 72. See post, "Where Authority Given Jointly to Several Persons," VII, E.

**54. Authority to buy.**—*Schultz v. Jordan*, 141 U. S. 213, 35 L. Ed. 705.

**55.** *DeSollar v. Hanscome*, 158 U. S. 216, 222, 39 L. Ed. 956.

**56.** *Butler v. Maples*, 9 Wall. 766, 775, 19 L. Ed. 822.

**57.** *Hatch v. Coddington*, 95 U. S. 48, 24 L. Ed. 339.

A general power conferred upon the agent of a railroad company to borrow money on its behalf, in such sums, for such length of time, and at such a rate of interest as he may think proper, and to purchase iron rails, locomotives, machinery, etc., on such terms as he may deem advisable, and, in order so to do, to make, execute, and deliver obligations, bills of exchange, contracts, and agreements of the company, includes authority to give to the lender of the money borrowed, or to the seller of the things purchased, the ordinary securities. *Hatch v. Coddington*, 95 U. S. 48, 24 L. Ed. 339.

**58. Repudiation of contract made by another agent.**—*Law v. Cross*, 1 Black 533, 17 L. Ed. 185.

**59. Authority to sell.**—*Hodge v. Combs*, 1 Black 192, 17 L. Ed. 157.

If the agent sells public stocks under such vague and indefinite authority, it is at least necessary for the purchaser, when his title comes in controversy, to show that he bought in good faith and paid a

fair consideration. *Hodge v. Combs*, 1 Black 192, 17 L. Ed. 157.

**60. Agent for sale has no parol to pledge.**—2 Kent Com. 625. *Allen v. St. Louis Bank*, 120 U. S. 20, 32, 30 L. Ed. 573.

**61.** *Schuchardt v. Allens*, 1 Wall. 359, 17 L. Ed. 642. See post, "To Sell and Convey Real Estate," VI, I, 3. See the title **WARRANTY**.

**62. To alter or modify contract.**—*Berthold v. Goldsmith*, 24 How. 536, 16 L. Ed. 762.

To enlarge his business, Goldsmith, the original plaintiff, authorized a third person to go to St. Louis to negotiate an arrangement with some commission house there to accept consignments of cigars from him and to sell the same on his account, agreeing with the person so authorized to give him half the profits with a guaranty that his compensation should amount to eighteen hundred dollars per annum. He made the arrangement with the defendants, stipulating as to their commissions and that the cigars should be shipped at Baltimore in bond, subject to duties and charges, and notified the plaintiff of the terms and conditions; whereupon the plaintiff wrote the defendants a letter, concluding with these words: "All shipped to your house. I will hold you responsible;" and sent two invoices of cigars, which were duly received. Afterwards, the person who negotiated the arrangement wrote an order to the defendants to deliver all the cigars, not



3. To SELL AND CONVEY REAL ESTATE.—It is a general proposition that a power to sell gives authority to sell for cash only, and does not uphold a mere exchange.<sup>63</sup> An authority given to an agent to sell real estate authorizes him to contract for the sale of such real estate, but not to convey it.<sup>64</sup> A power of attorney authorizing an agent to contract for the sale of, and to sell certain real estate, either in whole or in part, and on such terms in all respects as he shall deem most advantageous, and to execute deeds of conveyance necessary for the full and perfect transfer of all the principal's right, title, etc., as sufficiently in all respects as he could do personally in the premises, has been construed as giving to the agent the power to enter into a covenant of warranty.<sup>65</sup> But a power "to sell, dispose of, contract, and bargain for land, etc., and to execute deeds, contracts and bargains for the sale of the same," does not authorize a relinquishment to the state of Kentucky of the land of the constituent, under the act of the legislature of that state of 1794; which allows persons who held lands subject to taxes to relinquish and disclaim their title thereto, by making an entry of the tract, or the part thereof disclaimed, with the surveyor of the county,<sup>66</sup> and where an agent was authorized to sell lands for cash, or on a credit with security on real property, to execute a deed describing the consideration, acknowledging its payment, and to receive the money or securities the purchaser might render, he is not authorized to exchange the lands for other property, or to accept the notes of the vendee as cash, or to accept personal security or any form of

sold, to another firm, upon receiving whatever sums they had advanced. The firm paid the advances, received the cigars and sold them, but no portion of the proceeds ever came to the hands of the plaintiff. The defense was that the person who gave the order was either a partner or an agent of the plaintiff, and in either capacity had a right to direct a transfer of the cigars, and thus exonerate the defendants from all liability. Held, he was not an agent of the plaintiff authorized to withdraw the consignments, or to exonerate the defendants from their obligation to account for the sales. On the contrary, the arrangement was that the cigars should remain in their custody and control, and that they should stand responsible for the proceeds, and the case shows that it was never changed. The court below were right in instructing the jury that there was no evidence to sustain the second ground of defense. *Berthold v. Goldsmith*, 24 How. 536, 16 L. Ed. 762.

**63. Authority to sell for cash only.**—*Woodward v. Jewell*, 140 U. S. 247, 35 L. Ed. 478, citing *Morrill v. Cone*, 22 How. 75, 16 L. Ed. 253.

**64. Authority to contract for sale of real estate.**—*Lyon v. Pollock*, 99 U. S. 668, 25 L. Ed. 265.

A., at the commencement of the late rebellion, owned property in San Antonio, Texas, consisting principally of real estate and stock in a gas company. Apprehending that his life was in danger in consequence of his avowed hostility to secession, he fled from the country, and, by a power of attorney, authorized B. to sell the property for whatever consideration and upon such terms as he might deem best, and to execute all proper instruments of transfer. B. took possession of the

property, which he retained until July, 1865, when he gave the charge of it, with the business and papers in his hands, to C. A., thereupon wrote to C., "I wish you to manage (my property) as you would with your own. If a good opportunity offers to sell every thing I have, I would be glad to sell. It may be parties will come into San Antonio who will be glad to purchase my gas stock and real estate." Held, that C. was thereby authorized to contract for the sale of the real estate, but not to convey it. *Lyon v. Pollock*, 99 U. S. 668, 25 L. Ed. 265.

**65. Authority to sell, execute deeds of conveyance, etc.**—*LeRoy v. Beard*, 8 How. 451, 12 L. Ed. 1151.

These expressions aided by the situation of the parties and the property, the usages of the country on such subjects, the acts of the parties themselves, and any other circumstance having a legal bearing upon the question, held to give the agent power to enter into a covenant of seizin. *LeRoy v. Beard*, 8 How. 451, 12 L. Ed. 1151. See the title COVENANTS, vol. 5, p. 5.

**66. Clarke v. Courtney**, 5 Pet. 319, 8 L. Ed. 140.

"The letter of attorney manifestly contemplated the ordinary contracts of bargain and sale between private persons for a valuable consideration; and conveyance by deed, without covenants of warranty. The very reference to covenants shows that the parties had in view the common course of conveyances, in which covenants of title are usually inserted, and the clause excludes them. The statute does not contemplate any deed or conveyance, but a mere entry of relinquishment or disclaimer of record; this entry constitutes a good title in the state; the state does

security except that specified in the condition.<sup>67</sup> Where a power of attorney is executed authorizing the agent to make conveyances to purchasers when sales were made by third persons, such a power is not a power to convey generally and at the donee's discretion, and being a naked power to convey when a sale had been made, a deed made by the donee not in accordance with the power is a fraud upon the power, because it is in violation of the authority thereby vested.<sup>68</sup> Where a party, holding a patent from the United States for certain lands, authorized, by a power of attorney, his agent "to act upon the application and demand of any person actually owning" town lots in Denver City, within the limits of the lands, and to execute and deliver deeds to such persons who "may apply for the same within three months from" a certain date, it was held that the "application and demand" must be made within that time, but that the authority of the agent to adjudicate the claims was not so limited.<sup>69</sup> A power of attorney created by two or more persons possessing distinct interests in real property may, of course, be so limited as to prevent a sale of the interest of either separately; but in the absence of qualifying terms, or other circumstances, thus restraining the authority of the attorney, a power to sell and convey real property, given by several parties, in general terms, is a power to sell and convey the interest of each, either jointly with the interests of the others, or by a separate instrument.<sup>70</sup>

4. TO COLLECT AND RECEIVE PAYMENT.—*a. In General.*—Generally as to authority of agents to receive payment for and on behalf of their principals, see the title PAYMENT, ante, p. 319. A power of attorney authorizing the attorney to sue for, recover, and receive moneys, debts, goods, etc., and to make acquittances or other sufficient discharges for same, and generally to do all other acts necessary and lawful to be done in and about the premises, authorizes the attorney to give

not buy, nor does the party sell, in such case. It seems to us that the nature of such a relinquishment, amounting, as it does, to a surrender of title without any valuable consideration, ought not to be inferred from any words, however general, much less from words so appropriate to cases of mere private sales as those in the present letter of attorney. The question, whether such a relinquishment should be made or not, is so emphatically a matter of pure discretion in the owner in the nature of a donation, that it ought not to be presumed to be delegated to another without the most explicit words used for, and appropriate to, such a purpose. We think that the words of the present letter of attorney are not sufficient to clothe the agent with such an authority." *Clarke v. Courtney*, 5 Pet. 319, 8 L. Ed. 140.

67. *Morrill v. Cone*, 22 How. 75, 16 L. Ed. 253.

68. **Power to convey when sales are made by third persons.**—*Deputron v. Young*, 134 U. S. 241, 33 L. Ed. 923.

69. *Clements v. Macheboeuf*, 92 U. S. 418, 23 L. Ed. 504. See the title PUBLIC LANDS.

70. **Power given by two or more persons to sell and convey distinct interests.**—*Holladay v. Daily*, 19 Wall. 606, 22 L. Ed. 187. See, also, *Williams v. Paine*, 169 U. S. 55, 42 L. Ed. 658.

The cases are numerous where a power given by several has been held invalid as to some of the parties, and yet sufficient to authorize a transfer of the title of the

others. The decision of those cases has proceeded on the doctrine stated, that where a power is given by several the interest of each in the property, to which the power refers, may be separately transferred. *Holladay v. Daily*, 19 Wall. 606, 22 L. Ed. 187.

A power of attorney to sell and convey real property, given by a husband and his wife in general terms, without any provision against a sale of the interest of either separately, or other circumstance restraining the authority of the attorney in that respect, authorizes a conveyance by the attorney of the interest of the husband by a deed executed in his name alone. *Holladay v. Daily*, 19 Wall. 606, 22 L. Ed. 187.

Where a power of attorney is made by husband and wife, French people resident in France, to sell lands in Illinois—the power, a long French instrument with the usual verbiage of the style de notaire, speaking of the lands as lands which "Mr. and Madame," etc., own there—there being evidence that the husband owned land there, but none that the husband and wife did, the presumption is that the joinder of the wife was made to alienate some supposed right of dower, and not to describe lands owned by the wife and husband jointly, instead of by the husband alone; this at least in favor of a bona fide purchaser, long in possession. *Dolton v. Cain*, 14 Wall. 472, 20 L. Ed. 830. See the title HUSBAND AND WIFE, vol. 6, p. 716.

a receipt in full, which will bind the party executing the power.<sup>71</sup> But a power of attorney given by a vendor to an agent to receive any sum or sums of money on account of and in part payment of a mortgage, etc., does not authorize the agent to give a receipt in full for certain balances by way of adjustment and compromise, and to arbitrate and decide all matters in variance between the parties. And where the vendor disapproved the acts of the agent, the payment is not good, even on account, against the vendor.<sup>72</sup> Instructions to the president or cashier of

**71. Authority to collect and receive payment.**—*Chouteau v. United States*, 95 U. S. 61, 24 L. Ed. 371. See, also, *Mackey v. Cox*, 18 How. 100, 15 L. Ed. 299.

A., having a claim against the government under his contract with the navy department for building the ironclad steam battery "Etlah," executed to B. a power of attorney authorizing him to sue for, recover, and receive all such sum or sums of money, debts, goods, wares, and other demands whatsoever, and especially payments that were or would be on his contract for building the "Etlah," with full power in and about the premises; to have, use, and take all lawful means and ways in his name for the purposes aforesaid; and to make acquittances or other sufficient discharges for him and in his name, and generally to do all other acts necessary and lawful to be done in and about the premises. The contract fixed the amount to be paid for the battery, and provided for its completion and delivery within eight months from June 24, 1863. For every month that the delivery might be made earlier than the time fixed, the contractor should receive \$4,500, and for every month later he should pay a like sum. It also provided that the department might, at any time during the progress of the work, make such alterations and additions to the plans and specifications as it might deem necessary and proper, the extra expense caused thereby to be paid at fair and reasonable rates, to be determined when the changes were directed to be made. The battery was finished for delivery in November, 1865, and the proper authorities of the department certified that the extra work and materials, rendered necessary in making the alterations and additions that were ordered, amounted to \$116,111. A portion of that sum having previously been paid, a voucher, in favor of A., for \$26,653.17, "being the full and final payment on all extras, and in full for all claims and demands for that work," was approved by the department April 24, 1866, and paid May 11 following to B., who, under his power of attorney, receipted it in full. A.'s assignee, asserting that the extra work amounted to \$172,273.55, brought suit in the court of claims to recover the excess over the amount paid, and \$118,283.30 alleged to be due, irrespective of extras, on account of an increase in the price of labor and materials during the time that the completion of the vessel was delayed by reason

of such alterations and additions. Held: 1. That the power of attorney authorized B. to accept payment of the voucher, which upon its face declared it was the last and full payment for the extra work, and that his acceptance bound A., and barred a recovery for such work. 2. That the United States is not liable to A. for the increased cost of the labor and materials. *Chouteau v. United States*, 95 U. S. 61, 24 L. Ed. 371.

Where a party gives to another a power of attorney, in blank, and defectively witnessed, authorizing—"to collect and receive any and all moneys due to him" from the government under an agreement specified, "and to make a good and sufficient release, acquittal or receipt for the same," and generally to do any and all things necessary in the premises—this power being by statute "null and void" from the defective execution—and the person to whom the power is thus given fills the blank with the name of an attorney at law, and instructs him to sue the government, and the attorney files a petition in the court of claims in the name of the principal in the power, "to the use and benefit" of the person to whom the power was delivered, the petition representing that such person is the person beneficially interested, and the principal—though not authorizing the suit—subsequently, with knowledge of the facts, suffers the suit to proceed and co-operates in its prosecution, and while the action is pending, a settlement is effected between the person to whom the power was delivered and the government (the principal to the power being no party to the settlement, but allowing it to proceed without objection), and the money is paid under the settlement, but owing to the law officers of the government not being advised of the settlement, the suit is not formally withdrawn—the principal in the power cannot, afterwards, file an amended petition alleging that the power was not intended to, and did not confer any power or authority on anybody to do more than to prosecute the claim to settlement, and to receive any draft in the name of the principal; and so claim payment under the contract himself. He is estopped by his own action from disputing the validity of 19 Wall. 13, 22 L. Ed. 144. See the title UNITED STATES.

**72.** *Curtis v. Innerarity*, 6 How. 146, 13 L. Ed. 380.  
the settlement. *Stowe v. United States*,



a bank to hold certain debts subject to the order of a person, who had become personally responsible for a sum of money, which these debts were intended in part to meet, and to place such debts when collected, to the credit of the party giving the instructions, import an authority to the party, subject to whose order the debts are held, to control the settlement and collection of the several demands, but is not necessarily a transfer of the title and interest in them.<sup>73</sup> A power of attorney drawn up in Spanish South America, and by Portuguese agents, in which throughout there is verbiage and exaggerated expression, will be held to authorize no more than its primary and apparent purpose. Hence a power to prosecute a claim in the Brazilian courts will not be held to give power to prosecute one before a commissioner of the United States at Washington, notwithstanding that the first named power is given with great superfluity, generality, and strength of language.<sup>74</sup> A party discounting a draft, and receiving therewith, deliverable to his order, a bill of lading of the goods against which the draft was drawn, acquires a special property in them, and has a complete right to hold them as security for the acceptance and payment of the draft. Where such party forwarded the draft, with the bill of lading thereto attached, to an agent, with instructions, by special indorsement on the bill and by letter, to hold the goods in the bill mentioned, against which the draft had been drawn, until payment of the draft should be made, the agent has no power, prior to such payment, to make a delivery which would divest the ownership of his principal.<sup>75</sup> A bill of lading of merchandise, deliverable to order, when attached to and forwarded with a time draft, sent without special instructions to an agent for collection, may be surrendered to the drawee on his acceptance of the draft. It is not the agent's duty to hold the bill after such acceptance.<sup>76</sup>

b. *Medium and Manner of Payment.*—Generally, as to the medium in which an agent may receive payment of a debt due his principal, see the title PAYMENT, ante, p. 319. Where a person is authorized to sell land for cash, or on a credit with security on real property, he cannot accept the notes of the vendee as cash.<sup>77</sup> Where an agreement to receive payment in goods was made by a person who acted under a power of attorney from the creditor, authorizing him to trade, sell, and dispose of notes, bills, bonds or mortgages, and, under this power, a partial payment was received in goods, which was afterwards recognized as a payment by the creditor, the power was sufficient to authorize an agreement to receive the remaining amount, also in goods, at any time when called for within twelve months, especially as the bond evidencing the debt had yet four years to run.<sup>78</sup>

5. TO ISSUE OR ACCEPT COMMERCIAL PAPER.—An individual may, instead of signing with his own hand, the notes and bills which he issues or accepts, appoint an agent to do these things for him. And this appointment may be a general power to draw or accept in all cases as fully as the principal could; or it may be a limited authority to draw or accept under given circumstances, defined under the instrument which confers the power. But, in each case, the person dealing with the agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that the paper on which he relies comes within the power under which the agent acts.<sup>79</sup> The principles regarding the power of an individual to appoint

73. *Rogers v. Lindsey*, 13 How. 441, 14 L. Ed. 215.

74. *Wright v. Ellison*, 1 Wall. 16, 17 L. Ed. 355.

75. *Collection of draft with bill of lading attached.*—*Dows v. National Exchange Bank*, 91 U. S. 618, 23 L. Ed. 214. See the title BILL OF LADING, vol. 3, pp. 232, 237, 242.

76. *National Bank v. Merchants' Nat. Bank*, 91 U. S. 92, 23 L. Ed. 208.

77. *Payment in cash.*—*Morrill v. Cone*, 22 How. 75, 16 L. Ed. 253.

78. *Payment in goods.*—*Very v. Levy*, 13 How. 345, 14 L. Ed. 173.

79. *The Floyd Acceptances*, 7 Wall. 666, 19 L. Ed. 169.

And this applies to every person who takes the paper afterwards, for it is to be kept in mind that the protection which commercial usage throws around negotiable paper cannot be used to establish the authority by which it was originally issued. These principles are well established in regard to the transactions of individuals. *The Floyd Acceptances*, 7

an agent to sign notes and bills which he issues or accepts, and the authority of such agent, are equally applicable to agents acting in behalf of the government,<sup>80</sup> and when an officer of the government, authorized to do so, accepts a draft in behalf of the United States, or one of its departments, the validity of the instrument cannot be disputed, in the hands of an innocent holder.<sup>81</sup> As there is no express authority to be found for any officer or agent of the government to draw or accept bills of exchange, such authority can only exist when these are the appropriate means of carrying into effect some other power belonging to such officer or agent under his prescribed duties.<sup>82</sup> It does not follow that because an officer or agent may lawfully issue bills of exchange for some purposes, that he can in that mode bind the government in another where he has no such authority.<sup>83</sup> And where, under existing laws, there can be no lawful occasion for an officer or agent to accept drafts on behalf of the government, such acceptances cannot bind it, though there may be occasion for drawing or paying drafts which may bind the government.<sup>84</sup>

**J. Authority of Public Agents.**—See the title PUBLIC OFFICERS.

**K. Effect of Recall of Authority.**—Persons who deal with an agent before notice of the recall of his powers are not affected by the recall.<sup>85</sup>

**L. Proof of Authority**<sup>86</sup>—1. **NECESSITY AND BURDEN OF PROOF.**—In order for the acts and declarations of an agent to bind the principal, it must be shown by legal evidence that the agent has authority to act in the matter.<sup>87</sup> There must be some satisfactory proof of a person being actually an agent, before the court can allow such person to be sworn under the act of assembly, relating to continental bills of credit, to identify the money in dispute.<sup>88</sup> A party who seeks to charge a principal for the contracts made by his agent must prove that agent's

Wall. 666, 19 L. Ed. 169. See the title **BILLS, NOTES AND CHECKS**, vol. 3, p. 257.

**80.** The Floyd Acceptances, 7 Wall. 666, 19 L. Ed. 169.

Whenever a negotiable paper is found in the market purporting to bind the government, it must necessarily be by the signature of an officer or agent of the government, and the purchaser of such paper, whether the first holder or another, must, at his peril, see that the officer or agent had authority to bind the government. The Floyd Acceptances, 7 Wall. 666, 19 L. Ed. 169.

As the United States can only become a party to a bill of exchange by the action of an officer or authorized agent of the government, the authority of such officer or agent depends upon the same principles that determine such authority in other contracts, and is not aided by the doctrine that, when once lawfully made, negotiable paper has a more liberal protection than other contracts in the hands of innocent holders. The Floyd Acceptances, 7 Wall. 666, 19 L. Ed. 169. See the titles **PUBLIC OFFICERS**; **UNITED STATES**.

**81.** The Floyd Acceptances, 7 Wall. 666, 19 L. Ed. 169; *United States v. Bank*, 15 Pet. 377, 10 L. Ed. 774.

**82.** The Floyd Acceptances, 7 Wall. 666, 19 L. Ed. 169.

**83.** The Floyd Acceptances, 7 Wall. 666, 19 L. Ed. 169.

**84.** The Floyd Acceptances, 7 Wall. 666, 19 L. Ed. 169.

The acceptances known as "The Floyd

Acceptances"—(certain acceptances on long time, made by the Hon. J. B. Floyd, secretary of war, of drafts drawn on him on army contracts, before the services contracted for were received, or the supplies to be furnished were delivered)—were mere accommodation loans of the credit of the United States, without authority, and therefore void. The Floyd Acceptances, 7 Wall. 666, 19 L. Ed. 169.

**85. Effect of recall of authority.**—*Hatch v. Coddington*, 95 U. S. 48, 24 L. Ed. 339. See post, "Termination of Agency," XII.

No person can be allowed to hold out another as his agent, and then disavow responsibility for his acts. After one has appointed an agent in a particular business, parties dealing with him in that business have a right to rely upon the continuance of his authority, until in some way informed of its revocation. The authorities to this effect are numerous, and will be found cited in the treatises of Paley and Story on Agency. *Insurance Co. v. McCain*, 96 U. S. 84, 86, 24 L. Ed. 653.

**86. Proof of authority.**—As to proof of agency, see *United States v. Jones*, 8 Pet. 387.

**87. Necessity.**—*United States v. Boyd*, 5 How. 29, 51, 12 L. Ed. 36; *United States v. Gooding*, 12 Wheat. 460, 6 L. Ed. 693. See post, "Liability of Principal to Third Persons," IX, B, 1. See the title **DECLARATIONS AND ADMISSIONS**, vol. 5, p. 214.

**88.** *Eastwick v. Hugg*, 1 Dall. 222, 224, 1 L. Ed. 109.

authority; and it is not for the principal to disprove it. The burden is on the plaintiff.<sup>89</sup>

2. **MANNER OF PROOF.**—That an agent has authority, and that his act is within its scope, may be proved by express authorization,<sup>90</sup> or by the course of business.<sup>91</sup> An agent's authority cannot be proved by his own acts alone.<sup>92</sup> An agent is a competent witness to prove his own verbal authority to make a contract for the delivery of stock, upon which suit is brought, and this is so although the agent's commission depends upon the establishment of the contract, and he has an action actually depending for his commissions on making the contract.<sup>93</sup> But an agent is not a competent witness to prove his own written authority to sell lands. The contents of the writing must be proved by other witnesses, and then he may be allowed to show in what manner he has executed his instructions.<sup>94</sup>

**M. Province of Court and Jury.**—The question whether at the time of doing an act, a person was acting as agent of another, is one for the jury to decide,<sup>95</sup> and when the question arises whether an act of an agent was done in the exercise and within the limits of the powers delegated, those powers are necessarily inquirable into by the court and jury.<sup>96</sup>

## VII. Manner of Executing Authority.

**A. In General.**—When the authority conferred upon a mandatary by a letter of attorney is special and limited, his acts under it are valid only as they come within its scope and operation. He was bound to conform to the conditions it contains, and in its execution to adopt the modes it indicates.<sup>97</sup>

**B. As Dependent upon Whether Contract Sealed or Unsealed.**—1. **CONTRACTS UNDER SEAL.**—Where the question as to the manner in which an agent executes his authority in making a contract arises, there is a broad line of distinction between instruments under seal and stipulations in writing not under seal, or by a parol. In the former case the contract must be executed in the name of the

89. **Burden of proof.**—*Schutz v. Jordan*, 141 U. S. 213, 35 L. Ed. 705. See post, "Liability of Principal to Third Persons," IX, B, 1. See the title **PRESUMPTIONS AND BURDEN OF PROOF**, ante, p. 618.

90. **Manner of proof.—Express authorization.**—*United States v. Gooding*, 12 Wheat. 460, 6 L. Ed. 693; *Parsons v. Armor*, 3 Pet. 413, 7 L. Ed. 724.

A general power of attorney, executed in the United States is, sufficient when authenticated by proof of the handwriting of the party and of the subscribing witnesses, before the mayor of a city. The act of assembly relates only to powers executed in a foreign country, and leaves the matter here to common-law proof. *Quesnel v. Mussy*, 1 Dall. 449, 1 L. Ed. 218.

91. **Course of business.**—*United States v. Gooding*, 12 Wheat. 460, 6 L. Ed. 693.

92. **Agent's own acts as proof of authority.**—*Thatcher v. Kaucher*, 131 U. S., appx. cxlvi, 24 L. Ed. 511.

93. **Competency of agent as witness.—Verbal authority to contract for delivery of stock.**—*Livingston v. Swanwick*, 2 Dall. 300, 1 L. Ed. 389.

94. **Written authority to sell lands.**—*Nicholson v. Millin*, 2 Dall. 246, 1 L. Ed. 267.

95. **Whether person acts as agent for another.**—*Turner v. Yates*, 16 How. 14, 14 L. Ed. 824.

The correspondence between the plaintiff and one alleged to have acted as his agent, offered to show that the latter was acting in the matter as principal, was properly allowed to go to the jury. *Turner v. Yates*, 16 How. 14, 14 L. Ed. 824.

96. **Whether agent acts in exercise of and within limits of authority.**—*Baldwin v. Bank*, 1 Wall. 234, 17 L. Ed. 534; *Mechanics' Bank v. Bank*, 5 Wheat. 326, 5 L. Ed. 100.

97. **Manner of executing authority.—In general.**—*Morrill v. Cone*, 22 How. 75, 16 L. Ed. 253. See, also, *Woodward v. Jewell*, 140 U. S. 247, 35 L. Ed. 478.

Although under a power of attorney, authorizing a conveyance of lands, the legal title does not pass when the attorney executes a deed, unless the sale was made in accordance with the requirements of the power, yet in this case, where the deed executed by the attorney was apparently within the scope of his power, and admitted the payment of the consideration, it was *prima facie* evidence of the conveyance of the legal title. The evidence offered to show that the power of attorney had not been complied with, was not sufficient in an action of ejectment to recover the lands after a long period of time had elapsed, and the lands had been repeatedly sold. *Morrill v. Cone*, 22 How. 75, 16 L. Ed. 253. See the title **EJECTMENT**, vol. 5, p. 695.



principal, must be under seal, and must purport on its face to be the contract of the principal and not of the agent acting for him.<sup>98</sup> Where an instrument, executed by an agent, shows on its face the names of the contracting parties, the agent may sign his own name first and add to it, "agent for his principal," or he may sign the name of his principal first, and add, "by himself as agent."<sup>99</sup> Where a deed is executed on behalf of a state by a public officer duly authorized, and this fact appears upon the face of the instrument, it is the deed of the state, notwithstanding the officer may be described as one of the parties, and may have affixed his individual name and seal.<sup>1</sup> By the civil code of Dakota, all distinctions between sealed and unsealed instruments are abolished, and any instrument within the scope of his authority, by which an agent intends to bind his principal, does bind him, if such intent is plainly inferable from the instrument itself.<sup>2</sup> Under the Mexican-Spanish law formerly prevailing in Texas a power of attorney to sell and convey land may be properly executed by the attorney in his own name, specifying that he executes the deed as attorney for his principal.<sup>3</sup>

2. **CONTRACTS NOT UNDER SEAL.**—The requirements as to execution of authority by an agent in the case of contracts in writing not under seal, or by parol, are less formal than in the case of contracts under seal. In such case the question

98. **Contract under seal.**—Whitney v. Wyman, 101 U. S. 392, 25 L. Ed. 1050; Smith v. Morse, 9 Wall. 76, 19 L. Ed. 597; Clarke v. Courtney, 5 Pet. 319, 8 L. Ed. 140; Gottfried v. Miller, 104 U. S. 521, 26 L. Ed. 851; Sun Printing, etc., Ass'n v. Moore, 183 U. S. 642, 647, 46 L. Ed. 366. See post, "Liability of Principal to Third Persons," IX, B, 1; "Liability of Agent to Third Persons," IX, B, 2.

The general doctrine is that a power must be executed in the name of the person who gives it, and this rule is applicable to a power to transfer title to property. Hunt v. Rousmanier, 8 Wheat. 174, 5 L. Ed. 589.

A power of attorney from "James B. Clarke and Eleanor his wife," to "Carey L. Clarke" for the sale of lands, is not properly or legally executed in the following form: "I, the said Carey L. Clarke, attorney as aforesaid, etc., do;" "in witness whereof, the said Carey L. Clarke, attorney as aforesaid, has hereunto subscribed his hand and seal, this 25th day of November, in the year of our Lord 1800.—Carey L. Clarke. (L. S.)" This act does not purport to be the act of the principal, but of the attorney; this may savor of re-nuement, since it is apparent that the party intended to pass the interest and title of his principals; but the law looks not to the intent alone, but to the fact, whether the intent has been executed in such a manner as to possess a legal validity. Clarke v. Courtney, 5 Pet. 319, 8 L. Ed. 140. See the title SEALS AND SEALED INSTRUMENTS.

99. **Manner of signing contract.**—Smith v. Morse, 9 Wall. 76, 19 L. Ed. 597.

Either form may be followed; all that is required in such case is that the contract shall purport on its face to be the contract of the principal. Smith v. Morse, 9 Wall. 76, 19 L. Ed. 597.

1. **Deed executed by public officer on behalf of state.**—Sheets v. Selden, 2 Wall.

177, 17 L. Ed. 822.

In such case the state alone is bound by the deed, and can alone claim its benefits. Accordingly, where the legislature of Indiana passed two acts, one authorizing the governor, and the other the governor and auditor of the state to sell certain property of the state, and to execute a deed of the same to the purchaser on behalf of and in the name of the state, and such property being sold, the governor and auditor executed to the purchaser a deed, naming themselves as parties of the first part, but referring therein to the acts of the legislature authorizing the sale, and to a joint resolution approving the same, and declaring that, by virtue of the power vested in them by the acts and joint resolution, they conveyed the property sold, "being all the right, title, interest, claim and demand which the state held or possessed," such deed was sufficient to pass the title of the state. Sheets v. Selden, 2 Wall. 177, 17 L. Ed. 822. See the titles DEEDS, vol. 5, p. 245; PUBLIC OFFICERS; STATES.

2. **Distinctions abolished in Dakota.**—Civil Code of Dakota of 1877, §§ 925, 1373; Post v. Pearson, 108 U. S. 418, 27 L. Ed. 774.

An agreement in writing, between "W., superintendent of the Keets Mining Company, parties of the first part, and P., party of the second part," by which "the said parties of the first part" agree to deliver at P.'s mill ore from the Keets mine (owned by the company) to be crushed and milled by P.; and signed by "W., Supt. Keets Mining Co.," and by P.; is the contract of the company. Post v. Pearson, 108 U. S. 418, 27 L. Ed. 774. See, also, Whitney v. Wyman, 101 U. S. 392, 25 L. Ed. 1050; Hitchcock v. Buchanan, 105 U. S. 416, 26 L. Ed. 1078.

3. **Sale and conveyance of land under Mexican-Spanish law.**—Hanrick v. Barton, 16 Wall. 166, 21 L. Ed. 350.

is always one of intent, and the court, being untrammelled by any other considerations, will give effect to an instrument by which an agent attempts to bind his principal, if it be within the scope of his authority, and if such intent is clear and plainly inferable from the instrument itself.<sup>4</sup>

**C. Agent of Corporation.**—An agent of a corporation should, in the body of the contract, name the corporation as the contracting party, and sign as its agent or officer. This is the mode in which bank bills, policies of insurance, and many other contracts of corporations are ordinarily executed.<sup>5</sup>

**D. Power Not Coupled with an Interest.**—In the case of a naked power not coupled with an interest, the law requires that every prerequisite to the exercise of that power must precede its exercise; that the agent must pursue the power or his act will not be sustained by it.<sup>6</sup>

**E. Where Authority Given Jointly to Several Persons.**—When an authority is given jointly to several persons they must generally act jointly, or their acts are invalid. This is a general rule for private agencies, though it is not universal in its application.<sup>7</sup> But the rule is otherwise when the authority is of a public nature, it is a familiar principle that an authority given to several for public purposes may be executed by a majority of their number.<sup>8</sup>

**F. Law With Respect to Which Authority Executed.**—Every authority given to an agent or attorney, to transact business for his principal, must, in the absence of any counter proofs, be construed to be an authority to transact it according to the laws of the place where it is to be done.<sup>9</sup> And where an agent is authorized to sell property belonging to the estate of a decedent, he is bound to make such sale in conformity with the laws of the state in which the property is situated.<sup>10</sup>

**G. Defective Execution Aided in Equity.**—Where the execution by an agent of the authority conferred upon him is insufficient in form, because of the manner in which he expressed his agency in appending his signature to an instru-

**4. Contracts not under seal.**—Whitney v. Wyman, 101 U. S. 392, 25 L. Ed. 1050; Clarke v. Courtney, 5 Pet. 319, 8 L. Ed. 140; Post v. Pearson, 108 U. S. 418, 27 L. Ed. 774; Sun Printing, etc., Ass'n v. Moore, 183 U. S. 642, 648, 46 L. Ed. 366. See post, "Liability of Principal to Third Persons," IX, B, 1; "Liability of Agent to Third Persons," IX, B, 2.

As the meaning of the lawmaker is the law, so the meaning of the contracting parties is the agreement. Words are merely the symbols they employ to manifest their purpose that it may be carried into execution. If the contract be unsealed and clear, it matters not how it is phrased, nor how it is signed, whether by the agent for the principal or with the name of the principal by the agent or otherwise. The intent developed is alone material, and when that is ascertained it is conclusive. Whitney v. Wyman, 101 U. S. 392, 25 L. Ed. 1050. See, also, Sun Printing, etc., Ass'n v. Moore, 183 U. S. 642, 648, 46 L. Ed. 366.

While a person is referred to in the body of an instrument as an individual, yet if he signs the agreement "for the Sun Printing and Publishing Association," this is a disclosure of the principal, and an apt manner of expressing an intent to bind such principal. Sun Printing, etc., Ass'n v. Moore, 183 U. S. 642, 648, 46 L. Ed. 366.

**5. Agent of corporation.**—Gottfried v.

Miller, 104 U. S. 521, 26 L. Ed. 851. See the titles CORPORATIONS, vol. 4, p. 621; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 8, p. 957.

**6. Power not coupled with an interest.**—Williams v. Peyton, 4 Wheat. 77, 4 L. Ed. 518. See, also, Deputron v. Young, 134 U. S. 241, 33 L. Ed. 923; Ransom v. Williams, 2 Wall. 313, 319, 17 L. Ed. 803.

Where a collector has no general authority to sell lands, at his discretion, for the nonpayment of tax, but a special power to sell in particular cases described in an act, those cases must exist, or his power does not arise. It is a naked power, not coupled with an interest. Williams v. Peyton, 4 Wheat. 77, 4 L. Ed. 518.

**7. Where authority given jointly to several persons.**—Private agents.—Cooley v. O'Connor, 12 Wall. 391, 20 L. Ed. 446. See ante, "Construction of Authority," VI, I.

**8. Public agents.**—Cooley v. O'Connor, 12 Wall. 391, 20 L. Ed. 446. See the title PUBLIC OFFICERS.

**9. Law with respect to which authority executed.**—Owings v. Hull, 9 Pet. 607, 9 L. Ed. 246. See the title CONFLICT OF LAWS, vol. 3, p. 1020.

**10. Sale of decedent's estate by agent.**—Owings v. Hull, 9 Pet. 607, 9 L. Ed. 246.

A sale of slaves, authorized by an executrix to be made in Louisiana, must be presumed to be made in the manner



ment, a court of equity will look beyond the form of the execution, and having ascertained his intention in signing the instrument, will, if possible, give it the effect intended.<sup>11</sup>

**H. Proof of Manner of Executing Authority.**—After an agent's written authority to sell land has been proved by witnesses other than himself, he may be allowed to show in what manner he has executed his instructions.<sup>12</sup>

### VIII. Delegation of Authority by Agent.

**A. Power of Agent to Delegate Authority.**—An agent ordinarily, and without express authority, or a fair presumption of one, growing out of the particular transaction or the usage of trade, has not the power to employ a subagent to do the business intrusted to him without the knowledge or consent of his principal.<sup>13</sup> The reason for this rule is that an agency is a personal trust for a ministerial purpose, and the principal employs the agent from the opinion he has of his personal skill and integrity, and the latter has no right to turn his principal over to another, of whom he knows nothing.<sup>14</sup> So if an agent be appointed to sell, he cannot depute the power to a clerk, or under agent, notwithstanding any usage of trade, unless by express assent of the principal.<sup>15</sup> The utmost relaxa-

required by the laws of that state to give it validity. And the purchaser, equally with the seller, is bound, under such circumstances, to know what these laws are, and to be governed thereby. *Owings v. Hull*, 9 Pet. 607, 9 L. Ed. 246. See the title EXECUTORS AND ADMINISTRATORS, vol. 6, p. 119.

**11. Defective execution aided in equity.**—*Stark v. Starr*, 94 U. S. 477, 24 L. Ed. 276.

A ratification by an attorney of a deed of settlement insufficient in form, because of the manner in which the attorney expressed his agency in appending his signature to the instrument declaring the ratification, will be given the effect intended by a court of equity, if such ratification has been acted upon by others, and has not been objected to by the principal, when called to his attention. The subsequent action of the principal in asserting a right in severalty to property, which he could only do upon his approval of such ratification by his attorney, will estop him from denying the ratification. *Stark v. Starr*, 94 U. S. 477, 24 L. Ed. 276.

**12. Proof of manner of executing authority.**—*Nicholson v. Mifflin*, 2 Dall. 246, 1 L. Ed. 367. See ante, "Proof of Authority," VI, L.

**13. Power of agent to delegate authority—General rule.**—*Warner v. Martin*, 11 How. 209, 229, 13 L. Ed. 667; *Shankland v. Washington*, 5 Pet. 390, 8 L. Ed. 166; *Wilson v. Smith*, 3 How. 763, 11 L. Ed. 820. See, also, *Hoover v. Wise*, 91 U. S. 308, 23 L. Ed. 392.

The plaintiff was the owner of a half ticket in "the fifth class of the National Lottery," authorized by the charter granted by congress to the city of Washington; the number of the original ticket was 5591, which drew a prize of \$25,000; the whole ticket was in the hands of Gillespie, to whom all the tickets in the lottery had been sold by the corporation

of Washington; and his agent issued the half ticket, which was signed by him, as the agent of Gillespie, the purchaser of all the tickets in the lottery; after the drawing of the prize, and before notice of the interest of any other person in the ticket No. 5591, Gillespie returned the original ticket to the managers or commissioners of the lottery, and the agents of the corporation, and received back from the corporation an equivalent to the value of the prize drawn by it, in securities deposited by him with the corporation for the payment of the prizes in the lottery. Held, that the corporation of Washington were not liable for the payment of half of the prize drawn by ticket No. 5591, to the owner of the half ticket. *Shankland v. Washington*, 5 Pet. 390, 8 L. Ed. 166.

**14. Reason for rule.**—2 Kent's Com. 633. *Warner v. Martin*, 11 How. 209, 13 L. Ed. 667.

**15. Agent to sell.**—*Warner v. Martin*, 11 How. 209, 223, 13 L. Ed. 667.

Lord Eldon in *Coles v. Trecothick*, 9 Ves. 236, repudiated the notion, that if an auctioneer is authorized to sell, all his clerks are, during his absence, in consequence of any such usage in that business. *Warner v. Martin*, 11 How. 209, 13 L. Ed. 667. See the title AUCTIONS AND AUCTIONEERS, vol. 2, p. 743.

It was ruled by the master of the *Rolls in Blore v. Sutton*, 3 Meriv. 237, that an agreement for a lease, evidenced only by a memorandum in writing, entered in the book of an authorized agent, signed by his clerk and not by the agent himself, was not a sufficient agreement in writing, it not being signed by an agent properly authorized, notwithstanding the entry was shown in evidence to have been approved by, and that it was made under the immediate direction of, the authorized agent, and in the usual



tion of the rule *potestas delegatas non potest delegare*, in respect to mercantile persons, is, that an agent for the sale of merchandise may employ a broker for the purpose when such is the usual course of business.<sup>16</sup> A common carrier who undertakes for himself to perform an entire service has no authority to constitute another person or corporation the agent of his consignor or consignee.<sup>17</sup> In the case of a power of attorney without power of substitution, the attorney cannot delegate the authority conferred upon him.<sup>18</sup> But where a power of substitution is given in a power of attorney, the party acting under the power of attorney cannot give any greater authority to a party substituted, than he himself is clothed with.<sup>19</sup>

**B. Adoption of Acts of Subagent.**—Where the usual course of the management of the principal's concerns in the employment of a subagent has been pursued for a length of time, and been recognized by the owners of property, they will be taken to have adopted the acts of the subagent as the acts of the agent himself.<sup>20</sup>

**C. Liability of Principal for Acts of Subagent.**—See post, "Liability of Principal for Acts of Subagent," IX, B, 1, d.

**D. Notice to Subagent as Notice to Principal.**—See post, "Notice to Subagent as Notice to Principal," IX, B, 6, e.

**E. Liability of Subagent to Principal.**—See post, "Liability of Subagent to Principal," IX, A, 1, d.

## IX. Rights, Duties and Liabilities.

**A. As between Principal and Agent**—1. DUTIES AND LIABILITIES OF AGENT TO PRINCIPAL—*a. Duty to Follow Instructions*—(1) *General Rule*.—One of the clear duties of an agent, as between himself and principal, is to obey the instructions of his principal,<sup>21</sup> or give notice that he declines to continue the

course of the business of his office. *Warner v. Martin*, 11 How. 209, 13 L. Ed. 667.

A factor cannot delegate his trust to his clerk; the law upon this is well settled. It has been repeatedly ruled. No usage of trade anywhere permits a factor to delegate to his clerk the commission trusted to himself. *Warner v. Martin*, 11 How. 209, 13 L. Ed. 667. See the title FACTORS AND COMMISSION MERCHANTS, vol. 6, p. 232.

**16. Extent of relaxation of rule.**—*Warner v. Martin*, 11 How. 209, 223, 13 L. Ed. 667. See the title BROKERS, vol. 3, p. 531.

**17. Power of common carrier to delegate authority.**—*Bank v. Adams Express Co.*, 93 U. S. 174, 23 L. Ed. 872.

A common carrier may employ a subordinate agency, but it must be subordinate to him, and not to one who neither employs it nor pays it, nor has any right to interfere with it. *Bank v. Adams Express Co.*, 93 U. S. 174, 23 L. Ed. 872. See the title CARRIERS, vol. 3, p. 556.

**18. Power of attorney—Without power of substitution.**—*Tillier v. Whitehead*, 1 Dall. 269, 1 L. Ed. 131. See, generally, the title POWERS, ante, p. 588.

**19. Power of attorney—With power of substitution.**—*Wright v. Ellison*, 1 Wall. 16, 17 L. Ed. 535.

**20. Adoption of acts of subagent.**—*Warner v. Martin*, 11 How. 209, 223, 13 L. Ed. 667.

**21. Duty to follow instructions—General rule.**—*National Bank v. City Bank*, 103 U. S. 668, 26 L. Ed. 417; *Brown v. McGran*, 14 Pet. 479, 10 L. Ed. 550; *Bank v. Cooper*, 137 U. S. 473, 34 L. Ed. 759; *Walker v. Smith*, 4 Dall. 389, 1 L. Ed. 878; *Knight v. Pythias v. Withers*, 177 U. S. 260, 44 L. Ed. 762; *Gwinn v. Buchanan, etc., Co.*, 4 How. 1, 11 L. Ed. 849; *Manella, etc., Co. v. Barry*, 3 Cranch 415, 2 L. Ed. 484; *Hall v. Leigh*, 8 Cranch 50, 3 L. Ed. 484; *Galigher v. Jones*, 129 U. S. 193, 32 L. Ed. 658; *Tiernan v. Jackson*, 5 Pet. 580, 8 L. Ed. 234.

There can, as a rule, be little hardship, and there is generally great benefit, in holding an agent bound to absolute compliance with the explicit instructions of his principal. In view of the manifold contingencies of business transactions, and the wide range of possibilities that attend any act of a commercial nature, few things could be more unfortunate than to incorporate into established law the right of an agent to disobey specific instructions, and to make a guess as to results an excuse for relief from accruing loss. Uniform recognition and enforcement of certain settled and clear rules are important. Among them, few are

agency.<sup>22</sup>

(2) *Where Departure from Instructions Permissible.*—In the course of human affairs, it is not unusual for a principal to give, in detail, his ideas of the line of conduct to be observed by his agent, and yet to allow a departure from that line of conduct, under particular circumstances.<sup>23</sup> And in some instances an agent is justified in disregarding instructions and in acting in the exercise of a sound discretion and in such manner as the usage of trade and his general duty require.<sup>24</sup>

(3) *Liability of Agent for Failure to Follow Instructions.*—That an agent is bound to pursue the orders of his principal, and is answerable for any injury consequent on his departing from them, however fair may have been his motives for such departure, is a plain principle of law,<sup>25</sup> and this is true though the

more significant or more essential than that in the relation of principal and agent strict compliance by the latter with the instructions of the former is an unvarying condition of exemption from liability. Loss from disregard thereof must be borne by the agent, unless he establishes that the disregard had no connection with the loss, and that it would certainly have followed whether instructions were obeyed or disregarded. *Bank v. Cooper*, 137 U. S. 473, 34 L. Ed. 759.

A voluntary agent has the option either to enter upon his agency, in strict conformity with the instructions of his principal, or with such reservations or conditions as he may think proper to prescribe; and the only consequence is that, in the latter case, he leaves his principal at liberty to adopt or repudiate his acts. *The Frances*, 9 Cranch 183, 3 L. Ed. 698.

**22. Notice that agent declines to continue agency.**—*Galigher v. Jones*, 129 U. S. 193, 32 L. Ed. 658.

**23. Allowance of departure from instructions.**—*Manella, etc., Co. v. Barry*, 3 Cranch 415, 2 L. Ed. 484.

If foreign merchants send out, by their general agent, written orders to their factor in this country, to purchase tobacco upon their account, but to ship it in the name of the factor, and by those orders, the factor is referred to the verbal communications of the general agent, who undertakes to order the tobacco to be shipped in the name of another person, and declares he has authority from the foreign merchants thus to control and vary their orders; the factor is justified in obeying the new orders of the general agent, though contrary to the first written orders. *Manella, etc., Co. v. Barry*, 3 Cranch 415, 2 L. Ed. 484. See, generally, the title FACTORS AND COMMISSION MERCHANTS, vol. 6, p. 232.

**24. Instructions may be disregarded.**—*Feild v. Farrington*, 10 Wall. 141, 19 L. Ed. 923; *Brown v. McGran*, 14 Pet. 479, 10 L. Ed. 550.

Though it is true that factors are generally bound to obey all orders of their principals respecting the time and mode of sale, yet when they have made

large advances or incurred expenses on account of the consignment, the principal cannot by any subsequent orders control their right to sell at such a time as in the exercise of sound discretion, and in accordance with the usage of trade, they may deem best to secure indemnity to themselves, and to promote the interests of the consignor. Of course they must act in good faith and with reasonable skill. This is the rule as laid down in *Brown v. McGran*, 14 Pet. 479, 10 L. Ed. 550, in which it was said that "where a consignment has been made generally without any specific orders as to the time or mode of sale, and the factor makes advances or incurs liabilities on the footing of such consignment, then the legal presumption is, that the factor is intended to be clothed with the ordinary rights of factors to sell, in the exercise of a sound discretion, at such time and in such mode as the usage of trade and his general duty require, and to reimburse himself for his advances and liabilities out of the proceeds of sale, and the consignor has no right, by any subsequent orders given after advances have been made or liabilities incurred by the factor, to suspend or control this right of sale, except so far as respects the surplus of the consignment not necessary to the reimbursement of such advances or liabilities." *Feild v. Farrington*, 10 Wall. 141, 19 L. Ed. 923. See, generally, the title FACTORS AND COMMISSION MERCHANTS, vol. 6, p. 232.

**25. Liability for failure to follow instructions.—In general.**—*Manella, etc., Co. v. Barry*, 3 Cranch 415, 2 L. Ed. 484; *Bank v. Cooper*, 137 U. S. 473, 34 L. Ed. 759; *Walker v. Smith*, 4 Dall. 389, 1 L. Ed. 878; *Bell v. Cunningham*, 3 Pet. 69, 7 L. Ed. 606. See post, "Action by Principal against Agent," IX, A, 1, f.

Strict compliance by an agent with the instructions of his principal is an unvarying condition of exemption from liability. Loss from disregard thereof must be borne by the agent unless he establishes that the disregard had no connection with the loss, and that it would certainly have followed whether

services of the agent be gratuitous.<sup>26</sup> If two principals, joint owners of merchandise, consign it to an agent for sale, and inform him that each owns one moiety, and if they give separate and variant instructions, each for his own moiety, one of the principals alone may maintain a separate action against the agent for a violation of his separate instructions.<sup>27</sup> If positive instructions are disobeyed and loss results, prima facie liability for that loss ensues, and the burden is on the defendant, the disobeying agent, to prove that obedience would have brought a like result.<sup>28</sup>

b. *Care and Diligence Required of Agents*.—A principal is entitled to the benefit of the diligence, zeal and disinterested exertions of the agent in the execution of his employment. An agent must act with reasonable skill, and use due care and diligence in performing the tasks which he has undertaken.<sup>29</sup> An agent to collect debts is only bound to use due diligence.<sup>30</sup> The question whether,

instructions were obeyed or disregarded. *Bank v. Cooper*, 137 U. S. 473, 34 L. Ed. 759.

Where a party accepts a consignment of goods as agent, he is liable for the full measure of damages sustained on account of his failure to follow instructions. Goods were shipped to defendant as agent with instructions not to deliver them to a third party without receiving payment therefor, or receiving satisfactory security. The defendant duly received the goods, but delivered them over without receiving payment, or exacting security, and shortly afterwards the party to whom they were delivered failed. The defendant representing other creditors of the party, as well as the plaintiffs (principals), made a composition, by which he received for the proportion of the plaintiffs a certain amount, and remitted that sum to them, without charging commissions. The plaintiffs refused to ratify the composition, and brought suit to recover the invoice value of the goods, with interest, according to the usage of trade. It was held, that the plaintiffs (principals) were entitled to recover the full amount of the original debt, with such reasonable compensation for the delay of payment, as the jury should think proper. *Walker v. Smith*, 4 Dall. 389, 1 L. Ed. 878.

A plaintiff has no right to direct a deputy marshal to receive a certain description of money in satisfaction of an execution. But the deputy marshal then acts as agent of the plaintiff, and not as agent of the marshal. If, therefore, the plaintiff, when he does this, gives to the deputy marshal other instructions, which are disobeyed, the marshal himself is not responsible, but the plaintiff must look to the deputy. *Gwinn v. Buchanan, etc., Co.*, 4 How. 1, 11 L. Ed. 849.

26. *Gratuitous services*.—*Walker v. Smith*, 4 Dall. 389, 1 L. Ed. 878.

27. *Separate actions for violation of instructions*.—*Hall v. Leigh*, 8 Cranch 50, 3 L. Ed. 484.

28. *Burden of proof*.—*Bank v. Cooper*, 137 U. S. 473, 34 L. Ed. 759.

29. *Care and diligence required—In general*.—Story on Agency, §§ 31, 211;

*Wadsworth v. Adams*, 138 U. S. 380, 34 L. Ed. 984; *Kilbourn v. Sunderland*, 130 U. S. 505, 519, 32 L. Ed. 1005; *Feild v. Farrington*, 10 Wall. 141, 19 L. Ed. 923; *National Bank v. City Bank*, 103 U. S. 668, 26 L. Ed. 417; *Lawrence v. McCalmont*, 2 How. 426, 11 L. Ed. 326; *National Bank v. Merchants' Nat. Bank*, 91 U. S. 92, 23 L. Ed. 208.

Where an agent of an importer, whose duty it is to institute suit to recover back excessive duties assessed and paid on importations, fails to bring suit within the period allowed for bringing such suits, he is liable to his principal for any loss sustained on account of such failure. *Bowerman v. Rogers*, 125 U. S. 585, 31 L. Ed. 815.

30. *Agent to collect debts*.—*Lawrence v. McCalmont*, 2 How. 426, 11 L. Ed. 326.

Where notes are deposited for collection by way of collateral security for an existing debt, the case does not fall within the strict rules of commercial law, applicable to negotiable paper. It falls under the general law of agency, and the agents are only bound to use due diligence to collect debts. *Lawrence v. McCalmont*, 2 How. 426, 11 L. Ed. 326. See, generally, the title **BILLS, NOTES AND CHECKS**, vol. 3, p. 257.

A person having accepted an agency to collect, is bound only to reasonable care and diligence in the discharge of his assumed duties. In a case of doubt, his best judgment is all the principal has a right to require. *National Bank v. Merchants' Nat. Bank*, 19 U. S. 92, 23 L. Ed. 208.

A promissory note, bearing date January 28, 1859, payable twelve months thereafter at the Citizens' Bank, New Orleans, and indorsed by A., the payee, and B., the then owner thereof, who resided in Missouri, was, before maturity, placed in the branch of the Louisiana State Bank at Baton Rouge, whose cashier indorsed and forwarded it to the mother bank at New Orleans for collection. It was duly protested for non-payment by the notary of the mother bank, who mailed notices of protest for the indorsers to the cashier of the branch



under the circumstances of a case, an agent exercised due care and diligence, where there is evidence, should be left to the jury.<sup>31</sup>

c. *Good Faith in Dealing with Principal*—(1) *In General*.—While the agency continues an agent must act in strictest good faith in regard to his principal in respect to every matter entrusted to his care and management. The agent's position being one of trust, he is forbidden to exercise his power for his own personal advantage, but must act solely with reference to the interests of his principal.<sup>32</sup> An agent in possession cannot deny the title of his princi-

bank. A., upon whom reliance was principally placed, died, and his executors were qualified before the maturity of the note; but neither they nor B. was served by the branch bank with notice of protest. Held, that the bank was liable for any loss thereby sustained by the holder of the note. As an agent, charged with the duty of collecting the note, and doing whatever was necessary to insure the liability of the indorsers if it was not paid, the branch bank was bound to give notice of its nonpayment at least to its principal, in order that he might do what was requisite to protect himself. The neglect to do this rendered the branch bank liable to the plaintiffs' testator for the loss of the money; and it is conceded that the negligence of the branch bank is chargeable upon the defendant. They are one concern as to liability, though treated as separate establishments and distinct entities in the transaction of business. *Bird v. Louisiana State Bank*, 93 U. S. 96, 23 L. Ed. 818. See, generally, the title BANKS AND BANKING, vol. 3, p. 1.

31. *Question of due care and diligence for jury*.—*National Bank v. City Bank*, 103 U. S. 668, 26 L. Ed. 417.

32. *Good faith in dealing with principal*—*In general*.—*Feild v. Farrington*, 10 Wall. 141, 19 L. Ed. 923; *Wadsworth v. Adams*, 138 U. S. 380, 34 L. Ed. 984; *Kilbourn v. Sunderland*, 130 U. S. 505, 519, 32 L. Ed. 1005; *Ralston v. Turpin*, 129 U. S. 663, 32 L. Ed. 747; *Mathewson v. Clarke*, 6 How. 122, 143, 12 L. Ed. 370; *Galigher v. Jones*, 129 U. S. 193, 32 L. Ed. 658; *Robertson v. Chapman*, 152 U. S. 673, 38 L. Ed. 592; *Wardell v. Railroad Co.*, 103 U. S. 651, 26 L. Ed. 509; *Knights of Pythias v. Withers*, 177 U. S. 260, 44 L. Ed. 762; *Taylor v. Benham*, 5 How. 233, 274, 12 L. Ed. 130; *Seymour v. Slide*, etc., *Gold Mines*, 153 U. S. 523, 38 L. Ed. 807; *Dent v. Ferguson*, 132 U. S. 50, 33 L. Ed. 242; *Marsh v. Whitmore*, 21 Wall. 178, 22 L. Ed. 482. See post, "Effect of War," XII, A, 4.

The very definition of an agent, given by Bouvier, as "one who undertakes to transact some business, or manage some affair, for another, by the authority and on account of the latter, and to render an account of it," presupposes that the acts done by the agent shall be done in the interest of the principal. *Knights of Pythias v. Withers*, 177 U. S. 260, 44

L. Ed. 762.

One's character as agent precludes him from deriving any advantage from contracts, made by his authority as agent, except through the principal for which he acted. The agent's position being one of trust, to engage in any matter for his personal advantage inconsistent with it was to violate his duty and to commit a fraud upon the principal. *Wardell v. Railroad Co.*, 103 U. S. 651, 26 L. Ed. 509; *Taylor v. Benham*, 5 How. 233, 274, 12 L. Ed. 130; *Mathewson v. Clarke*, 6 How. 122, 143, 12 L. Ed. 370.

All transactions between a principal and his agent whereby the agent derives advantages beyond legitimate compensation for his services, will be closely examined by courts of equity and set aside if there be any ground to suppose that he has abused the confidence reposed in him. *Ralston v. Turpin*, 129 U. S. 663, 32 L. Ed. 747.

A master and supercargo exercises full powers over the vessel and cargo. He purchases and sells where he can do so to the best advantage; and for his entire services in this agency, and for the management of the ship, he is paid. An agent, thus acting for his principals, cannot engage in a traffic on his own account. He buys for himself and his principals at the same market, and sells at the same. On the one side, he is interested in a small portion of the profits, and in a commission. On the other, he realizes the entire profits, deducting therefrom the common charge of freight. In the purchases and in the sales under such circumstances, the agent would be influenced, as may be reasonably supposed, by his own interests. From the accounts rendered, it appears that a much larger profit was realized by the master and supercargo on his private sales than on the sales for the company. Whether this resulted from the more judicious purchases or sales in the private enterprise, it shows that the traffic was inconsistent with the general agency. It was a rival interest, hostile to the interest of the company, exercised by their agent, and without their approbation or knowledge. This the law will not sanction. It requires not only a bona fide action by an agent, but that he shall be free from those selfish motives which conflict with the interests of his principals. *Mathewson v. Clarke*, 6 How. 122, 143, 12 L. Ed. 370. See,

pal.<sup>33</sup> The doctrine as to fiduciary relations, applied to its full extent, is simply a rule of evidence which, under some circumstances, imposes upon an agent the burden of proving the fairness and justice of the transaction with his principal within the scope of his agency.<sup>34</sup>

(2) *Agent to Sell Purchasing for Himself*—(a) *In General*.—The character of vendor and that of purchaser cannot be held by the same person. They impose different obligations. Their union in the same person would at once raise a conflict between interest and duty. The law, therefore, prohibits a party selling on another's account from becoming, either directly or indirectly, a buyer on his own account at the sale, and will always condemn transactions of that character whenever their enforcement is attempted.<sup>35</sup> A purchase, per interpositam personam, by an agent, of the particular property of which he has the sale, or in which he represents another, whether he has an interest in it or not, carries fraud on the face of it.<sup>36</sup> And if an agent to sell effects a sale to himself, under the cover of the name of another person, he becomes, in respect to the property, a trustee for the principal, and, at the election of the latter, seasonably made, will be compelled to surrender it, or, if he has disposed of it to a bona fide purchaser, to account not only for its real value, but for any

generally, the title *MASTERS OF VESSELS*, vol. 8, p. 300.

It is among the rudiments of the law that the same person cannot act for himself and at the same time, with respect to the same matter, as the agent of another whose interests are conflicting. Thus a person cannot be a purchaser of property and at the same time the agent of the vendor. Directors of corporations, and all persons who stand in a fiduciary relation to other parties, and are clothed with power to act for them, are subject to this rule; they are not permitted to occupy a position which will conflict with the interest of parties they represent and are bound to protect. They cannot, as agents or trustees, enter into or authorize contracts on behalf of those for whom they are appointed to act, and then personally participate in the benefits. Hence all arrangements by directors of a railroad company, to secure an undue advantage to themselves at its expense, by the formation of a new company as an auxiliary to the original one, with an understanding that they, or some of them, shall take stock in it, and then that valuable contracts shall be given to it, in the profits of which they, as stockholders in the new company, are to share, are so many unlawful devices to enrich themselves to the detriment of the stockholders and creditors of the original company, and will be condemned whenever properly brought before the courts for consideration. *Wardell v. Railroad Co.*, 103 U. S. 651, 26 L. Ed. 509. See, generally, the titles *CORPORATIONS*, vol. 4, p. 621; *OFFICERS AND AGENTS OF PRIVATE CORPORATIONS*, vol. 8, p. 957.

Where an agent, with whom his principal deposits government bonds for safe-keeping to the amount of \$6,000, substitutes therefor a note and mortgage for \$7,000, a reservation to himself of the

surplus over the amount of the bonds received from the proceeds of the note, is valid and will be given effect by a court of equity. *Cook v. Tullis*, 18 Wall. 332, 340, 21 L. Ed. 933.

Where an agent with authority to buy at a certain price buys for less and charges the property to his principal at the maximum and pockets the difference, he is clearly liable for such difference to his principal. *Kilbourn v. Sunderland*, 130 U. S. 505, 516, 32 L. Ed. 1005.

As to principal's right to benefit of agent's contracts, see *Kilbourn v. Sunderland*, 130 U. S. 505, 516, 517, 32 L. Ed. 1005.

**33. Agent cannot dispute principal's title.**—*Seymour v. Slide, etc.*, *Gold Mines*, 153 U. S. 523, 38 L. Ed. 807.

**One who holds possession of real estate as manager for or under another cannot dispute that other's title.** *Johnson v. Baytop*, 3 Ad. & El. 188; *Phelan v. Kelly*, 25 Wend. 389, 393. The estoppel is like to that which arises in the case of landlord and tenant, and comes within the scope of the general rule that an agent in possession cannot deny the title of his principal. *Seymour v. Slide, etc.*, *Gold Mines*, 153 U. S. 523, 38 L. Ed. 807. See, generally, the titles *ESTOPPEL*, vol. 5, p. 913; *LANDLORD AND TENANT*, vol. 7, p. 827.

**34. Burden of proof.**—*Dent v. Ferguson*, 132 U. S. 50, 33 L. Ed. 242; *Robertson v. Chapman*, 152 U. S. 673, 38 L. Ed. 592.

**35. Agent to sell purchasing for himself—In general.**—*Marsh v. Whitmore*, 21 Wall. 178, 22 L. Ed. 482; *Veazie v. Williams*, 8 How. 134, 151, 12 L. Ed. 1018; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328; *Michoud v. Girod*, 4 How. 503, 11 L. Ed. 1076; *Wardell v. Railroad Co.*, 103 U. S. 651, 26 L. Ed. 509; *Robertson v. Chapman*, 152 U. S. 673, 682, 38 L. Ed. 592.

**36. Purchase carries fraud on its face.**—*Michoud v. Girod*, 4 How. 503, 11 L. Ed.

profit realized by him on such resale.<sup>37</sup> But where the sale is an actual sale, in good faith so far as the conduct of the agent in effecting it is concerned, and the contract between the principal and the purchaser has been so far executed that it cannot be rescinded by either party to it, then the agent's duty in selling the property does not prevent him from purchasing from the original purchaser.<sup>38</sup> Where an agent to sell buys of himself, or by his power of attorney conveys to himself, that which he was authorized to sell, such sale is voidable, if not void, and at all event unlawful as opposed to the soundest public policy.<sup>39</sup> But acts which amount to a ratification by the principal may validate a void sale.<sup>40</sup>

(b) *Officers Buying Corporate Property at Sacrifice*.—The managers and officers of a company where capital is contributed in shares, have no right to enter into or participate in any combination, the object of which is to sell the property of the company and obtain it for themselves at a sacrifice.<sup>41</sup>

(c) *Attorney Buying Property Sold for Client*.—See the title ATTORNEY AND CLIENT, vol. 2, p. 719.

(d) *Auctioneer Buying Property*.—See the title AUCTIONS AND AUCTIONEERS, vol. 2, pp. 744, 745.

1076; *Robertson v. Chapman*, 152 U. S. 673, 38 L. Ed. 592. See, generally, the title FRAUD AND DECEIT, vol. 6, p. 394.

37. *Agent trustee for principal*.—*Robertson v. Chapman*, 152 U. S. 673, 38 L. Ed. 592.

And this surrender and accounting will be compelled upon the demand of the principal, although it may not appear that the property, at the time the agent fraudulently acquired it, was worth more than he paid for it. The law will not, in such case, impose upon the principal the burden of proving that he was, in fact, injured, and will only inquire whether the agent has been unfaithful in the discharge of his duty. While his agency continues, he must act, in the matter of such agency, solely with reference to the interests of his principal. The law will not permit him, without the knowledge or assent of his principal, to occupy a position in which he will be tempted not to do the best he may for the principal. *Robertson v. Chapman*, 152 U. S. 673, 38 L. Ed. 592.

38. *Purchase in good faith by agent from original purchaser*.—*Robertson v. Chapman*, 152 U. S. 673, 682, 38 L. Ed. 592.

And the agent's failure to give notice to his principal of his sale immediately upon its being made, cannot be regarded as a fraud upon the rights of the principal. *Robertson v. Chapman*, 152 U. S. 673, 682, 38 L. Ed. 592.

Where the evidence showed that the agent was not in fact interested in the offer made by the purchaser, that the latter purchased on his own account exclusively, and without any understanding that the agent was to become interested with him, or take his place in the purchase, and that the agent had no expectation when the purchaser's offer was accepted of becoming the owner of the property, it was held that the subsequent purchase of the property by the agent

did not constitute a breach of his trust. *Robertson v. Chapman*, 152 U. S. 673, 682, 38 L. Ed. 592.

39. *Sale voidable at least*.—*Veazie v. Williams*, 8 How. 134, 151, 12 L. Ed. 1018; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328. See *Michoud v. Girod*, 4 How. 503, 554, 11 L. Ed. 1076.

40. *Validation of void sale*.—*Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328. See post, "Ratification of Unauthorized Acts of Agent," XI.

41. *Officers buying corporate property at sacrifice*.—*Jackson v. Ludeling*, 21 Wall. 616, 22 L. Ed. 492.

The managers and officers of a company where capital is contributed in shares are, in a very legitimate sense, trustees alike for its stockholders and its creditors, though they may not be trustees technically and in form. They have no right to seek their own profit at the expense of the company, its stockholders, or even its bondholders. Contrariwise, in case of embarrassment to the company, and any necessity to sell the estates of the company, it is their duty, to the extent of their power, to secure for all those whose interests are in their charge, the highest possible price for the property which can be obtained for it. These principles applied to a case where the local managers and officers of an embarrassed railroad, holding a small portion of its bonds, of which a much greater portion was held by nonresidents, got an order of sale under a mortgage to secure the bonds, and proceed in a hasty and rather secret way to sell it, and to buy it at a price much below its value, for themselves; the conditions of sale being made such as to render it difficult for persons generally to purchase; and the whole proceeding of sale being attended also with evidence of gross disregard of the interests of the bondholders generally, and of course of the stock-



(3) *Agent to Convey Conveying to Himself*.—An agent cannot, by his power of attorney, convey to himself that which he was authorized to sell for his principal.<sup>42</sup>

(4) *Agent to Buy Purchasing for Himself*.—Where a party purchases property under the direction of, or on behalf of another, the purchase must be held to be in trust for the benefit of the principal, on repayment of the money advanced by the agent.<sup>43</sup> However, where an agent, employed to purchase property of a certain description, fails to find any property upon which his contract could operate, he is not precluded by the fact of such agency from buying other property on his own account.<sup>44</sup>

(5) *Agent to Buy Purchasing from Himself*.—A person cannot legally purchase on account of another that which he sells on his own account. He is not allowed to unite the two opposite characters of buyer and seller.<sup>45</sup>

(6) *Agent to Locate Land Locating It for Himself*.—If an agent locate land for himself which he ought to have located for his principal, he is, in equity, a trustee for his principal.<sup>46</sup>

(7) *Acting as Agent of Both Buyer and Seller*.—Necessarily, the agent for the buyer cannot be the agent for the seller at the same time.<sup>47</sup>

(8) *Gifts and Purchases from Principal*.—(a) *Gifts*.—A principal may make a valid gift to his agent of property committed to the latter's care or management.<sup>48</sup> But in accepting a gift from his principal the agent is under an obligation to withhold no information in his possession respecting the subject of the gift, or the condition of the estate in his hands, which good faith requires to be disclosed, or that may reasonably influence the judgment of the principal in making the gift. Gifts procured by agents from their principals will be scrutinized with a close and vigilant suspicion, and will be set aside if there be any ground to suppose that the agent has abused the confidence reposed in him.<sup>49</sup>

holders. *Jackson v. Ludeling*, 21 Wall. 616, 22 L. Ed. 492. See, generally, the titles CORPORATIONS, vol. 4, p. 621; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 8, p. 957; STOCKS AND STOCKHOLDERS; TRUSTS AND TRUSTEES.

42. *Agent to convey, conveying to himself*.—*Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328; *Stark v. Starr*, 94 U. S. 477, 24 L. Ed. 276.

43. *Agent to buy purchasing for himself*.—*Rothwell v. Dewees*, 2 Black 613, 17 L. Ed. 309; *Irvine v. Marshall*, 20 How. 558, 15 L. Ed. 994. See the title TRUSTS AND TRUSTEES.

44. *Tweed's Case*, 16 Wall. 504, 21 L. Ed. 389.

A person having entered, January 23d, 1866, into a contract with the government to purchase, as its agent, "cotton which formerly belonged to the so-called Confederate States, now in the possession of individuals in the Red River country (concealed)," was not precluded by the fact of such agency and during it from buying on his own account other cotton in that region not formerly belonging to those so-called states; he having discovered, when he went to the region, that there was no cotton upon which his contract operated, and his contract not obliging him by its terms to devote his whole time to the business of the agency, nor from buying cotton if of a kind not such as was described in his agreement.

*Tweed's Case*, 16 Wall. 504, 21 L. Ed. 389. See the title ABANDONED AND CAPTURED PROPERTY, vol. 1, p. 1.

45. *Agent to buy purchasing from himself*.—*Michoud v. Girod*, 4 How. 503, 11 L. Ed. 1076.

46. *Agent to locate land, locating it for himself*.—*Massie v. Watts*, 6 Cranch 148, 3 L. Ed. 181. See, also, *Irvine v. Marshall*, 20 How. 558, 15 L. Ed. 994. See, generally, the titles PUBLIC LANDS; TRUSTS AND TRUSTEES.

47. *Acting as agent of both buyer and seller*.—*Kilbourn v. Sunderland*, 130 U. S. 505, 32 L. Ed. 1005. See, also, *Michoud v. Girod*, 4 How. 503, 11 L. Ed. 1076; *Veazie v. Williams*, 8 How. 134, 12 L. Ed. 1018.

48. *Gifts from principal to agent*.—*Ralston v. Turpin*, 129 U. S. 663, 32 L. Ed. 747.

To establish a contrary doctrine would be to impair the natural right of an owner to make such disposition of his property as he may think would best subserve his interest and comfort or gratify his feelings. *Ralston v. Turpin*, 129 U. S. 663, 32 L. Ed. 747. See, generally, the title GIFTS, vol. 6, p. 564.

49. *Transaction closely scrutinized*.—1 Story's Eq. Jur., § 315; *Ralston v. Turpin*, 129 U. S. 663, 32 L. Ed. 747.

"An instructive case upon this point is *Harris v. Tremeneere*, 15 Ves. 34, 38, which was a suit to cancel leases to a party who, at the time, held the relation of

(b) *Purchases*.—A purchase, by an agent from his principal, of the property committed to his agency, will be closely examined by courts of equity, and set aside if there be any ground for supposing that the confidence reposed in the agent has been abused.<sup>50</sup>

(9) *Acquiring Title to Principal's Property Through Defect in Title*.—If an agent discover a defect in the title of his principal to land, he cannot misuse it, to acquire a title for himself; and if he does, he will be held as a trustee holding for his principal.<sup>51</sup>

(10) *Using Principal's Funds or Property*.—An agent to whom a bill is sent for collection cannot lawfully transfer or pledge the same in payment of his own debt, and the transferee with knowledge or after maturity gets no title as against the true owner.<sup>52</sup> A creditor, who has possession of the property of his debtor, as his agent, cannot, without reducing his debt to judgment, and without the process or order of a court, and without the consent and against the will of the debtor, sell or otherwise dispose of the property and apply its proceeds to the payment of his debt.<sup>53</sup> The settled law of Tennessee is that where an agent

steward, agent, and attorney to the lessor. Some of the leases were pure gifts by the employer. Lord Chancellor Eldon disclaimed any jurisdiction to annul such gifts, when based upon the generosity of the donor, or to weigh the value or amount of the consideration, as if it had been the subject of barter, but said, that if he could find 'in the answer or the evidence the slightest hint' that the defendant had laid before his employer an account of value of the premises that was not perfectly accurate, he would set aside such leases. He would do this, he said, without regard to the intention of the parties, 'upon the general ground that the principal would never be safe if the agent could take a gift from him upon a representation that was not most accurate and precise.'" *Ralston v. Turpin*, 129 U. S. 663, 32 L. Ed. 747.

**50. Purchases from principal.**—1 Story's Eq. Jur., § 315; *Ralston v. Turpin*, 129 U. S. 663, 32 L. Ed. 747; *Brooks v. Martin*, 2 Wall. 70, 17 L. Ed. 732.

In order to sustain such a sale, it must be made to appear, first, that the price paid approximates reasonably near to a fair and adequate consideration for the thing purchased; and, second, that all the information in possession of the purchaser, which was necessary to enable the seller to form a sound judgment of the value of what he sold, was communicated by the former to the latter. *Brooks v. Martin*, 2 Wall. 70, 85, 17 L. Ed. 732.

Where one partner, who is in sound health, is made sole agent of the partnership by another, who is not, and who relies on him wholly for true accounts, and the party thus made agent manages the business at a distance from the other, communicating to him no information, the relation of partners, whatever it may be in general, becomes fiduciary, and the law governing such relations applies. Purchase by one partner of the other's interest set aside as fraudulent. *Brooks v. Martin*, 2 Wall. 70, 17 L. Ed. 732. See ante, "Agents to Sell Purchasing for Him-

self," IX, A, 1, c, (2). See, generally, the title PARTNERSHIP, ante, p. 73.

**51. Acquiring title to principal's property through defect in title.**—*Ringo v. Binns*, 10 Pet. 269, 9 L. Ed. 420; *Michoud v. Girod*, 4 How. 503, 11 L. Ed. 1076. See, also, *Prevost v. Gratz*, 6 Wheat. 481, 5 L. Ed. 311; *Oliver v. Piatt*, 3 How. 333, 11 L. Ed. 622.

An agent, who had been employed to perfect the title to a tract of land for his principal, in the course of his agency, became acquainted with its deficiency; and having concealed this from his principal, obtained a legal title to the same land for himself; an application was made to the legislature of Kentucky, by the holders of the imperfect title, to supply its defects; which was done by a law specially enacted for that purpose; of this proceeding, the agent was informed; and when it was stated to him, that his conduct, to the injury of his principal, might be attended with unpleasant consequences to himself, he declared in writing, under his hand, in the presence of two witnesses, that he disavowed an intention to interfere with the title of his principal, and assigned the title he had acquired to him, that the same might be carried into grant; at the same time he was paid \$100 for his expenses, etc. In violation of this transfer, he took out a patent for the same land in his own name, and a bill was filed in the circuit court of Kentucky, to compel him to convey the legal title, thus acquired, to those who held the equitable title, under the act of the legislature of that state. *Ringo v. Binns*, 10 Pet. 269, 9 L. Ed. 420. See, generally, the title PUBLIC LANDS.

**52. Pledging property for payment of own debt.**—1 Pars. on Bills and Notes, 119. *Dodge v. Freedman's Sav., etc., Co.*, 93 U. S. 379, 23 L. Ed. 920. See, generally, the title BILLS, NOTES AND CHECKS, vol. 3, p. 257.

**53. Application of property to payment of debt owing from principal to agent.**—*Xenia Bank v. Stewart*, 114 U. S. 224, 233, 29 L. Ed. 101.

obtains money of his principal, and converts it to his use, and is not sued until three years elapse, the remedy by assumpsit is barred.<sup>54</sup>

d. *Liability of Subagent to Principal.*—Whenever, by express agreement of the parties, a subagent is to be employed by an agent to receive money for the principals, or where an authority to do so may fairly be implied from the usual course of trade, or the nature of the transactions, the principal may treat the subagent as his agent, and when he has received the money, may recover it in an action for money had and received.<sup>55</sup>

e. *Accounting.*—Where a principal places money in the hands of an agent to be loaned by the agent for the principal at interest, a trust relation is established between the parties and the principal is entitled to an accounting. It is the duty of such agent to keep an account and in its absence it will be presumed that he invested the money at the rates agreed upon. After the death of the agent his execution will be charged with interest at the legal rate.<sup>56</sup> Where an agent, who is directed to sell property for his principal, effects a sale to himself, he will be held to be a trustee for his principal, and, at the election of the latter, seasonably made, will be required to surrender the property, or, if he has disposed of it to a bona fide purchaser, to account not only for its real value, but for any profit realized by him on such resale.<sup>57</sup> At a sale of public lands in a territory, an agent who purchased for another must account, as trustee, to his employer, although the statutes of the territory have abolished all resulting trusts.<sup>58</sup>

f. *Action by Principal against Agent.*—It is a general rule of law, that if an injury arises to a principal, in consequence of the misconduct of his agent, an action may be sustained against him for the damages.<sup>59</sup> In an action for dam-

54. *Law of Tennessee.*—Mattingly v. Boyd, 20 How. 128, 15 L. Ed. 845. See, generally, the titles ASSUMPSIT, vol. 2, p. 636; LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, p. 900.

55. *Liability of subagent to principal.*—Wilson v. Smith, 3 How. 763, 11 L. Ed. 820. See post, "Action by Principal against Agent," IX, A, 1, f. See, generally, the title ASSUMPSIT, vol. 2, p. 636.

Where a draft was remitted by a collecting agent to a subagent for collection, and the proceeds were applied by the subagent in payment of the indebtedness of the agent to himself in ignorance of the rights of the principal, the federal supreme court held that, there being no new advance made, and no new credit given by the subagent, the principal was entitled to recover against him. Wilson v. Smith, 3 How. 763, 11 L. Ed. 820, cited in United States v. State Bank, 96 U. S. 30, 34, 24 L. Ed. 647; Hoover v. Wise, 91 U. S. 308, 314, 23 L. Ed. 392. See, also, Bank v. The New England Bank, 5 How. 212, 12 L. Ed. 409.

56. *Money in hands of agent to be loaned for principal.*—Dillman v. Hastings, 144 U. S. 136, 36 L. Ed. 378. See the titles EXECUTORS AND ADMINISTRATORS, vol. 6, p. 119; TRUSTS AND TRUSTEES.

57. *Agent to sell purchasing for himself.*—Robertson v. Chapman, 152 U. S. 673, 38 L. Ed. 592. See, generally, the title TRUSTS AND TRUSTEES.

58. *Sale of public lands in territory.*—

Irvine v. Marshall, 20 How. 558, 15 L. Ed. 994.

It promotes the public sales, that agents should be allowed to attend and purchase, under the usual responsibility of agents or trustees. Irvine v. Marshall, 20 How. 558, 15 L. Ed. 994. See, generally, the titles PUBLIC LANDS; TRUSTS AND TRUSTEES.

59. *Action by principal against agent—Right of action.*—General Interest Ins. Co. v. Ruggles, 12 Wheat. 408, 6 L. Ed. 674; United States v. Laub, 12 Pet. 1, 9 L. Ed. 977; Bell v. Cunningham, 3 Pet. 69, 7 L. Ed. 606. See ante, "Liability of Agent for Failure to Follow Instructions," IX, A, 1, a, (3); "Liability of Subagent to Principal," IX, A, 1, d.

If a common locator, who undertakes to locate lands for an absent person, fails in the performance of the usual duties of a locator, he is liable to the action of the injured party, which may be instituted wherever his person is found. Massie v. Watts, 6 Cranch 148, 3 L. Ed. 181. See, generally, the titles PUBLIC LANDS; VENUE.

*Defenses.*—Where a debtor put into the hands of an agent a sum of money, for the payment of specified demands against him, and limited the amount to such demands; and to be paid in small sums, to a numerous class of creditors, scattered over various distant parts of the country; and it appeared, that he had disbursed all the money thus put into his hands, but the voucher for such payments were destroyed by fire, without any fault of his; and he could not ascertain the names



ages for breach of an agent's orders, the principal is entitled to compensation for actual and positive loss, resulting plainly and directly from the breach of orders, but vindictive and speculative damages should not be given.<sup>60</sup>

2. **LIABILITY OF PRINCIPAL TO AGENT**—a. *Compensation or Commissions*—(1) *Right to Compensation*—(a) *In General*.—A person who performs the duties of an agent for another is entitled to compensation for those duties.<sup>61</sup> An agent is entitled, in an action at law, to compensation for services outside of his original authority, where such services were beneficial to and approved by the principal.<sup>62</sup> The principal's refusal, without sufficient reasons, to fulfill an agreement made by his agent, will not defeat the agent's right to compensation.<sup>63</sup>

of the creditors to whom payment had been made; but no claim was presented to his principal, by any of the creditors, to whom payment was to be made by the agent, after the lapse of three years; and all this, accompanied by proof, that he had faithfully discharged the duties of a like agency for several years, and regularly accounted for his disbursements; it would afford reasonable grounds to conclude, that he had disbursed all the moneys placed in his hands by his principal, for the purposes for which he received it; and protect him against a suit for any balance. *United States v. Laub*, 12 Pet. 1, 9 L. Ed. 977.

Plaintiff deposited bonds with defendant as collateral security for a debt owing to defendant by a third person. Defendant sold such bonds and applied the proceeds to the payment of the debt. In an action by plaintiff to recover the proceeds, on the ground that the sale was unlawful and unauthorized, it was held that if the debtor had authority and did consent to such sale and appropriation, and if the plaintiff, having full knowledge of the transactions, ratified and confirmed what was done, he could not maintain the action. *Hathaway v. First Nat. Bank*, 134 U. S. 494, 33 L. Ed. 1004. See post, "Ratification of Unauthorized Acts of Agent," XI.

60. **Measure of damages.**—*Bell v. Cunningham*, 3 Pet. 69, 7 L. Ed. 606. See ante, "Liability of Agent for Failure to Follow Instructions," IX, A, 1, a, (3). See, generally, the titles **DAMAGES**, vol. 5, p. 157; **EXEMPLARY DAMAGES**, vol. 6, p. 193.

The faithful execution of orders which an agent or correspondent has contracted to execute, is of vital importance in commercial transactions, and may often affect the injured party far beyond the actual sum misapplied; a failure in this respect may entirely break up a voyage, and defeat the whole enterprise. Speculative damages, dependent on possible successive schemes, ought not to be given in such cases; but positive and direct loss, resulting plainly and immediately from the breach of orders, may be taken into the estimate. *Bell v. Cunningham*, 3 Pet. 69, 7 L. Ed. 606.

The profits which would have been obtained on the sale of the article directed to be purchased, may be properly allowed

as damages. *Bell v. Cunningham*, 3 Pet. 69, 7 L. Ed. 606.

C. & Co., merchants of Boston, owners of a ship, proceeding on freight, from Havana, to the consignment of B. & Co., at Leghorn, and to return to Havana, instructed B. & Co., to invest the freight, estimated at 4600 petsoes; 2200 in marble tiles, and the residue, after paying disbursements, in wrapping paper; B. & Co. undertook to execute these orders; instead, however, of investing 2200 petsoes in marble, they invested all the funds which came into their hands in wrapping paper, which was received by the master of the ship, and was carried to Havana, and there sold on account of C. & Co., and produced a loss instead of the profit which would have resulted had the investment been made in marble tiles; as soon as information of the breach of orders was received, C. & Co., addressed a letter to B. & Co., expressing in strong terms their disapprobation of the departure from their orders, but did not signify their determination to disavow the transaction entirely, and consider the paper as sold on account of B. & Co. Held, that C. & Co. were entitled to recover damages for the breach of their orders; that their not having given notice to B. & Co. that the paper would be considered as sold on their account did not injure their claim; and that the amount of the damages may be determined by the positive and direct loss arising plainly and immediately from the breach of the orders. *Bell v. Cunningham*, 3 Pet. 69, 7 L. Ed. 606.

61. **Right to compensation**—*In general*.—*Massie v. Watts*, 6 Cranch 148, 3 L. Ed. 181; *Kock v. Emmerling*, 22 How. 69, 16 L. Ed. 292; *Wadsworth v. Adams*, 138 U. S. 380, 34 L. Ed. 984.

62. **Where services outside original authority.**—*Wright v. Ellison*, 1 Wall. 16, 17 L. Ed. 555.

63. **Refusal of principal to fulfill agreement made by agent.**—*Kock v. Emmerling*, 22 How. 69, 16 L. Ed. 292.

**Agent was employed to sell an estate.**—*Kock v. Emmerling*, 22 How. 69, 16 L. Ed. 292.

"Where the vendor is satisfied with the terms, made by himself, through the broker, to the purchaser, and no solid objection can be stated, in any form, to the contract, it would seem to be clear that

Where the compensation of an agent engaged in lending money for his principal is by special agreement to be paid out of fees received by him from the borrowers, he is not entitled to demand compensation from the principal for his services.<sup>64</sup>

(b) *Necessity for Faithful Performance of Duties.*—It is a condition precedent to an agent's right to compensation that the services he undertook to render should be faithfully performed.<sup>65</sup> Fraudulent misconduct proved against an agent operates to deprive him of the right to stipulated commissions.<sup>66</sup> An agent cannot be deprived of a right to his commissions on the ground that he has not avoided a contract which was not in strict conformity with the statute of frauds, in the absence of any instruction or instructions from the principal not to comply therewith.<sup>67</sup>

(c) *Where Transaction Illegal or Contrary to Public Policy.*—Where the transaction for which the agent is employed is illegal, or contrary to good morals

the commission of the agent was due, and ought to be paid. It would be a novel principle if the vendor might capriciously defeat his own contract with his agent by refusing to pay him when he had done all that he was bound to do. The agent might well undertake to procure the purchaser; but this being done, his labor and expense could not avail him, as he could not coerce a willingness to pay the commission which the vendor had agreed to pay. Such a state of things could only arise from an express understanding that the vendor was to pay nothing, unless he should choose to make the sale." *Kock v. Emmerling*, 22 How. 69, 16 L. Ed. 292.

64. *Hughes v. Dundee Mortgage Co.*, 140 U. S. 98, 35 L. Ed. 354.

65. *Necessity for faithful performance by agent—In general.*—*Wadsworth v. Adams*, 138 U. S. 380, 34 L. Ed. 984.

66. *Fraudulent misconduct of agent.*—*Wadsworth v. Adams*, 138 U. S. 380, 34 L. Ed. 984; *Shaeffer v. Blair*, 149 U. S. 248, 37 L. Ed. 721; *Denver v. Roane*, 99 U. S. 355, 25 L. Ed. 476.

*Where an agent authorized to sell notes for his principal for a specified sum, abuses the confidence reposed in him and withholds from his principal facts which ought, in good faith, to be communicated to the latter, and practically co-operates with a prospective purchaser, in the latter's effort to get them at a sum less than the principal had authorized the agent to accept, he will lose his right to any compensation under the agreement. He is no more entitled to compensation than a broker will be entitled to commissions who, having undertaken to sell particular property for the best price that could be fairly obtained for it, becomes, without the knowledge of his principal, the agent of another to get it for him at the lowest possible price. The assumption of the latter position would be a fraud upon the vendor who is entitled, in such cases, to the benefit of the diligence, zeal and disinterested exertions of the agent in the execution of his employment.* *Wadsworth v. Adams*, 138 U. S. 380, 34 L. Ed. 984. See, generally, the title FRAUD AND DECEIT, vol. 6, p. 394.

67. *Failure to avoid contract not in conformity with statute of frauds.*—*Bibb v. Allen*, 149 U. S. 481, 37 L. Ed. 817.

"Contracts not in conformity with the statute are only voidable and not illegal, and an agent may, therefore, execute such voidable contracts without being chargeable with either fraud, misconduct, or disregard of the principal's rights. If the statute of frauds was not complied with, in making the sale contracts in the present case, we do not see that the defendant was in a position to take advantage thereof, or that such want of compliance with the statute, after the contracts were executed, would constitute any defense to the action. The suit was not brought on these contracts of sale, which the plaintiff in error claims were voidable under the New York statute of frauds. It is an action by the agents against their principal to recover for work and labor performed, and money paid out at the principal's instance and request, and in the settlement of the principal's business, in which the agent had authority to make disbursements for him. In the present case the plaintiffs had, by their contract, rendered themselves personally responsible for the losses which might and did occur under the contracts of sale made for account of the defendant, and as such agents they are entitled to recover against their principal the full amount expended by them for him in the transaction. If in closing out the contracts of sale, profits had been realized on the transactions, whether by reason of decline in the price of cotton, or by the purchasers 'to cover' the cotton sold, the brokers would, upon well-settled principles, have been liable to their principal for the same. They could not have set up or interposed as a valid defense to such liability that the contracts of sale out of which the profits were realized were not enforceable under the statute of frauds, or were voidable by the agents or the purchaser with whom they contracted. Neither can the principal interpose such an objection as against the agent's right to commission or to reimbursement for his outlays, after the execution of contracts, merely voidable for



and public policy, and the agent has knowledge of and is privy to the unlawful design of the parties to the transaction, and brings them together for the very purpose of entering into an illegal agreement, he is particeps criminis, and cannot recover commissions for services rendered,<sup>68</sup> but where a contract, void on account of the illegal intent of the principal parties to it, has been negotiated by an agent ignorant of such intent, and innocent of any violation of the law, the latter may have a meritorious ground for the recovery of compensation for services rendered.<sup>69</sup> An agent employed to procure a contract from the government to furnish its supplies,<sup>70</sup> or to take charge of a claim before congress, and to procure by "lobby services" the passage of a bill providing for the payment of the claim,<sup>71</sup> or to obtain the passage of a particular law by the legislature of a state,<sup>72</sup> cannot recover compensation for his services, such transactions and agreements being contrary to public policy and void. Where services rendered by an agent which are legal are blended and confused with those which are illegal, the whole is a unit and indivisible, that which is bad destroys the good, and compensation can be recovered for no part.<sup>73</sup>

(2) *Amount*.—The amount of compensation for the services of an agent may be and usually is, fixed by express contract,<sup>74</sup> but in the absence of an express contract, an agent is entitled to be paid the customary compensation, or the compensation fixed by established usage,<sup>75</sup> or what his services are reasonably

want of writing." *Bibb v. Allen*, 149 U. S. 481, 37 L. Ed. 817. See the title ASSUMPSIT, vol. 2, p. 636; FRAUDS, STATUTE OF, vol. 6, p. 451.

68. *Where agent has knowledge of unlawful design*.—Story on Agency, §§ 330, 334, and authorities cited. *Irwin v. Williar*, 110 U. S. 499, 510, 28 L. Ed. 225; *Bibb v. Allen*, 149 U. S. 481, 37 L. Ed. 817; *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 32 L. Ed. 979. See, generally, the title ILLEGAL CONTRACTS, vol. 6, p. 737.

69. *Where agent ignorant of illegal intent*.—*Irwin v. Williar*, 110 U. S. 499, 510, 28 L. Ed. 225; *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 32 L. Ed. 979.

70. *Procuring contract from government*.—*Tool Co. v. Norris*, 2 Wall. 45, 17 L. Ed. 868.

71. *Taking charge of claim before congress*.—*Trist v. Child*, 21 Wall. 441, 22 L. Ed. 623.

72. *Obtaining passage of law by state legislature*.—*Marshall v. Baltimore, etc.*, R. Co., 16 How. 314, 14 L. Ed. 953.

A contract is void, as against public policy, and can have no standing in court by which one party stipulates to employ a number of secret agents in order to obtain the passage of a particular law by the legislature of a state, and the other party promises to pay a large sum of money in case the law should pass. It was also void if, when it was made, the parties agreed to conceal from the members of the legislature the fact that the one party was the agent of the other, and was to receive a compensation for his services in case of the passage of the law. And if there was no agreement to that effect, there can be no recovery upon the contract, if in fact the agent did conceal from the members of the legislature that he was an agent who was to receive compen-

sation for his services in case of the passage of the law. Moreover, in this particular case, the law which was passed was not such a one as was stipulated for, and upon this ground there could be no recovery. There having been a special contract between the parties by which the entire compensation was regulated and made contingent, there could be no recovery on a count for quantum meruit. *Marshall v. Baltimore, etc., R. Co.*, 16 How. 314, 14 L. Ed. 953. See, generally, the title ASSUMPSIT, vol. 2, p. 636.

73. *Services partly illegal*.—*Trist v. Child*, 21 Wall. 441, 22 L. Ed. 623.

A contract by which an agent agrees to procure by "lobby services" the passage of a bill through congress, providing for the payment of a claim, is distinguishable from one for purely professional services, within which category are included drafting a petition which sets forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them, either orally or in writing, to a committee or other proper authority, with other services of like character intended to reach only the understanding of the persons sought to be influenced. Though compensation can be recovered for the latter services when they stand by themselves, yet when they are blended and confused with those which are forbidden, the whole is a unit and indivisible, and that which is bad destroys the good. Compensation can be recovered for no part. *Trist v. Child*, 21 Wall. 441, 22 L. Ed. 623.

74. *Express contract fixing compensation*.—*Stagg v. Insurance Co.*, 10 Wall. 589, 19 L. Ed. 1038; *Kock v. Emmerling*, 22 How. 69, 16 L. Ed. 292.

75. *Amount fixed by custom or usage*.—*Messie v. Watts*, 6 Cranch 148, 3 L.



worth.<sup>76</sup> Where there is an express contract for the compensation of an agent, no proof of a general custom as to such compensation is admissible which is in conflict with the contract.<sup>77</sup>

(3) *Actions for Compensation.*—If compensation be refused a person, who has properly performed the duties of an agent, he may institute an action against the principal for the recovery thereof.<sup>78</sup> An agent may maintain an action of

Ed. 181; *Kock v. Emmerling*, 22 How. 69, 16 L. Ed. 292; *Wright v. Ellison*, 1 Wall. 16, 17 L. Ed. 555. See, generally, the title **USAGES AND CUSTOMS**.

Where an agent was employed to sell an estate in Louisiana, and the owner refused, without sufficient reasons, to fulfill an agreement which the agent had made, a right to demand compensation accrued to the agent, the amount of which is to be settled by established usage. *Kock v. Emmerling*, 22 How. 69, 16 L. Ed. 292.

A contract to sell property, real or personal, on commission, is governed by the same rules as other sales. If a usage has been established in a particular locality for the sales of plantations, such usage, being reasonable, should govern in the absence of a special agreement. Nothing is more common in our large cities than to charge brokerage for procuring the loan of money. This varies as the money market rises or falls. One per cent, and sometimes two, is charged for this service. The same rule applies as to the sale of property. Where the contract is fair, such compensation should be paid, as is agreed by the parties, or established by usage. *Kock v. Emmerling*, 22 How. 69, 16 L. Ed. 292.

Although no express contract be made, yet it cannot be doubted that the law implies a contract between every man who transacts business for another, at the request of that other, and the person for whom it is transacted. A common locator, who undertakes to locate lands for an absent person, is bound to perform the usual duties of a locator, and is entitled to the customary compensation for those duties. *Massie v. Watts*, 6 Cranch 148, 3 L. Ed. 181. See, generally, the titles **IMPLIED CONTRACTS**, vol. 6, p. 888; **PUBLIC LANDS**.

**76. Reasonable value of services.**—*Goddard v. Foster*, 17 Wall. 123, 21 L. Ed. 589; *Wright v. Ellison*, 1 Wall. 16, 17 L. Ed. 555.

A., at Valparaiso, was the agent, under an agreement of May 7th, 1849, of B., at Boston, who was sending him adventures and shipments of goods, he selling the goods and investing the proceeds in other merchandise consigned to B., who sold the return cargoes; keeping an account of the profit and loss. A. was to have one-quarter of the net profits of B.'s business, that he, A., "conducted to completion," but was at liberty to withdraw from the arrangement at any time, "by giving B. so much notice that any voyage he, B., may have commenced previous to receipt

of such advice, shall receive the full benefit of all A.'s service to its final accomplishment." On the 22d of February, 1850, A. wrote to B. that he had resolved to join a Valparaiso house, which he named, but added: "I will manage your business as usual until December 31st, which will afford you ample time to make your arrangements for sending some one out if you are inclined." B. received this letter May 29th, 1850, and afterwards loaded and dispatched a ship consigned to A., or "in his absence," to the house which he had mentioned as the one he had resolved to join. A., concluded the whole business of this voyage as he had done that of previous voyages; but it was not "conducted to completion" prior to December 31st, 1850. Held, that A.'s letter of February 22d was to be taken as if he had said: "In the interval, before the arrival of any new agent to represent you, I will perform the same services for the new voyages not covered by the contract of May 17th, 1849, that I have rendered in the voyages covered by the contract, and that your new agent would perform were he here;" and, accordingly, that for all services performed by him in regard to this voyage he was entitled to be paid what the services were reasonably worth. *Goddard v. Foster*, 17 Wall. 123, 21 L. Ed. 589.

**77. Evidence of custom conflicting with express contract not admissible.**—*Stagg v. Insurance Co.*, 10 Wall. 589, 19 L. Ed. 1038.

Where an agent had received a general circular from his principal, which contained in clear language the terms of his compensation, and had acted on that circular without complaint for several years, he is estopped to deny that he was employed on those terms. The production of a circular of prior date, with other terms as to compensation, does not alter the case. *Stagg v. Insurance Co.*, 10 Wall. 589, 19 L. Ed. 1038. See, generally, the title **PAROL EVIDENCE**, ante, p. 12.

**78. Right of action.**—*Massie v. Watts*, 6 Cranch 148, 3 L. Ed. 181; *Livingston v. Swanwick*, 2 Dall. 300, 1 L. Ed. 389; *Goddard v. Foster*, 17 Wall. 123, 21 L. Ed. 589.

If compensation be refused a common locator, who undertakes to locate lands for an absent person, he may sue therefor in any court within whose jurisdiction the person for whom the location was made can be found. *Massie v. Watts*, 6 Cranch 148, 3 L. Ed. 181. See the titles **PUBLIC LANDS**; **VENUE**.

assumpsit against his principal for the value of services rendered.<sup>79</sup> An agent may sue his principal in his own name, on the contract by which he was employed, though he be a member of a mercantile house through which the correspondence necessary to the transaction of the business was carried on. The partners of the agent would not be parties to his contract with his principal, even if he agreed to make them sharers in the profits of it.<sup>80</sup> Upon the trial of an action brought by an agent for his commissions, the verdict in a former action against the principal upon a contract made by the agent, cannot be given in evidence.<sup>81</sup>

(4) *Compensation of Agent of Captors of Prize*.—As to compensation of an agent appointed by captors of a prize to represent their interest in the prize money, see the title PRIZE.

*b. Reimbursement for Advances, Expenses, and Disbursements*.—(1) *General Rule*.—The principal is bound to indemnify the agent against the consequences of all acts done by him in the execution of his agency, or in pursuance of the authority conferred upon him. Speaking generally, the agent has the right to be reimbursed for all his advances, expenses and disbursements incurred in the course of the agency, made on account of or for the benefit of his principal, when such advances, expenses and disbursements are reasonable, and have been properly incurred and paid without misconduct on the part of the agent.<sup>82</sup> If, in obeying the instructions or orders of the principal, the agent does acts which he does not know at the time to be illegal, the principal is bound to indemnify him for damages which he may be compelled to pay third parties.<sup>83</sup> An agent cannot be deprived of a right to reimbursement for advances made in the execution of his agency for a principal on the ground that he has not avoided a contract which is not in strict conformity with the statute of frauds, in the absence of any instruction or instructions from the principal not to comply therewith.<sup>84</sup>

**79. Assumpsit.**—*Goddard v. Foster*, 17 Wall. 123, 21 L. Ed. 589.

Compensation for services rendered by the plaintiff, as agent for the defendant in conducting a certain commercial adventure at his request and for his benefit, may be recovered in an action of assumpsit for the value of the services rendered. *Goddard v. Foster*, 17 Wall. 123, 21 L. Ed. 589. See, generally, the titles ASSUMPSIT, vol. 2, p. 636; IMPLIED CONTRACTS, vol. 6, p. 888.

**80. Parties.**—*Law v. Cross*, 1 Black 533, 17 L. Ed. 185.

**81. Evidence.**—*Livingston v. Swanwick*, 2 Dall. 300, 1 L. Ed. 389. See, generally, the titles EVIDENCE, vol. 5, p. 1004; VERDICT.

**82. Reimbursement of agent for advances, etc.**—*General rule.*—*Bibb v. Allen*, 149 U. S. 481, 37 L. Ed. 817.

"It is another general proposition, in respect to the relation between principal and agent, that a request to undertake an agency or employment, the proper execution of which does or may involve the loss or expenditure of money on the part of the agent, operates as an implied request on the part of the principal, not only to incur such expenditure, but also as a promise to repay it. So that the employment of a broker to sell property for future delivery implies not only an undertaking to indemnify the broker in respect to the execution of his agency, but likewise

implies a promise on the part of the principal to repay or reimburse him for such losses or expenditures as may become necessary, or may result from the performance of his agency." *Bibb v. Allen*, 149 U. S. 481, 37 L. Ed. 817.

**83. Damages paid by agent to third persons.**—*Bibb v. Allen*, 149 U. S. 481, 37 L. Ed. 817. See, also, *Riggs v. Lindsay*, 7 Cranch 500, 3 L. Ed. 419.

Where an agent has sold cotton for account of another, and was obliged to refund the purchase money to the purchaser on account of false packing by the principal, he is entitled to recover the amount so paid from the principal. *Bibb v. Allen*, 149 U. S. 481, 37 L. Ed. 817. See, generally, the title DAMAGES, vol. 5, p. 157.

**84. Failure to avoid contract not in conformity with statute of frauds.**—*Bibb v. Allen*, 149 U. S. 481, 37 L. Ed. 817.

Contracts not in conformity with the statute are only voidable, and not illegal, and an agent may, therefore, execute such voidable contracts without being chargeable with either fraud, misconduct, or disregard of the principal's rights. The principal cannot interpose such an objection as against the agent's right of reimbursement for his outlays after the execution of contracts, merely voidable for want of writing. *Bibb v. Allen*, 149 U. S. 481, 37 L. Ed. 817. See, generally, the title FRAUDS, STATUTE OF, vol. 6, p. 451.

(2) *Exception to Rule Where Transaction Illegal*.—Where, in the execution of his agency, or in pursuance of the authority conferred upon him, an agent does acts which he does not know at the time to be illegal, or contrary to good morals and public policy, the principal is bound to indemnify him for advances, expenses and losses incurred,<sup>85</sup> but where the agent has knowledge of the illegality of the transaction and is privy to the unlawful design, he is regarded as particeps criminis which precludes him from a recovery for advances made or expenses incurred by himself.<sup>86</sup>

(3) *Action for Reimbursement*.—An action of assumpsit in a common-law court is the proper remedy to recover money paid, laid out, and expended by an agent on behalf of his principal.<sup>87</sup>

c. *Lien of Agent*.—Where an agent holds the legal title to property of which his principal is the equitable owner, such title, as between the principal and agent themselves, operates as a lien on the property in favor of the agent for his serv-

**85. Where agent ignorant of illegality of transaction.**—*Irwin v. Williar*, 110 U. S. 499, 510, 28 L. Ed. 225; *Bibb v. Allen*, 149 U. S. 481, 37 L. Ed. 817. See, generally, the title **ILLEGAL CONTRACTS**, vol. 6, p. 737.

Where a contract, void on account of the illegal intent of the principal parties to it, has been negotiated by a person ignorant of such intent and innocent of any violation of law, the latter may have a meritorious ground for the recovery of advances made by him. *Irwin v. Williar*, 110 U. S. 499, 510, 28 L. Ed. 225; *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 32 L. Ed. 979.

**86. Where agent has knowledge of illegality of transaction.**—*Addison on Contracts*, § 636; *Story on Agency*, §§ 339, 340; *Bibb v. Allen*, 149 U. S. 481, 37 L. Ed. 817; *Irwin v. Williar*, 110 U. S. 499, 510, 28 L. Ed. 225; *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 32 L. Ed. 979.

**87. Action for reimbursement—Assumpsit.**—*Minturn v. Maynard*, 17 How. 477, 15 L. Ed. 235; *Willinks v. Hollingsworth*, 6 Wheat. 240, 5 L. Ed. 251; *Riggs v. Lindsay*, 7 Cranch 500, 3 L. Ed. 419. See, generally, the title **ASSUMPSIT**, vol. 2, p. 636.

Where a libel was filed in personam, against the owners of a steamboat in California, by their general agent or broker, for the balance of an account for money paid, laid out, and expended, in paying for supplies, repairs, and advertising of the steamboat, together with commission on the disbursements, the libel was properly dismissed, for want of jurisdiction. There was nothing in the case to bring it within the class of maritime contracts; nor does the local law of California, which authorizes an attachment of vessels for supplies or repairs, extend to the balance of accounts between agent and principal, who have never dealt on the credit, pledge, or security of the vessel. The proper remedy is an action of assumpsit in a common-law court. *Minturn v. Maynard*, 17 How. 477, 15 L. Ed. 235. See, generally, the title **ADMIRALTY**, vol. 1, p. 119.

H. and others, merchants, in Baltimore, consigned a vessel and cargo to W. and others, merchants, in Amsterdam, with instructions to them respecting her ulterior destination, which showed, that on the failure of getting a freight to Batavia, or of selling the vessel at a price limited, she was to proceed to St. Petersburg, and there take in a return cargo of Russian goods for the United States, but with instructions to the master, committing to him the management of the ulterior voyage. No freight to Batavia could be obtained, and the vessel could not be sold for the price limited, at Amsterdam, and W. and others purchased, in Amsterdam, with the concurrence of the master, a return cargo of Russian goods, partly with the money of H. and others, and partly with money advanced by themselves. On the return of the vessel to Baltimore, H. and others objected to the purchase of this cargo in Amsterdam, as being contrary to express orders, and gave notice to W. and others of their determination to hold them responsible for all losses sustained in consequence of this breach of instructions; but received the goods and sold them. W. and others brought an assumpsit against H. and others, to recover from them the moneys advanced; the declaration contained the three usual money counts. Held: 1st. That the plaintiffs had a demand in law against the defendants, which could be maintained in this form of action; 2d. That whether the plaintiffs could, or could not, be made responsible in any form of action which might be devised, for the possible loss resulting from the breaking up of the intended voyage to St. Petersburg, the defendants were not entitled to a deduction from the plaintiffs' demand, for the amount of such loss. *Willinks v. Hollingsworth*, 6 Wheat. 240, 5 L. Ed. 251.

The defendants having ordered the plaintiff to purchase salt for them, and to draw on them for the amount, and he having so purchased and drawn, they are bound to accept and pay his bills; and if they do not, he may recover from them



ices and for advances made by him in connection therewith.<sup>88</sup> Where a principal is engaged in fraudulently appropriating property of another to his own use, an agent, who assists in perpetrating the fraud, cannot claim a lien on the property on account of his services and liabilities as agent.<sup>89</sup>

**B. As between Principal or Agent and Third Persons—1. LIABILITY OF PRINCIPAL TO THIRD PERSONS<sup>90</sup>—a. In General.**—Whatever an agent does or says in reference to the business with which he is at the time employed, and within the scope of the authority conferred, is as binding upon the principal as if it were done or said by the principal himself.<sup>91</sup> It is a general rule, applicable to agency of every description, that the agent cannot bind his principal, except in matters coming within the scope of his authority.<sup>92</sup> The agent, acting within his author-

the amount of the bills, and damages and costs of protest (if he has paid the same), upon a count for money paid, laid out and expended; and the bills of exchange may be given in evidence on that count. If, after protest of the bills, the plaintiff sell the salt without orders, it will not prejudice his right of action, although he render no account of sales to the defendants. *Riggs v. Lindsay*, 7 Cranch 500, 3 L. Ed. 419.

**88. Lien of agent—Legal title in agent.**—*Calais Steamboat Co. v. Scudder*, 2 Black 372, 17 L. Ed. 282.

A person residing in California, employed an agent to contract for, and superintend the building of a ship at New York. The agent was furnished with funds for the purpose, and specially directed by the principal to give himself out as the true owner, and to conceal the interest of the principal. Accordingly the agent made all contracts in his own name, and had the vessel registered as his own property. Held, that as between the principal and the agent themselves, the legal title of the latter could not avail him, except as a lien for his services and money advanced. *Calais Steamboat Co. v. Scudder*, 2 Black 372, 17 L. Ed. 282.

**89. Agent engaged in perpetrating fraud.**—*Trask v. Jacksonville, etc., R. Co.*, 124 U. S. 515, 31 L. Ed. 521.

**90. Liability of principal to third persons.**—See post, "Liability of Agent to Third Persons," IX, B, 2.

**91. Liability of principal to third persons—In general.**—*American Fur Co. v. United States*, 2 Pet. 358, 7 L. Ed. 450; *United States v. Gooding*, 12 Wheat. 460, 6 L. Ed. 693; *Stockwell v. United States*, 13 Wall. 531, 20 L. Ed. 491; *Hoffman v. Hancock, etc., Ins. Co.*, 92 U. S. 161, 23 L. Ed. 539; *Bank v. Guttschlick*, 14 Pet. 19, 10 L. Ed. 335; *Insurance Co. v. Mahone*, 21 Wall. 152, 22 L. Ed. 593; *The Burdett*, 9 Pet. 682, 9 L. Ed. 273; *General Interest Ins. Co. v. Ruggles*, 12 Wheat. 408, 6 L. Ed. 674; *Boyle v. Zacharie*, 6 Pet. 635, 8 L. Ed. 527; *Cliquot's Champagne*, 3 Wall. 114, 18 L. Ed. 116; *Baldwin v. Bank*, 1 Wall. 234, 17 L. Ed. 534; *Philadelphia, etc., R. Co. v. Quigley*, 21

*How.* 202, 16 L. Ed. 73; *Poorman v. Woodward*, 21 How. 266, 16 L. Ed. 152; *The Schooner Freeman*, 18 How. 182, 15 L. Ed. 341; *Vicksburg, etc., Railroad v. O'Brien*, 119 U. S. 99, 30 L. Ed. 299; *Xenia Bank v. Stewart*, 114 U. S. 224, 29 L. Ed. 101; *Angle v. North-Western, etc., Ins. Co.*, 92 U. S. 330, 23 L. Ed. 556; *Schimmelpennich v. Bayard*, 1 Pet. 264, 7 L. Ed. 138; *Randolph v. Ware*, 3 Cranch 503, 2 L. Ed. 512; *Shankland v. Washington*, 5 Pet. 390, 8 L. Ed. 166; *Parsons v. Armor*, 3 Pet. 413, 7 L. Ed. 724; *Butler v. Maples*, 9 Wall. 766, 19 L. Ed. 822; *Owings v. Hull*, 9 Pet. 607, 9 L. Ed. 246; *Quebec Bank v. Hellman*, 110 U. S. 178, 28 L. Ed. 111; *Insurance Co. v. Wilkinson*, 13 Wall. 222, 20 L. Ed. 617; *Insurance Co. v. Newton*, 22 Wall. 32, 22 L. Ed. 793; *Taylor v. Davis*, 110 U. S. 330, 335, 28 L. Ed. 163; *The Monte Allegre*, 9 Wheat. 616, 6 L. Ed. 174. See ante, "Nature and Extent of Agent's Authority," VI; "Instructions as Limiting Authority," VI, E; "Effect of Holding Out Agent as Clothed with Authority," VI, F; "Agent Must Act in Way Usual in Line of Business in Which He Is Acting," VI, G; "Duty of Third Persons to Ascertain Agent's Authority," VI, H; "Authority of Public Agents," VI, J; "Proof of Authority," VI, L.

**92. Agent must act within scope of authority.**—*General Interest Ins. Co. v. Ruggles*, 12 Wheat. 408, 6 L. Ed. 674; *Parsons v. Armor*, 3 Pet. 413, 7 L. Ed. 724.

This rule applies particularly to a master and owner of a vessel, and is construed with considerable strictness. Thus, in the case of *Brucher v. Lawson*, Cas. Temp. Hardw. 85. and *Abbott* 119, the action was against the owner of a ship, for goods lost by the carelessness of the master; and judgment was given for the defendant, because it did not appear that the ship was usually employed in carrying goods for hire. For Lord Hardwicke said, no man could say that the master, by taking in goods of his own head, could make the owner liable. *General Interest Ins. Co. v. Ruggles*, 12 Wheat. 408, 6 L. Ed. 674. See the titles MASTER OF VESSELS, vol. 8, p. 300; SHIPS AND SHIPPING.

ity, is substituted for the principal in every respect.<sup>93</sup> The acts of agents do not necessarily derive their validity from professing, on the face of them, to have been done in the exercise of their agency. In the more solemn exercise of derivative powers, as applied to the execution of instruments known to the common law, rules of form have been prescribed. But in the diversified exercise of the duties of a general agent, the liability of the principal depends upon the facts, that the act was done in the exercise, and within the limits of the powers delegated.<sup>94</sup> These facts are necessarily inquirable into by a court and jury and this inquiry is not confined to written instruments, but extends to any act, with or without writing within the scope of the power or confidence reposed in the agent.<sup>95</sup> In ascertaining such facts, as connected with the execution of any written instrument, parol testimony is admissible.<sup>96</sup> Whatever an agent does or says in reference to the business with which he is at the time employed, and within the scope of the authority conferred, may be proved, as well in a criminal as in a civil case, in like manner as if the evidence applied personally to the principal,<sup>97</sup> and such proof may be made by other evidence than the agent's oath.<sup>98</sup>

b. *Contracts*—(1) *Disclosed Principal*—(a) *In General*.—Where an agent contracts in the name of his principal, while acting within the scope of his authority, or in the course of his employment, the contracts are the contracts of the principal, and are binding on the principal,<sup>99</sup> whether the principal be a corpora-

### 93. Agent substituted for principal.—

The *Burdett*, 9 Pet. 682, 9 L. Ed. 273; *Vicksburg, etc., Railroad v. O'Brien*, 119 U. S. 99, 30 L. Ed. 299.

Persons dealing with an agent are entitled to the same protection as if dealing with the principal, to the extent that the agent acts within the scope of his authority. *Angle v. North-Western, etc., Ins. Co.*, 92 U. S. 330, 23 L. Ed. 556.

### 94. Facts upon which liability depends.—

*Mechanics' Bank v. Bank*, 5 Wheat. 326, 5 L. Ed. 100; *Baldwin v. Bank*, 1 Wall. 234, 17 L. Ed. 534. See ante, "Duty of Third Persons to Ascertain Agent's Authority," VI, H.

### 95. Question for court and jury.—

*Mechanics' Bank v. Bank*, 5 Wheat. 326, 5 L. Ed. 100.

96. Evidence as to nature of agent's acts—*Parol testimony*.—*Mechanics' Bank v. Bank*, 5 Wheat. 326, 5 L. Ed. 100.

Where a check was drawn by a person who was the cashier of an incorporated bank, and it appeared doubtful, upon the face of the instrument, whether it was an official act or a private act, parol evidence was admitted, to show that it was an official act. *Mechanics' Bank v. Bank*, 5 Wheat. 326, 5 L. Ed. 100. See, generally, the title *PAROL EVIDENCE*, ante, p. 12.

### 97. Agent's acts provable as principal's.—

*American Fur Co. v. United States*, 2 Pet. 358, 7 L. Ed. 450; *United States v. Gooding*, 12 Wheat. 460, 468, 6 L. Ed. 693; *Stockwell v. United States*, 13 Wall. 531, 20 L. Ed. 491; *Cliquot's Champagne*, 3 Wall. 114, 18 L. Ed. 116; *Xenie Bank v. Stewart*, 114 U. S. 224, 29 L. Ed. 101; *The Burdett*, 9 Pet. 682, 9 L. Ed. 273.

98. Proof by evidence other than agent's oath.—*The Burdett*, 9 Pet. 682, 9 L. Ed. 273.

Whatever an agent does in the lawful exercise of that authority is imputable to the principal, and may be proven without calling the agent as a witness. *Vicksburg, etc., Railroad v. O'Brien*, 119 U. S. 99, 30 L. Ed. 299. See ante, "Proof of Manner of Executing Authority," VII, H.

### 99. Disclosed principal—In general.—

*Taylor v. Davis*, 110 U. S. 330, 335, 28 L. Ed. 163; *Bank v. Patterson*, 7 Cranch 299, 3 L. Ed. 351; *Shankland v. Washington*, 5 Pet. 390, 8 L. Ed. 166; *Randolph v. Ware*, 3 Cranch 503, 2 L. Ed. 512; *Philadelphia, etc., R. Co. v. Quigley*, 21 How. 202, 16 L. Ed. 73; *Poorman v. Woodward*, 21 How. 266, 16 L. Ed. 152; *Ford v. Williams*, 21 How. 287, 289, 16 L. Ed. 36; *Baldwin v. Bank*, 1 Wall. 234, 17 L. Ed. 534; *Bank v. Gutschlick*, 14 Pet. 19, 10 L. Ed. 335; *General Interest Ins. Co. v. Ruggles*, 12 Wheat. 408, 6 L. Ed. 674. See ante, "Manner of Executing Authority," VII.

It is true with respect to policies of insurance, as well as to all other contracts, that the principal is responsible for the acts of his agent, within the scope of his authority, *General Interest Ins. Co. v. Ruggles*, 12 Wheat. 408, 6 L. Ed. 674, but a promise by an agent, that he would write to his principal to get insurance done, does not bind the principal to insure. *Randolph v. Ware*, 3 Cranch 503, 2 L. Ed. 512. See, generally, the title *INSURANCE*, vol. 7, p. 66.

Where certain persons gave a joint and several note for the purpose of raising money, and authorized their agent to use the note to borrow money thereon for the joint benefit of himself and the other makers thereof, and the agent received a certificate of deposit, which certificate was afterwards duly paid upon presentation,



tion or an individual,<sup>1</sup> and a principal's liability on a contract made by his general agent is not affected by the agent's failure to report the contract to his principal.<sup>2</sup> Upon a negotiable promissory note made by an agent in his own name but disclosing on its face the name of the principal, an action lies against the principal.<sup>3</sup>

(b) *Where Credit Given to Agent.*—If a party is informed that the person with whom he is dealing is merely the agent for another, and prefers to deal with the agent personally on his own credit, he will not be allowed afterwards to charge the principal.<sup>4</sup>

(2) *Undisclosed Principal.*—Where a party has entered into a written contract, it may be so shown that he did it as the agent of another, though the agency was concealed and the principal not disclosed, and the principal, in such case, may be held liable upon it.<sup>5</sup> A contract of an agent is the contract of the principal, and the latter may be sued on the contract, though not named therein.<sup>6</sup> Extraneous evidence is admissible to show that a person whose name is affixed to a contract, acted only as an agent, thereby enabling the principal to be sued in his own name, and this, though it purported on its face to have been made by the agent himself and the principal not named.<sup>7</sup> But upon a negotiable promissory note made by an agent in his own name, and not disclosing, on its face, the name of the principal, no action lies against the principal.<sup>8</sup> A contract made by the agent of a shipper limiting the carrier's liability, is binding upon the principal

the signers of the note cannot escape from their responsibility upon the plea that a certificate of deposit was not money, and thus the agent did not act within the scope of his authority to borrow money. *Poorman v. Woodward*, 21 How. 266, 16 L. Ed. 152.

The legal effect of an agreement made by an agent for his principal, whilst the agent is acting within the scope of his authority, being that it is the agreement of the principal, it is settled that the allegation that a party made, accepted, indorsed or delivered a bill of exchange, is sufficient, although the defendant did not, in fact, do either of these acts himself, provided he authorized the doing of them. *Bank v. Guttschlick*, 14 Pet. 19, 10 L. Ed. 335. See the title *BILLS, NOTES AND CHECKS*, vol. 3, p. 257.

**1. Contract by agent of corporation.**—*Washington Gas Light Co. v. Lansden*, 172 U. S. 534, 43 L. Ed. 543; *Philadelphia, etc., R. Co. v. Quigley*, 21 How. 202, 210, 16 L. Ed. 73.

Whenever a corporation aggregate is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents, are express promises of the corporation. *Bank v. Patterson*, 7 Cranch 299, 3 L. Ed. 351. See, generally, the titles *CORPORATIONS*, vol. 4, p. 621; *OFFICERS AND AGENTS OF PRIVATE CORPORATIONS*, vol. 8, p. 957.

**2. Liability not affected by agent's failure to report contract.**—*Washington, etc., Steam Packet Co. v. Sickles*, 10 How. 419, 13 L. Ed. 479.

**3. Principal disclosed on face of note.**—*Mechanics' Bank v. Bank*, 5 Wheat. 326,

5 L. Ed. 100; *Metcalf v. Williams*, 104 U. S. 93, 26 L. Ed. 665; *Hitchcock v. Buchanan*, 105 U. S. 416, 26 L. Ed. 1078. See, also, *Cragin v. Lovell*, 109 U. S. 194, 198, 27 L. Ed. 903. See ante, "Manner of Executing Authority," VII.

**4. Where credit given to agent.**—*Ford v. Williams*, 21 How. 287, 16 L. Ed. 36. See, also, *Patrick v. Bowman*, 149 U. S. 411, 37 L. Ed. 790.

**5. Undisclosed principal.**—*Jones v. Guaranty, etc., Co.*, 101 U. S. 622, 25 L. Ed. 1030. See ante, "Manner of Executing Authority," VII.

**6.** *Ford v. Williams*, 21 How. 287, 16 L. Ed. 36; *Baldwin v. Bank*, 1 Wall. 234, 241, 17 L. Ed. 534; *Higgins v. McCrea*, 116 U. S. 671, 680, 29 L. Ed. 764.

When a person deals with an agent, without any disclosure of the fact of his agency, he may elect to treat the after-discovered principal as the person with whom he contracted. *Ford v. Williams*, 21 How. 287, 16 L. Ed. 36; *Nash v. Towne*, 5 Wall. 689, 18 L. Ed. 527. See, also, *Higgins v. McCrea*, 116 U. S. 671, 680, 29 L. Ed. 764.

**7. Admissibility of parol evidence.**—*Salmon Falls Mfg. Co. v. Goddard*, 14 How. 446, 454, 14 L. Ed. 493; *Ford v. Williams*, 21 How. 287, 16 L. Ed. 36; *Baldwin v. Bank*, 1 Wall. 234, 17 L. Ed. 534. See the title *PAROL EVIDENCE*, ante, p. 12.

**8. Principal not disclosed on face of note.**—*Cragin v. Lovell*, 109 U. S. 194, 198, 27 L. Ed. 903, distinguishing *Mechanics' Bank v. Bank*, 5 Wheat. 326, 5 L. Ed. 100; *Metcalf v. Williams*, 104 U. S. 93, 26 L. Ed. 665, and *Hitchcock v. Buchanan*, 105 U. S. 416, 26 L. Ed. 1078.



although not authorized by him, where the agency was not disclosed to the carrier when the contract was made.<sup>9</sup>

(3) *Money Collected and Paid Over to Principal*.—See post, "Money Collected and Paid Over to Principal," IX, B, 2, b.

(4) *Where Agent Exceeds Authority*.—It is a general rule that if an agent exceed his authority, however sincere his belief that he is acting within authority conferred, his acts will not bind his principal,<sup>10</sup> unless such unauthorized acts are subsequently approved and ratified by the principal.<sup>10a</sup> No liability on the part of the principal can exist to one dealing with an agent with notice that the particular act of the agent was without authority from the principal.<sup>11</sup> In the case of a special agency, the one who deals with the agency must inquire into the extent of his authority, and the principal is not liable for acts done in excess of such authority,<sup>12</sup> but a principal is bound by all that his general agent does within the scope of the business in which he is employed, though the agent may have violated special or secret instructions given him, but not disclosed to the party with whom the agent deals.<sup>13</sup> In regard to notes and bills issued or accepted by an agent, whether acting under a general or special power, the rule is that, in each case, the person dealing with the agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that the papers on which he relies come within the power under which the agent acts.<sup>14</sup> A person con-

**9. Contract limiting carrier's liability.**—*York Co. v. Central Railroad*, 3 Wall. 107, 18 L. Ed. 170. See the title CARRIERS, vol. 3, pp. 556, 601.

**10. Where agent exceeds authority—In general.**—*Clarke v. Van Riemsdyk*, 9 Cranch 153, 3 L. Ed. 688; *The Sally Magee*, 3 Wall. 451, 18 L. Ed. 197; *Schimmelpennich v. Bayard*, 1 Pet. 264, 7 L. Ed. 138; *Parsons v. Armor*, 3 Pet. 413, 7 L. Ed. 724. See ante, "In General," IX, B, 1, a.

"Regularly it is true," says Lord Coke, "that when a man doth less than the commandment or authority committed unto him, then, the commandment or authority being not pursued, the act is void. And when a man doth that which he is authorized to do, and more, then it is good for that which is warranted, and void for the rest. Yet both these rules have divers exceptions and limitations." (Co. Litt., 258 a.) And "Lord Coke is well warranted," says Mr. Justice Story (*Story Agency*, § 166), "in suggesting that there are exceptions and limitations. Where there is a complete execution of the authority, and something ex abundanti is added which is improper, then the execution is good and the excess only is void. But when there is not the complete execution of the power, or when the boundaries between the excess and the rightful execution are not distinguishable, then the whole would be void." *Curtis v. Innerarity*, 6 How. 146, 12 L. Ed. 380.

Where the cashier of a bank wrote to the secretary of the treasury, saying that the bearer of the letter was authorized to contract for the transfer of money from New York to New Orleans, and such a transaction was not within the scope of the powers of the cashier, nor authorized by the directors, the bank was not bound to reimburse the money which the secretary of the treasury advanced. *United*

*States v. City Bank*, 21 How. 356, 16 L. Ed. 130. See the title BANKS AND BANKING, vol. 3, p. 1.

**10a. Ratification by principal.**—See post, "Ratification of Unauthorized Acts of Agent," XI.

**11. Where third person has knowledge of want of authority.**—*Butler v. Maples*, 9 Wall. 766, 19 L. Ed. 822; *Owings v. Hull*, 9 Pet. 607, 9 L. Ed. 246.

**12. Special agency.**—*Butler v. Maples*, 9 Wall. 766, 19 L. Ed. 822; *Owings v. Hull*, 9 Pet. 607, 9 L. Ed. 246.

From the general rule that an agent, with limited powers, cannot bind his principal, when he transcends his power, it follows that a person transacting business with him, on the credit of his principal, is bound to know the extent of his authority. *Schimmelpennich v. Bayard*, 1 Pet. 264, 7 L. Ed. 138. See ante, "Classification of Agencies," II; "Duty of Third Persons to Ascertain Agent's Authority," VI, H.

**13. General agency.**—*Butler v. Maples*, 9 Wall. 766, 19 L. Ed. 822; *Owings v. Hull*, 9 Pet. 607, 9 L. Ed. 246.

**14. Issuance or acceptance of commercial paper by agent.**—*Marsh v. Fulton County*, 10 Wall. 676, 19 L. Ed. 1040; *The Floyd Acceptances*, 7 Wall. 666, 19 L. Ed. 169. See, also, *Merchants' Bank v. State Bank*, 10 Wall. 604, 19 L. Ed. 1008.

This rule applies to every person who takes the paper after such issuance or acceptance, for the protection which commercial usage throws around negotiable paper cannot be used to establish the authority by which it was originally issued. *Marsh v. Fulton County*, 10 Wall. 676, 19 L. Ed. 1040; *The Floyd Acceptances*, 7 Wall. 666, 19 L. Ed. 169. See, generally, the title BILLS, NOTES AND CHECKS, vol. 3, p. 257.

tracting with an agent is bound to know that the agent cannot, in virtue of any general power, do any act which is not in conformity with the laws of the state in which the contract was made. The principal can never be presumed to authorize his agent to violate the law.<sup>15</sup>

c. *Torts*—(1) *In General*.—The tortious act of an agent is the act of the principal, and the principal is liable therefor to third persons, if the act be done in the course of the agency, though not directly authorized by the principal, and though it may have been done in disobedience of his orders.<sup>16</sup> This rule is equally applicable whether the principal be a corporation or an individual.<sup>17</sup> But a willful fraud committed by an agent on a third person, when the act is not within the agency, does not bind the principal.<sup>18</sup>

(2) *Where Principal Receives Benefit of Tortious Act*.—The principle that the tortious act of the agent is the act of the principal if done in the course of the agency, though not directly authorized is emphatically true when the principal has received and appropriated the benefit of the act.<sup>19</sup>

(3) *Extent of Liability*—(a) *Compensatory Damages*.—A principal is liable to make compensation for injuries done by his agent within the scope of his em-

**15. Act not in conformity with laws of state in which contract made.**—Owings v. Hull, 9 Pet. 607, 9 L. Ed. 246.

Where an agent, authorized to sell property belonging to the estate of a decedent, does not make such sale in conformity with the laws of the state, in which the property is situated, his acts do not bind his principal. The purchaser, equally with the seller, is bound, under such circumstances to know what these laws are, and to be governed thereby. Owings v. Hull, 9 Pet. 607, 9 L. Ed. 246.

**16. Liability for torts—In general.**—Stockwell v. United States, 13 Wall. 531, 20 L. Ed. 491; Railroad Co. v. Hanning, 15 Wall. 649, 21 L. Ed. 220; Hoover v. Wise, 91 U. S. 308, 23 L. Ed. 392; Sturgis v. Boyer, 24 How. 110, 16 L. Ed. 591; Veazie v. Williams, 8 How. 134, 12 L. Ed. 1018; Philadelphia, etc., R. Co. v. Derby, 14 How. 468, 14 L. Ed. 502; Macon County v. Shores, 97 U. S. 272, 24 L. Ed. 889; Merchants' Bank v. State Bank, 10 Wall. 604, 19 L. Ed. 1008; United States v. State Bank, 96 U. S. 30, 24 L. Ed. 647; Philadelphia, etc., R. Co. v. Quigley, 21 How. 202, 16 L. Ed. 73; Salt Lake City v. Hollister, 118 U. S. 256, 30 L. Ed. 176; Lake Shore, etc., R. Co. v. Prentice, 147 U. S. 101, 37 L. Ed. 97; The Amiable Nancy, 3 Wheat. 546, 4 L. Ed. 456; National Bank v. Graham, 100 U. S. 699, 702, 25 L. Ed. 750; Denver, etc., R. Co. v. Harris, 122 U. S. 597, 608, 30 L. Ed. 1146; New Jersey Steamboat Co. v. Brockett, 121 U. S. 637, 30 L. Ed. 1049; Washington Gas Light Co. v. Lansden, 172 U. S. 534, 43 L. Ed. 543; American Fur Co. v. United States, 2 Pet. 358, 7 L. Ed. 450; Jecker v. Montgomery, 18 How. 110, 15 L. Ed. 311; Guy v. Donald, 203 U. S. 399, 51 L. Ed. 245; The Monte Allegre, 9 Wheat. 616, 6 L. Ed. 174. See, generally, the title TORTS.

The principal is liable for the acts and negligence of the agent in the course of his employment, although he did not authorize or did not know of the acts com-

plained of. Story on Agency, § 452; 2 Addison on Torts, 343, 2d Ed. So long as he stands in the relation of principal or master to the wrongdoer, the owner is responsible for his acts. When he ceases to be such and the actor is himself the principal and master, not a servant or agent, he alone is responsible. Railroad Co. v. Hanning, 15 Wall. 649, 21 L. Ed. 220.

**Liability of vessels and owners.**—As to the liability of vessels and their owners for the tortious acts of masters, pilots or other officers, see the titles COLLISION, vol. 3, p. 870; MASTERS OF VESSELS, vol. 8, p. 300; PILOTS, ante, p. 399; SHIPS AND SHIPPING; TOWAGE, TUGS AND TOWS.

As to acts of an agent subjecting a vessel to condemnation as a prize, see the title PRIZE.

**17. Rule applicable to individuals and corporations.**—Washington Gas Light Co. v. Lansden, 172 U. S. 534, 43 L. Ed. 543; Philadelphia, etc., R. Co. v. Quigley, 21 How. 202, 16 L. Ed. 73; Salt Lake City v. Hollister, 118 U. S. 256, 30 L. Ed. 176; National Bank v. Graham, 100 U. S. 699, 702, 25 L. Ed. 750; Lake Shore, etc., R. Co. v. Prentice, 147 U. S. 101, 37 L. Ed. 97; Denver, etc., R. Co. v. Harris, 122 U. S. 597, 30 L. Ed. 1146; New Jersey Steamboat Co. v. Brockett, 121 U. S. 637, 30 L. Ed. 1049. See, generally, the titles CORPORATIONS, vol. 4, p. 621; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 8, p. 957.

**18. Fraudulent act not within agency.**—The Schooner Freeman, 18 How. 182, 15 L. Ed. 341. See, generally, the title FRAUD AND DECEIT, vol. 6, p. 394.

**19. Where tortious act beneficial to principal.**—Stockwell v. United States, 13 Wall. 531, 20 L. Ed. 491.

It is well settled in England as here, that if a principal ratify a sale by his agent, and take the benefit of it, and it afterwards turn out that fraud or mistake existed in the sale, the latter may be

ployment, though the act is done wantonly and recklessly, or against the express orders of the principal.<sup>20</sup> This rule is applicable whether the principal be a corporation or an individual.<sup>21</sup>

(b) *Exemplary or Punitive Damages*.—See the title EXEMPLARY DAMAGES, vol. 6, pp. 193, 196.

(4) *Liability in Particular Instances*.—Particular instances in which a principal has been liable for the tortious acts of his agent will be found in the note.<sup>22</sup>

annulled, and the parties placed in statu quo, or they may, where the case and the wrong are divisible, be at times relieved to the extent of the injury. The principal in such case is profiting by the acts of the agent, and is hence answerable civiliter for the acts of the agent, however innocent himself of any intent to defraud. *Veazie v. Williams*, 8 How. 134, 157, 12 L. Ed. 1018.

**20. Compensatory damages**.—*Lake Shore, etc., R. Co. v. Prentice*, 147 U. S. 101, 37 L. Ed. 97; *The Amiable Nancy*, 3 Wheat. 546, 4 L. Ed. 456; *Philadelphia, etc., R. Co. v. Derby*, 14 How. 468, 14 L. Ed. 502; *New Jersey Steamboat Co. v. Brockett*, 121 U. S. 637, 30 L. Ed. 1049. See, generally, the title DAMAGES, vol. 5, p. 157.

A principal is liable to make compensation for a libel published or a malicious prosecution instituted by his agent. *Lake Shore, etc., R. Co. v. Prentice*, 147 U. S. 101, 110, 37 L. Ed. 97. See, generally, the titles LIBEL AND SLANDER, vol. 7, p. 857; MALICIOUS PROSECUTION, vol. 7, p. 1080.

**21. Rule applicable to corporations**.—*Lake Shore, etc., R. Co. v. Prentice*, 147 U. S. 101, 37 L. Ed. 97; *Philadelphia, etc., R. Co. v. Quigley*, 21 How. 202, 210, 16 L. Ed. 73; *National Bank v. Graham*, 100 U. S. 699, 702, 25 L. Ed. 750; *Salt Lake City v. Hollister*, 118 U. S. 256, 261, 30 L. Ed. 176; *Denver, etc., R. Co. v. Harris*, 122 U. S. 597, 608, 30 L. Ed. 1146; *Philadelphia, etc., R. Co. v. Derby*, 14 How. 468, 14 L. Ed. 502; *New Jersey Steamboat Co. v. Brockett*, 121 U. S. 637, 30 L. Ed. 1049.

In the case of a corporation, as of an individual, if any wantonness or mischief on the part of the agent, acting within the scope of his employment, causes additional injury to the plaintiff in body or mind, the principal is liable to make compensation for the whole injury suffered. *Lake Shore, etc., R. Co. v. Prentice*, 147 U. S. 101, 37 L. Ed. 97, citing *Kennon v. Gilmer*, 131 U. S. 22, 33 L. Ed. 110. See, generally, the titles CORPORATIONS, vol. 4, p. 621; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 8, p. 957.

**22. Liability in particular instances—Negligence**.—The general rule is that when an injury has been sustained by the negligent manner in which a wharf or other work is constructed or protected, the principal is liable for the acts and

negligence of the agent in the course of the employment, although he did not authorize or know of the acts complained of. When the actor ceases to be a servant or agent, and is, himself, the master, he alone is responsible. *Railroad Co. v. Hanning*, 15 Wall. 649, 21 L. Ed. 220.

When a contractor agrees with a railroad company to furnish the materials and labor for building a wharf, to put in posts, piles, etc., as the company should require, making an old wharf as good as new, and a new one in the most workman-like manner; to submit to the supervision and direction of the company's engineer, and to do the work to his satisfaction; held, that the company had the general and special control of the work, and that the contractor was their agent; and that the company was responsible for an injury occurring through the negligence of the contractor or of those in his employment. *Railroad Co. v. Hanning*, 15 Wall. 649, 21 L. Ed. 220. See, generally, the title NEGLIGENCE, vol. 8, p. 873.

**Fraud**.—Where a person acquires title to property through an agent, he is chargeable with the agent's frauds as if he had committed them personally. *McIntire v. Pryor*, 173 U. S. 38, 52, 43 L. Ed. 606.

It is no answer to the liability of a principal to say that the act done by the agent was of a fraudulent character, and that the principal did not authorize the commission of a fraud. For a fraud committed by a partner or an agent the principal is not liable criminally; but he is liable in a civil suit if the fraud be committed in the transaction of the very business in which the agent was appointed to act. *Story on Agency*, §§ 452-454. *Hoover v. Wise*, 91 U. S. 308, 23 L. Ed. 392.

Where the money or property of an innocent person has gone into the coffers of the nation by means of a fraud to which its agent was a party, such money or property cannot be held by the United States against the claim of the wronged and injured party. The agent was agent for no such purpose. His doings were vitiated by the underlying dishonesty, and could confer no rights upon his principal. *United States v. State Bank*, 96 U. S. 30, 24 L. Ed. 647. See, also, *McIntire v. Pryor*, 173 U. S. 38, 52, 43 L. Ed. 606. See, generally, the title FRAUD AND DECEIT, vol. 6, p. 394.

**Libel**.—A corporation may be held liable for a libel, by its agent within the scope of his employment; and the malice necessary



d. *Liability of Principal for Acts of Subagent*.—Where an agent has power to employ a subagent, the acts of the subagent have the same effect as if done by the principal and he is liable for them,<sup>23</sup> but for the acts of the agent of an intermediate independent employer, he is not liable.<sup>24</sup>

2. *LIABILITY OF AGENT TO THIRD PERSONS*.—See ante, "Liability of Principal to Third Persons," IX, B, 1.

a. *Contracts*—(1) *Private Agents*—(a) *In General*.—A promise by an agent that he would write to his principal and request him to enter into a contract, does

to support the action, if proved in the agent, may be imputed to the corporation. *Lake Shore, etc., R. Co. v. Prentice*, 147 U. S. 101, 37 L. Ed. 97; *Philadelphia, etc., R. Co. v. Quigley*, 21 How. 202, 211, 16 L. Ed. 73.

"But, as well observed by Mr. Justice Field, now Chief Justice of Massachusetts: 'The logical difficulty of imputing the actual malice or fraud of an agent to his principal is perhaps less when the principal is a person than when it is a corporation; still the foundation of the imputation is not that it is inferred that the principal actually participated in the malice or fraud, but the act having been done for his benefit by his agent acting within the scope of his employment in his business, it is just that he should be held responsible for it in damages.'" *Lake Shore, etc., R. Co. v. Prentice*, 147 U. S. 101, 37 L. Ed. 95.

In *Philadelphia, etc., R. Co. v. Quigley*, 21 How. 202, 16 L. Ed. 73, the federal supreme court held that a railroad corporation was responsible for the publication by them of a libel, in which the capacity and skill of a mechanic and builder of depots, bridges, station houses, and other structures for railroad companies, were falsely and maliciously disparaged and undervalued. The publication in that case consisted in the preservation, in the permanent form of a book for distribution among the persons belonging to the corporation, of a report made by a committee of the company's board of directors, in relation to the administration and dealings of the plaintiff as a superintendent of the road. *Denver, etc., R. Co. v. Harris*, 122 U. S. 597, 30 L. Ed. 1146. See, generally, the title *LIBEL AND SLANDER*, vol. 7, p. 857.

**Malicious prosecution.**—A principal may be held liable for a malicious prosecution by his agent within the scope of his employment, and the malice necessary to support the action, if proved in the agent, may be imputed to the principal. *Lake Shore, etc., R. Co. v. Prentice*, 147 U. S. 101, 37 L. Ed. 97; *Salt Lake City v. Hollister*, 118 U. S. 256, 262, 30 L. Ed. 176. See, generally, the title *MALICIOUS PROSECUTION*, vol. 8, p. 1080.

**23. Liability of principal for acts of subagent.**—Story on Agency, §§ 452, 454; *Hoover v. Wise*, 91 U. S. 308, 23 L. Ed. 392.

**24. For acts of agent of intermediate independent employer.**—*Hoover v. Wise*, 91 U. S. 308, 23 L. Ed. 392.

It is difficult to lay down a precise rule which will define the distinctions arising in such cases. The application of the rule is full of embarrassment. For a collection of the cases and illustrations of the doctrine, reference may be had to Story on Agency, § 454, et seq. *Hoover v. Wise*, 91 U. S. 308, 23 L. Ed. 392.

An attorney employed, not by the creditor, but by a collection agent who undertakes the collection of the debt, is the agent of the collection agent, and not of the creditor who employed that agent. *Hoover v. Wise*, 91 U. S. 308, 23 L. Ed. 392. See the title *ATTORNEY AND CLIENT*, vol. 2, p. 703.

"Cases show that where a bank, as a collection agency, receives a note for the purposes of collection, that its position is that of an independent contractor, and that the instruments employed by such bank in the business contemplated are its agents, and not the subagents of the owner of the note. It is not perceived that it can make any difference that such collection agency is composed of individuals, instead of being an incorporation. \* \* \* There are, doubtless, cases to be found holding to the contrary of these views; but the principal they decide is nevertheless well established. Cases, no doubt, may also be found where actions have been sustained by the creditor against the last agent, or where he is charged with his acts, in which the point before us was not raised or brought to the notice of the court. Such cases are not authority on the point. Nor do we think any great difficulty arises from the case of *Wilson v. Smith*, 3 How. 763, 770, 11 L. Ed. 820. That decision is based upon the case of *Bank v. New England Bank*, 1 How. 234, 11 L. Ed. 115, which is the only case referred to in the opinion, and in which case the question was not raised. The question there was not a privy, but of the right to retain under the circumstances stated. Again, in that case it was held, from the course of dealings between the banks, that it was fairly to be inferred that it was understood between them that the collections should be held subject to a settlement of accounts." *Hoover v. Wise*, 91 U. S. 308, 23 L. Ed. 392. See the titles *BANKS AND BANK-*

not bind the principal to make such contract, but does make the agent personally liable.<sup>26</sup>

(b) *Principal Disclosed*.—An agent who contracts in the name of his principal, is not liable to a suit on such contract,<sup>27</sup> unless he expressly agrees to be bound thereby.<sup>28</sup> But an agent who covenants in his own name, and yet describes himself as agent for another person, is personally liable, for the reason that he substitutes himself for his principal.<sup>29</sup>

(c) *Principal Undisclosed*.<sup>30</sup>—If an agent sign a note with his own name alone, and there is nothing on the face of the note to show that he was acting as agent, he will be personally liable on the note, and the principal will not be liable.<sup>31</sup> It is the ordinary rule that if a person merely adds to the signature of his name the word "agent," without disclosing his principal, he is person-

ING, vol. 3, p. 1; INDEPENDENT CONTRACTORS, vol. 6, p. 904.

**26. Liability on agent on contracts.—In general.**—*Randolph v. Ware*, 3 Cranch 503, 2 L. Ed. 512.

A promise by an agent that he would write to his principal to get insurance done, does not bind the principal to insure, but does make the agent personally liable. It is a personal contract, on the part of the agent, which binds himself and no other, and for the performance of which he is responsible in his private character. *Randolph v. Ware*, 3 Cranch 503, 2 L. Ed. 512. See, generally, the title INSURANCE, vol. 7, p. 66.

**27. Principal disclosed.**—*Parks v. Ross*, 11 How. 362, 13 L. Ed. 730; *Hitchcock v. Buchanan*, 105 U. S. 416, 26 L. Ed. 1078; *Taylor v. Davis*, 110 U. S. 330, 335, 28 L. Ed. 163. See ante, "Manner of Executing Authority," VII.

Where a bill of exchange purports to be made at the office of a company, and directs the drawee to charge the amount thereof to the account of the company, of which the signers describe themselves as president and secretary, it is the draft of the company, and not of the individuals by whose hands it is signed. *Hitchcock v. Buchanan*, 105 U. S. 416, 26 L. Ed. 1078.

The defendant as agent advertised a ship for freight to Madeira. The plaintiff shipped flour on board; after which, and before the ship sailed, a third person attached her for a debt due to him from the principal, the owner of the vessel. The voyage was by this means broken up, and the plaintiff's flour, being relanded, was sold at a loss. It was held, by the court, that the defendant (the agent) was not answerable for the damages sustained by the plaintiff. *Joyce v. Sims*, 2 Dall. 223, 1 L. Ed. 358.

**28. Express agreement as to liability.**—*Whitney v. Wyman*, 101 U. S. 392, 25 L. Ed. 1050.

Where a party who discloses his principal and is known to be acting as an agent, enters as such into a contract, he is not liable thereon in the absence of his express agreement to be thereby bound. *Whitney v. Wyman*, 101 U. S. 392, 25 L.

Ed. 1050; *Sun Printing, etc., Ass'n v. Moore*, 183 U. S. 642, 648, 46 L. Ed. 366.

**29. Agent covenanting in own name.**—*Duval v. Craig*, 2 Wheat. 45, 4 L. Ed. 180. See ante, "Manner of Executing Authority," VII.

*Linthicum* instituted an action of covenant on articles of agreement by which Lutz covenanted that Linthicum should have peaceful possession of a certain house, and retain and keep the same for five years. Linthicum was evicted by Lutz before the time expired. It appeared by the articles of agreement that they were made "by and between John Lutz, etc., and agent for John McPherson, of the one part, and Otho M. Linthicum of the other part, 'and it was witnessed,' that the said John Lutz, agent as aforesaid, has rented and leased," etc., the premises to Linthicum; and on the other hand, Linthicum covenants to pay the rent, etc. The articles concluded with these words: "In witness whereof, we, the said John Lutz and O. M. Linthicum, have hereunto interchangeably set our hands and seals, day and date above. John Lutz, agent for John McPherson (L. S.), O. M. Linthicum (L. S.)." Held, that the articles purported to have been made by Lutz, and to have been sealed by him, and not to have been made and sealed by his principal; and that the description of himself as agent, did not, under such circumstances, exclude his personal responsibility for disturbing the peaceful possession of the tenant, notwithstanding his principal was disclosed in the instrument. *Lutz v. Linthicum*, 8 Pet. 165, 8 L. Ed. 904. See the titles COVENANT, ACTION OF, vol. 5, p. 1; COVENANTS, vol. 5, p. 5; LANDLORD AND TENANT, vol. 7, p. 827.

**30. Principal undisclosed.**—See ante, "Manner of Executing Authority," VII; "Undisclosed Principal," IX, B, 1, b, (2).

**31. Agent signing in his own name alone.**—1 *Parsons on Notes and Bills* 92; *Falk v. Moebis*, 127 U. S. 597, 32 L. Ed. 266. See, also, *Cragin v. Lovell*, 109 U. S. 194, 27 L. Ed. 903.

And although it could be proved that the agency was disclosed to the payee when the note was made, and that it was



ally bound. The appendix is regarded as a mere *descriptio personæ*, and it does not of itself make third persons chargeable with notice of any representative relation of the signer.<sup>32</sup> But where a person acting merely as agent of another, thus sign papers, and the party with whom he deals has full knowledge of his agency and of the principal for whom he acts, an express disclosure of the principal's name on the face of the papers, or in the signature, is not essential to protect the agent from personal responsibility.<sup>33</sup> Where a person is placed in the position of holding himself out not only as the agent of an unknown principal, but of one whom he had no authority to represent, his contract, though of course not binding upon any one else, is binding upon the agent, at least if the credit be given to such agent.<sup>34</sup> Where an agent has entered into a written contract in which he appears as principal, parol evidence is inadmissible to show, with a view of exonerating him, that he disclosed his agency and mentioned the name of his principal at the time the contract was executed.<sup>35</sup>

(2) *Public Agents*.—Public agents are not ordinarily liable on mere contracts or promises made in behalf of their principals.<sup>36</sup> The rule that an agent who contracts in the name of his principal is not liable to a suit on such contracts, is particularly applicable to a public officer or agent, acting for his government, when such agent acts in the line of his duty, and by legal authority, his contracts made on account of the government, are public and not personal.<sup>37</sup> A

the understanding of all parties that the principal, and not the agent, should be held, this will not generally be sufficient, either to discharge the agent or to render the principal liable on the note. 1 Parsons on Notes and Bills, 92; *Falk v. Moebs*, 127 U. S. 597, 32 L. Ed. 266.

**32. Merely adding word "agent" to signature.**—*Metcalf v. Williams*, 104 U. S. 93, 26 L. Ed. 665. See ante, "Manner of Executing Authority," VII.

**33. Where third party has knowledge of agency.**—*Metcalf v. Williams*, 104 U. S. 93, 26 L. Ed. 665.

If a person be in fact a mere agent, of some principal, and is in the habit of expressing his representative character in his dealings with a particular party by merely adding the word "agent" to his signature, and the party recognizes him in that character, it would be contrary to justice and truth to construe the documents thus made and used as his personal obligations, contrary to the intent of the parties. *Metcalf v. Williams*, 104 U. S. 93, 26 L. Ed. 665.

**34. Agent acting without any authority whatever.**—*Patrick v. Bowman*, 149 U. S. 411, 37 L. Ed. 790.

**35. Parol evidence to show that agent disclosed principal.**—*Nash v. Towne*, 5 Wall. 689, 18 L. Ed. 527. See the title PAROL EVIDENCE, ante, p. 12.

**36. Public agents—In general.**—*Garland v. Davis*, 4 How. 131, 11 L. Ed. 907. See, generally, the title PUBLIC OFFICERS.

**37. Parks v. Ross**, 11 How. 362, 13 L. Ed. 730; *Hodgson v. Dexter*, 1 Cranch 345, 2 L. Ed. 130.

As regarding an agent acting for his government the rule is that he is not responsible on any contract he may make

in that capacity, and wherever his contract or engagement is connected with a subject fairly within the scope of his authority, it shall be intended to have been made officially, and in his public character, unless the contrary appears by satisfactory evidence of an absolute and unqualified engagement to be personally liable. *Parks v. Ross*, 11 How. 362, 13 L. Ed. 730.

A contrary doctrine would be productive of the most injurious consequences to the public, as well as to individuals. The government is incapable of acting otherwise than by its agents, and no prudent man would consent to become a public agent, if he should be made personally responsible for contracts on the public account. *Hodgson v. Dexter*, 1 Cranch 345, 2 L. Ed. 130.

**Contract to pay expense of emigration of Cherokee Nation.**—Where the United States and the Cherokee Nations agreed that the latter should emigrate across the Mississippi, and the former pay the expenses thereof, and the Cherokees undertook to conduct the movement entirely by their own agents, a person whose wagons had been hired could not hold the agent who had hired them personally responsible. The owner of the wagons knew that the agent was a public officer, and dealt with him as such. *Parks v. Ross*, 11 How. 362, 13 L. Ed. 730.

**Drawing bill of exchange on public treasury.**—Where a foreign consul draws a bill of exchange on the public treasury of his government, in his official capacity, he is not personally liable. In such case it is presumed that the contract was made on account of the government, and that the credit was given to it as an official engagement, and therefore without any



public agent of the government, contracting for the use of government, is not personally liable, although the contract be under his seal.<sup>38</sup>

b. *Money Collected and Paid Over to Principal*.—In regard to the liability of agents in an action for money had and received, the general rule is, that the action should be brought against the principal and not against a known agent, who is discharged from liability by a bona fide payment over to his principal,<sup>39</sup> unless anterior to making payment over, he shall have had notice from the plaintiff of his right and of his intention to claim the money.<sup>40</sup> A voluntary payment to an agent without notice of objection will not subject the agent who shall have paid over to his principal. The absence of notice will be an exculpation of the agent in every instance.<sup>41</sup> But where money is illegally demanded and received by an agent, he cannot exonerate himself from personal responsibility, by paying it over to his principal, when he has had notice not to pay it over.<sup>42</sup> So when an agent receives from a third person a larger sum of money than he is authorized

personal liability attaching on the part of the agent. *Jones v. LeTombe*, 3 Dall. 384, 1 L. Ed. 647.

38. *Hodgson v. Dexter*, 1 Cranch 345, 2 L. Ed. 130.

39. *Money collected and paid over to principal—General rule*.—*Cary v. Curtis*, 3 How. 236, 11 L. Ed. 576. See the title ASSUMPSIT, vol. 2, p. 636.

An agent being in lawful possession of a steam tug, no cause of action against him, in favor of third persons, can arise, either in contract or tort, in respect to any earnings of the tug or any compensation for or value of her use. Whatever claim there may be, could be only against the principal. *Baldwin v. Black*, 119 U. S. 643, 30 L. Ed. 530. See the titles ADMIRALTY, vol. 1, p. 119; MORTGAGES AND DEEDS OF TRUST, vol. 8, p. 452; SEQUESTRATION; TOWAGE, TUGS AND TOWS.

40. *Effect of notice not to pay over*.—*Cary v. Curtis*, 3 How. 236, 11 L. Ed. 576.

41. *Where payment voluntary and without notice of objection*.—*Cary v. Curtis*, 3 How. 236, 11 L. Ed. 576; *Elliott v. Swartwout*, 10 Pet. 137, 9 L. Ed. 373. See, also, *Bend v. Hoyt*, 13 Pet. 263, 10 L. Ed. 154.

A. having received money as agent, and promptly paid it over to his principal, without notice of any adverse claim, or reason to suspect it, the plaintiffs, having been guilty of laches, must look to that principal. *Hooper v. Robinson*, 98 U. S. 528, 25 L. Ed. 219.

*Money paid to agent by mistake*.—If an agent pay over money, which has been paid to him by mistake, he does no wrong, and the plaintiff must call on the principal; but if, after the payment has been made, and before the money has been paid over, the mistake is corrected, the agent cannot afterwards pay it over, without making himself personally liable. Here, then, is the true distinction; when the money is paid voluntarily, and by mistake, to the agent, and he has paid it over to the principal, he cannot be made personally responsible; but if, before paying it over,

he is apprised of the mistake, and required not to pay it over, he is personally liable. *Elliott v. Swartwout*, 10 Pet. 137, 155, 9 L. Ed. 373. See, generally, the title MISTAKE AND ACCIDENT, vol. 8, p. 417.

*Payment over of revenue collected without objection*.—Where a collector of revenue has received money in payment of duties, in the ordinary and regular course of his duty, and has paid it over into the treasury, without objection being made, at the time of payment, that the duties were excessive, or at any time before the money was paid over to the United States, this constitutes a case of a purely voluntary payment, without objection or notice not to pay over the money, or any declaration made to the collector of an intention to prosecute him to recover back the money, and it is to be considered as a voluntary payment, by mutual mistake of law, and the collector is not personally liable in an action to recover back the money. *Elliott v. Swartwout*, 10 Pet. 137, 9 L. Ed. 373.

The law as thus laid down with respect to collectors of revenue is applicable to agents in private transactions between man and man. *Cary v. Curtis*, 3 How. 236, 11 L. Ed. 576.

42. *Payment after notice and protest*.—*Elliott v. Swartwout*, 10 Pet. 137, 9 L. Ed. 373; *Penhallow v. Doane*, 3 Dall. 54, 87, 1 L. Ed. 507. See, also, *Bend v. Hoyt*, 13 Pet. 263, 10 L. Ed. 154.

Payment with notice, or with a protest against the legality of the demand, may create a liability on the part of the agent who shall pay over to his principal in despite of such notice or protest. *Cary v. Curtis*, 3 How. 236, 11 L. Ed. 576.

*Payment after notice of application for appeal*.—Where an agent, who is a party to the suit, receives money under an erroneous judgment, and pays it over to his principal, after notice of an application for an appeal, he is liable to refund, in case of a reversal of the judgment. *Penhallow v. Doane*, 3 Dall. 54, 87, 1 L. Ed. 507.

*Payment of duties to collector of revenue accompanied by protest*.—Where, at

to receive, the agent and not the principal is liable for the repayment of the excess.<sup>43</sup>

c. *Actions by Third Persons against Agent*.<sup>44</sup>—In general, an injunction will not be allowed, nor a decree rendered against an agent, where the principal is not made a party to the suit; but if the principal be not himself subject to the jurisdiction of the court (as in the case of a sovereign state), the rule may be dispensed with.<sup>45</sup> The answer of an agent is not evidence against his principal; nor are his admissions in pais, unless where they are a part of the *res gestæ*.<sup>46</sup>

3 LIABILITY OF THIRD PERSONS TO PRINCIPAL.<sup>47</sup>—a. *On Contracts Made with Agent*—(1) *Principal Disclosed*.—Where the character of the agent is disclosed on the face of the contract, the principal, and not agent is bound to bring suit on it,<sup>48</sup> and there is no distinction in this respect between the cases of a home and a foreign principal.<sup>49</sup> The principal being responsible for the acts of his agent in making a contract within the scope of his authority, any misrepresentation or material concealment by the agent is equally fatal to the contract, as if it had been the act of the principal himself.<sup>50</sup>

the time of payment of duties to a collector of revenue, notice was given to the collector that the duties were charged too high, and that the party paying, so paid to get possession of his goods, and accompanied by a declaration to the collector that he would be sued to recover back the amount erroneously paid, and notice was given to him not to pay it over to the treasury, the collector is personally liable in an action to recover back such excess of duties paid to him as collector, although he may have paid over the money into the treasury. *Elliott v. Swartwout*, 10 Pet. 137, 9 L. Ed. 373. The law as thus laid down with respect to collectors of the revenue, is precisely that which is applicable to agents in private transactions between man and man. *Cary v. Curtis*, 3 How. 236, 11 L. Ed. 576. See the title REVENUE LAWS.

**Effect of notice dependent upon known powers of agent, etc.**—However, the effect of the notice in fixing liability upon the agent is dependent on the known powers of the agent, and the character of his agency. If, for instance, the agent was known to be a mere carrier or vehicle to transfer to his employer the amount received, with no power of retaining it, payment to the agent with such knowledge, although accompanied with a denial of the justice of the demand, would seem to exclude every idea of an agreement express or implied on the part of the agent to refund, and could furnish no ground for an action against the agent who should pay over the fund received to his principal. *Cary v. Curtis*, 3 How. 236, 11 L. Ed. 576.

**43. Money received in excess of authority.**—*United States v. Jones*, 8 Pet. 387, 396, 8 L. Ed. 983.

The order of a contractor requested the secretary of war to pay to his agent any sum that might be due on the contract, not exceeding a specified amount. Under this authority, the government could not pay to the agent, so as to charge the prin-

incipal, a larger sum than was due on his contract; and for any payment beyond this, the government must look to the agent, and not to the principal for repayment. *United States v. Jones*, 8 Pet. 387, 396, 8 L. Ed. 983.

**44. Actions by third persons against agent.**—See ante, "Money Collected and Paid Over to Principal," IX, B, 1, b, (3).

**45. Injunction against agent.**—*Osborn v. United States Bank*, 9 Wheat. 738, 6 L. Ed. 204. See the title INJUNCTIONS, vol. 6, p. 1022.

**46. Answer of agent as evidence.**—*Leeds v. Marine Ins. Co.*, 2 Wheat. 380, 4 L. Ed. 266. See the titles DECLARATIONS AND ADMISSIONS, vol. 5, p. 214; EQUITY, vol. 5, p. 803.

**47. Liability of third persons to principal.**—See post, "Liability of Third Persons to Agent," IX, B, 4.

**48. Contracts—Principal disclosed.**—*Oelricks v. Ford*, 23 How. 49, 16 L. Ed. 534. See, also, *Albany, etc., Co. v. Lundberg*, 121 U. S. 451, 30 L. Ed. 982.

"In the present case, the broker's note, and which is approved by the defendants, affixing the firm name, is too clear upon the face of it to admit of doubt as to the person with whom the contract was made. The purchase is from 'J. W. Bell, agent for Benjamin Ford, of New York,' and the case shows that Bell had full authority. The name of the principal is disclosed in the contract, and the place of his residence, as the person making the sale of the flour, through his agent. This fixes the duty of performance upon him and exonerates the agent." *Oelricks v. Ford*, 23 How. 49, 16 L. Ed. 534.

**49. No distinction between home and foreign principal.**—*Oelricks v. Ford*, 23 How. 49, 16 L. Ed. 534.

**50. Misrepresentation or concealment by agent.**—*General Interest Ins. Co. v. Ruggles*, 12 Wheat. 408, 6 L. Ed. 674.

It is settled that, when an agent who is authorized by his principal to lend money for lawful interest, exacts for his own



(2) *Principal Undisclosed*.—The contract of the agent is the contract of the principal, and where a simple contract, other than a bill or note,<sup>51</sup> is made by an agent, the principal whom he represents may in general maintain an action upon it in his own name, although at the time of making the contract, the agent made it in his own name, without disclosing the name of his principal.<sup>52</sup> It is not necessary to the validity of a contract, under the statute of frauds, that the writing disclose the principal.<sup>53</sup> In such case, parol evidence is admissible, although the contract is in writing, to show that the person named in the contract was an agent, and that he was acting for his principal.<sup>54</sup>

b. *Property Wrongfully Transferred by Agent*—(1) *In General*.—It is the rule that in case of an irregular transfer by an agent, of the property of his principal, courts of equity will compel the holder to give an account of the property he holds.<sup>55</sup> A sale upon credit, instead of being for ready money, under a general authority to sell, and in a trade where the usage is to sell for ready money only, creates no contract between the principal and the buyer, and the thing sold may be recovered in an action of trover.<sup>56</sup> And where a merchant, in order to secure himself from loss, took merchandise from an agent, with a knowledge that the agent was about to fail, the principal who consigned that merchandise to the agent may avoid the sale, and reclaim his goods, or hold the merchant accountable for them.<sup>57</sup> Commercial paper in the possession of an agent, as such, bearing a restrictive endorsement, e. g., "for collection," will be notice to all persons subsequently dealing with it that it was intended for such special purpose, and, unless it appears to the contrary, that the principal does not intend to transfer the title or ownership of the proceeds thereof. A third person, therefore, who appropriates the proceeds of such paper to another than its designated object, will be liable to the principal.<sup>58</sup> But where third persons purchase property from an agent, in whom the principal has vested the legal title, in ignorance of the fact that the seller was acting as agent for another, and with-

benefit more than the lawful rate, without authority or knowledge of his principal, the loan is not thereby rendered usurious. *Call v. Palmer*, 116 U. S. 98, 29 L. Ed. 559. See, generally, the title USURY.

51. *Bill or note*.—*Nash v. Towne*, 5 Wall. 689, 18 L. Ed. 527.

52. *Principal undisclosed—Simple contract*.—*Ford v. Williams*, 21 How. 287, 16 L. Ed. 36; *Baldwin v. Bank*, 1 Wall. 234, 17 L. Ed. 534; *Nash v. Towne*, 5 Wall. 689, 18 L. Ed. 527; *Higgins v. McCrea*, 116 U. S. 671, 680, 29 L. Ed. 764.

It is a well-established rule of law, that, where a contract, not under seal, is made by an agent in his own name for an undisclosed principal, either the agent or the principal may sue on it; the defendant in the latter case being entitled to be placed in the same situation, at the time of the disclosure of the real principal, as if the agent had been the contracting party. *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 12 L. Ed. 465.

An agent was employed to collect checks and drafts on banks, and to bring to his principal the proceeds in specie. The agent contracted with a carrier for the transportation of the specie, without disclosing his principal. Upon the loss of the goods, the contract resting in parol at the time of the loss, it was held that the principal might maintain an action against the carrier in his own name. *New Jersey Steam Nav. Co. v. Merchants'*

*Bank*, 6 How. 344, 12 L. Ed. 465.

53. *Statute of frauds*.—*Ford v. Williams*, 21 How. 287, 16 L. Ed. 36. See the title FRAUDS, STATUTE OF, vol. 6, p. 451.

54. *Admissibility of parol evidence to show agency*.—*Nash v. Towne*, 5 Wall. 689, 18 L. Ed. 527; *Ford v. Williams*, 21 How. 287, 16 L. Ed. 36; *Baldwin v. Bank*, 1 Wall. 234, 17 L. Ed. 534; *Salmon Falls Mfg. Co. v. Goddard*, 14 How. 446, 454, 14 L. Ed. 493. See the title PAROL EVIDENCE, ante, p. 12.

55. *Property wrongfully transferred by agent*.—*Warner v. Martin*, 11 How. 209, 13 L. Ed. 667.

56. *Sale upon credit instead of for ready money*.—*Paley*, Principal and Agent, 109. *Warner v. Martin*, 11 How. 209, 13 L. Ed. 667. See the title TROVER AND CONVERSION.

57. *Warner v. Martin*, 11 How. 209, 13 L. Ed. 667.

Where the purchase was made from the agent's clerk, who had been left by the agent in charge of the business, this was an additional reason for avoiding the sale, because an agent cannot delegate his authority without the assent of the principal. *Warner v. Martin*, 11 How. 209, 13 L. Ed. 667. See ante, "Delegation of Authority by Agent," VIII.

58. *Proceeds of commercial paper endorsed "for collection"*.—*Sweeny v. Easter*, 1 Wall. 166, 173, 17 L. Ed. 681. See



out any notice that the property was wrongfully transferred or of the principal's rights or equitable title thereto, they will be protected in their purchase.<sup>59</sup>

(2) *Pledge of Principal's Property.*—An agent who has power to sell the produce of his principal, has no power to affect the property by tortiously pledging it as a security, or satisfaction for a debt of his own.<sup>60</sup> When goods are so pledged or disposed of by the agent, the principal may recover them back by an action of trover against the pawnee, without tendering to the agent what may be due to him, and without any tender to the pawnee of the sum for which the goods were pledged; or without any demand of such goods.<sup>61</sup> But an agent who has a lien on the goods of his principal may deliver them over to a third person, as a security to the extent of his lien, and may appoint such person to keep possession of the goods for him. In that case, the principal must tender the amount of the lien due to the agent, before he can be entitled to recover back the goods so pledged.<sup>62</sup>

4. *LIABILITY OF THIRD PERSONS TO AGENT.*<sup>63</sup>—Where a contract, not under seal, is made by an agent in his own name for an undisclosed principal, either the agent or the principal may sue on it.<sup>64</sup> But where such a contract is un-

the title *BILLS, NOTES AND CHECKS*, vol. 3, p. 257.

**59. Where property purchased in good faith.**—*Calais Steamboat Co. v. Scudder*, 2 Black 372, 17 L. Ed. 282.

A person residing in California employed an agent to contract for and superintend the building of a ship at New York. The agent was furnished with funds for the purpose, and specially directed by the principal to give himself out as the true owner, and to conceal the interest of the principal. Accordingly the agent made all contracts in his own name, and had the vessel registered as his own property. After she was finished he sold her, and put the price in his pocket. Held, that the principal's right in the vessel was gone, unless he could prove that the vendee had notice of his right before payment of the purchase money. *Calais Steamboat Co. v. Scudder*, 2 Black 372, 17 L. Ed. 282.

As between the principal and agent themselves, the legal title of the latter could not avail him, except as a lien for his services and money advanced, but the rule is different as respects a third person who has bought in good faith and for a valuable consideration. When a question arises between two innocent parties, which of them shall suffer by the misconduct of another, the loss must fall upon him who has enabled the wrong to be committed, and not on him who had no means of knowing that it was a wrong. If the equitable owner of a thing has permitted another to hold the legal title accompanied with the usual documentary evidence of it, with full possession and with declarations of ownership corresponding to the legal title he cannot set up his equity against a bona fide purchaser, who had no notice of it. Secret instructions from the equitable to the legal owner, which produced no change in the apparent relation of the latter to the thing, will not affect the right of the purchaser. The burden of proof rests upon the equitable owner to show that the pur-

chaser had notice of his rights in due time. *Calais Steamboat Co. v. Scudder*, 2 Black 372, 17 L. Ed. 282.

**60. Pledge of principal's property.**—*Warner v. Martin*, 11 How. 209, 13 L. Ed. 667.

**61. Recovery of goods pledged by agent.**—*Warner v. Martin*, 11 How. 209, 13 L. Ed. 667.

It is no excuse that the pawnee was wholly ignorant that he who held the goods held them as the mere agent, unless where the principal has held forth the agent as the principal. *Warner v. Martin*, 11 How. 209, 13 L. Ed. 667. See the title *TROVER AND CONVERSION*.

**62. Where agent has lien on property.**—*Warner v. Martin*, 11 How. 209, 13 L. Ed. 667.

**63. Liability of third persons to agent.**—See ante, "Liability of Third Persons to Principal," IX, B, 3.

**64. Contract not under seal.**—*New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 12 L. Ed. 465.

The rule is well established that a consignee may sue in a court of admiralty, either in his own name, as agent, or in the name of his principal, as he thinks best. *McKinlay v. Morrish*, 21 How. 343, 16 L. Ed. 100. See the title *ADMIRALTY*, vol. 1, p. 119.

The first question presented by the bill of exceptions is, whether this action can be maintained in the name of Lundberg, or should have been brought in the name of his principals, N. M. Hoglund's Sons & Co. The paper upon which each of the contracts in suit is written has at its head, besides the name of that firm, the name of 'Gustaf Lundberg, successor to Nils Mitander,' followed by the street and number of his office in Boston. The contract itself begins with a promise by him in the first person singular, 'I, Gustaf Lundberg, agent for N. M. Hoglund's Sons & Co. of Stockholm, agree to sell;' the description added to his name in this clause is the only mention of or reference

der seal, only the agent may sue upon it, in a court of law.<sup>66</sup>

5. **DECLARATIONS OR ADMISSIONS OF AGENT AS BINDING PRINCIPAL.**—See the titles **DECLARATIONS AND ADMISSIONS**, vol. 5, pp. 214, 222, et seq.; **DOCUMENTARY EVIDENCE**, vol. 5, pp. 431, 460.

6. **NOTICE TO AGENT AS NOTICE TO PRINCIPAL**—a. *General Rule.*—It is the general rule that during the existence of an agency, the knowledge of or notice to the agent with regard to any matter affecting or coming within the scope of the agency, is the knowledge of or notice to the principal, and that the principal is bound by such knowledge or notice,<sup>67</sup> and the fact that an agent commits a fraud cannot alter the legal effect of his knowledge in regard to third persons who had no connection whatever with him in relation to the perpetration of the fraud, and no knowledge that any such fraud had been perpetrated.<sup>68</sup> When the agency has terminated, this principle is of course no longer true.<sup>69</sup> The

to that firm in the contract; his promise is not expressed to be made by them as their agent, or in their behalf; and the agreement is signed by him with his own name merely. There are strong authorities for holding that a contract in such form as this is the personal contract of the agent, upon which he may sue, as well as be sued, in his own name, at common law. \* \* \* In *Gadd v. Houghton*, 1 Ex. D. 357, the contract which was held not to bind the agent personally was expressed to be made 'on account of the principals,' and in *Oelricks v. Ford*, 23 How. 49, 16 L. Ed. 534, in which the contract, which was held to bind the principal, more nearly resembled that before us than in any other case in this court, the important element of a signature of the agent's name, without addition, was wanting." *Albany, etc., Co. v. Lundberg*, 121 U. S. 451, 30 L. Ed. 982.

66. **Contract not under seal.**—*Story Ag.*, § 160. *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 12 L. Ed. 465.

67. **Notice to agent as notice to principal**—*In general.*—*The Distilled Spirits*, 11 Wall. 356, 20 L. Ed. 167; *Hoover v. Wise*, 91 U. S. 308, 23 L. Ed. 392; *Duncan v. Jaudon*, 15 Wall. 165, 21 L. Ed. 142; *May v. LeClaire*, 11 Wall. 217, 20 L. Ed. 50; *Connecticut, etc., Ins. Co. v. Burnstine*, 131 U. S., appx. cliii, 24 L. Ed. 706; *Fidelity, etc., Co. v. Courtney*, 186 U. S. 242, 46 L. Ed. 1193; *American Surety Co. v. Pauly*, No. 1, 170 U. S. 133, 42 L. Ed. 977; *Smith v. Ayer*, 101 U. S. 320, 25 L. Ed. 955; *Johnston v. Laffin*, 103 U. S. 800, 26 L. Ed. 532; *Stockwell v. United States*, 13 Wall. 531, 20 L. Ed. 491; *Mechanics' Bank v. Seton*, 1 Pet. 299, 7 L. Ed. 152; *General Interest Ins. Co. v. Ruggles*, 12 Wheat. 408, 6 L. Ed. 674; *The Hiram*, 1 Wheat. 440, 4 L. Ed. 131; *Grace v. American Cent. Ins. Co.*, 109 U. S. 278, 27 L. Ed. 932; *West Philadelphia Bank v. Dickson*, 95 U. S. 180, 24 L. Ed. 407; *Boering v. Chesapeake Beach R. Co.*, 193 U. S. 442, 48 L. Ed. 742; *Stanley v. Schwalby*, 162 U. S. 255, 40 L. Ed. 960; *Astor v. Wells*, 4 Wheat. 466, 4 L. Ed. 616; *Railroad Co. v. Smith*, 21 Wall. 255, 22 L. Ed. 513; *McIntire v. Pryor*, 173 U. S. 38, 52, 43 L. Ed.

606; *Armstrong v. Ashley*, 204 U. S. 272, 51 L. Ed. 482.

This rule is fully stated in *Story on Agency*, § 140, in which the author says that "notice of facts to an agent is constructive notice thereof to the principal himself, where it arises from or is at the time connected with the subject matter of his agency." *American Surety Co. v. Pauly*, No. 1, 170 U. S. 133, 42 L. Ed. 977.

If the rule were otherwise, it would cause great inconvenience, and notice would be avoided in every case. *Mechanics' Bank v. Seton*, 1 Pet. 299, 7 L. Ed. 152. See, generally, the title **NOTICE**, vol. 8, p. 928.

68. **Agent's fraud does not alter rule.**—*Armstrong v. Ashley*, 204 U. S. 272, 51 L. Ed. 482. See the title **FRAUD AND DECEIT**, vol. 6, p. 394.

69. **Principal not applicable after termination of agency.**—*General Interest Ins. Co. v. Ruggles*, 12 Wheat. 408, 6 L. Ed. 674; *Grace v. American Cent. Ins. Co.*, 109 U. S. 278, 27 L. Ed. 932. See post, "Termination of Agency," XII.

Insurance was effected on a vessel, after there had been an absolute destruction of the vessel, though this fact was unknown to the assured. The master omitted to communicate information to the owner, and expressed his intention not to write to the owner, and took measures to prevent the fact of the loss being known, for the avowed purpose of enabling the owner to effect insurance, in consequence of which, information of the loss had not reached the parties at the time the policy was underwritten. It was held that the owner, having acted in good faith, was not precluded from a recovery upon the policy, on account of the fraudulent misconduct on the part of the master, as the master was the owner's special agent for purposes of navigating only, with no power to effect insurance, and, as the subject of the agency was totally destroyed, the agency terminated and knowledge of the agent was no longer knowledge of the principal. *General Interest Ins. Co. v. Ruggles*, 12 Wheat. 408, 6 L. Ed. 674. See the titles **MARINE INSURANCE**, vol. 8, p. 149; **MASTERS OF VESSELS**, vol. 8, p. 300.



rule is based on the principle of law, that it is the agent's duty to communicate to his principal the knowledge which he has respecting the subject matter of his agency, and the presumption that he will perform that duty.<sup>70</sup> The principle of law that the knowledge of an agent is in law the knowledge of his principal, is intended for the protection of the other party (actually or constructively) to a transaction for and on account of the principal had with such agent.<sup>71</sup>

b. *Time of Acquiring Knowledge.*—It is the general rule that the existence of knowledge or notice in the agent of facts connected with the subject matter of the agency, acquired while acting for the principal and within the scope of his authority, is notice to the principal.<sup>72</sup> That a principal is bound and affected by knowledge or notice obtained by his agent in negotiating a particular transaction, is everywhere conceded.<sup>73</sup> And this rule has been held to apply to knowledge acquired by him in a prior transaction and present to his mind at the time he is acting as such agent, provided it be of such a character as he may communicate to his principal without breach of professional confidence,<sup>74</sup> notice or knowledge acquired by the agent after the termination of the agency cannot, of course, be imputed to the principal.<sup>75</sup>

c. *Principal Not Charged with Notice of Agent's Secret or Confidential Information.*—The knowledge of the agent, in order to bind the principal, must be of such a character as he may communicate to his principal without breach of professional confidence.<sup>76</sup>

**70. Principle on which rule based.**—The Distilled Spirits, 11 Wall. 356, 20 L. Ed. 167; American Surety Co. v. Pauly, No. 1, 170 U. S. 133, 42 L. Ed. 977; Stanley v. Schwalby, 162 U. S. 255, 40 L. Ed. 960; General Interest Ins. Co. v. Ruggles, 12 Wheat. 408, 6 L. Ed. 674.

"Upon general principles of public policy, it is presumed that the agent has communicated such facts to the principal; and if he has not, still the principal having entrusted the agent with the particular business, the other party has a right to deem his acts and knowledge obligatory upon the principal; otherwise, the neglect of the agent, whether designed or undesigned, might operate most injuriously to the rights and interests of such party." Story on Agency, § 140. American Surety Co. v. Pauly, No. 1, 170 U. S. 133, 42 L. Ed. 977.

**71. Rule intended to protect party dealing with agent.**—Fidelity, etc., Co. v. Courtney, 186 U. S. 342, 46 L. Ed. 1193; The Distilled Spirits, 11 Wall. 356, 20 L. Ed. 167. See, also, American Surety Co. v. Pauly, No. 1, 170 U. S. 133, 156, 157, 42 L. Ed. 977.

In the very nature of things, such a principle does not obtain in favor of a surety who has bonded one officer of a corporation, so as to relieve him from the obligations of his bond, by imputing to the corporation knowledge acquired by another employee subsequent to the execution of the bond (and from negligence or wrongful motives, not disclosed to the corporation), of a wrong committed by the official whose faithful performance of duty was guaranteed by the bond. As the rule of imputation to the principal of the knowledge of an agent does not apply to such a case, it must follow that it can only obtain as a consequence of an express pro-

vision of the contract of suretyship. Fidelity, etc., Co. v. Courtney, 186 U. S. 342, 46 L. Ed. 1193. See the titles BANKS AND BANKING, vol. 3, p. 1; INDEMNITY, vol. 6, p. 902; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 8, p. 957; SURETYSHIP.

**72. Time of acquiring knowledge—In general.**—The Hiram, 1 Wheat. 440, 4 L. Ed. 131; The Distilled Spirits, 11 Wall. 356, 20 L. Ed. 167; Hoover v. Wise, 91 U. S. 308, 23 L. Ed. 392; General Interest Ins. Co. v. Ruggles, 12 Wheat. 408, 6 L. Ed. 674; Armstrong v. Ashley, 204 U. S. 272, 51 L. Ed. 482.

**73. At time of negotiating particular transaction.**—The Distilled Spirits, 11 Wall. 356, 20 L. Ed. 167; Hoover v. Wise, 91 U. S. 308, 23 L. Ed. 392; Johnston v. Laffin, 103 U. S. 800, 26 L. Ed. 532; McIntire v. Pryor, 173 U. S. 38, 52, 43 L. Ed. 606.

A purchaser is effected with notice of prior liens, trusts, or frauds, by the knowledge of his agent who effects the purchase when such knowledge or notice is obtained by the agent in negotiating the particular transaction. The Distilled Spirits, 11 Wall. 356, 20 L. Ed. 167.

**74. Prior to particular transactions.**—The Distilled Spirits, 11 Wall. 356, 20 L. Ed. 167; Hoover v. Wise, 91 U. S. 308, 23 L. Ed. 392; McIntire v. Pryor, 173 U. S. 38, 52, 43 L. Ed. 606.

**75. Knowledge acquired after termination of agency.**—See ante, "General Rule," IX, B. 6, a.

**76. Agent's secret or confidential information.**—The Distilled Spirits, 11 Wall. 356, 20 L. Ed. 167.

When it is not the agent's duty to communicate such knowledge, when it would be unlawful for him to do so, as, for example, when it has been acquired confi-



d. *Principal on Whom Agent Commits Fraud Not Charged with Notice.*—The presumption that the agent informed his principal of that which his duty and the interests of his principal required him to communicate does not arise where the agent acts or makes declarations not in execution of any duty that he owes to the principal, nor within any authority possessed by him, but to subserve simply his own personal ends or to commit some fraud against the principal. In such cases the principal is not bound by the acts or declarations of the agent unless it be proved that he had at the time actual notice of them, or having received notice of them, failed to disavow what was assumed to be said and done in his behalf.<sup>77</sup>

e. *Notice to Subagent as Notice to Principal.*—Where an agent has power to employ a subagent, notice given to the subagent in the transaction of the business, has the same effect as if received by the principal.<sup>78</sup> But a principal is not chargeable with the knowledge of a subagent when he has given no authority to employ him.<sup>79</sup>

f. *Notice of Particular Matters*—(1) *Notice of Prior Liens, Trusts or Frauds.*—A purchaser is affected with notice of prior liens, trusts or frauds, by the knowledge of his agent who effects the purchase whether the knowledge be acquired by the agent in the particular transaction, or in a prior transaction and present to his mind at the time he is acting as such agent, provided it be of such a character as he may communicate to his principal without breach of professional confidence.<sup>80</sup>

(2) *Notice of Prior Unrecorded Conveyance.*—A purchaser of land for val-

duably as attorney for a former client in a prior transaction, the reason of the rule ceases, and in such a case an agent would not be expected to do that which would involve the betrayal of professional confidence, and his principal ought not to be bound by his agent's secret and confidential information. This often happened in the case of large estates in England, where men of great professional eminence were frequently consulted. They thus became possessed, in a confidential manner, of secret trusts or other defects of title, which they could not honorably, if they could legally, communicate to subsequent clients. *The Distilled Spirits*, 11 Wall. 356, 20 L. Ed. 167. See, generally, the title ATTORNEY AND CLIENT, vol. 2, p. 703.

77. *Principal on whom agent commits fraud.*—*American Surety Co. v. Pauly*, No. 1, 170 U. S. 133, 42 L. Ed. 977.

In his treatise on Equity Jurisprudence, Pomeroy says: "It is now settled by a series of decisions possessing the highest authority that when an agent or attorney has, in the course of his employment, been guilty of an actual fraud contrived and carried out for his own benefit, by which he intended to defraud and did defraud his own principal or client, as well as perhaps the other party, and the very perpetration of such fraud involved the necessity of his concealing the facts from his own client, then under such circumstances the principal is not charged with constructive notice of facts known by the attorney and thus fraudulently concealed." Vol. 2, § 675. *American Surety Co. v. Pauly*, No. 1, 170 U. S. 133, 42 L. Ed. 977. See, generally, the title FRAUD AND DECEIT, vol. 6, p. 394.

78. *Notice to subagent as notice to principal.*—Story on Agent, §§ 452, 454; *Hoover v. Wise*, 91 U. S. 308, 23 L. Ed. 392. See ante, "Delegation of Authority by Agent," VIII; "Liability of Principal for Acts of Subagent," IX, B, 1, d.

79. *Hoover v. Wise*, 91 U. S. 308, 23 L. Ed. 392.

An account or money demand having been delivered by its owners to a collection agency with instructions to collect the debt, that agency transmitted the claim to an attorney, who, knowing the insolvency of the debtor, persuaded him to confess judgment. The money collected was transmitted to the collection agency, but never reached the creditors. Proceedings in bankruptcy were instituted against the debtor within four months after such confession, and were prosecuted to a decree. Held, that as the attorney was the agent of the collection agency which employed him, and not of the creditors, his knowledge of the insolvency of the debtor was not chargeable to them in such sense as to render them liable to the assignee in bankruptcy for the money collected on the judgment. *Quære*, would they have been so liable had the money reached their hands? *Hoover v. Wise*, 91 U. S. 308, 23 L. Ed. 392. See the title BANKRUPTCY, vol. 2, p. 792.

80. *Prior liens, trusts or frauds.*—*The Distilled Spirits*, 11 Wall. 356, 20 L. Ed. 167; *Connecticut, etc., Ins. Co. v. Burnstine*, 131 U. S., appx. cliii, 24 L. Ed. 706.

*Notice of a prior incumbrance to an agent is notice to the principal.* *Astor v. Wells*, 4 Wheat. 466, 4 L. Ed. 616.

*Trusts.*—Notice to the cashier of a bank, or of bankers, that the stock pledged is

uable consideration may doubtless be affected by knowledge which an attorney, solicitor or conveyancer, employed by him in the purchase, acquires or has while so employed, but in order to charge a purchaser with notice of a prior unrecorded conveyance, he or his agent must either have knowledge of the conveyance, or at least, of such circumstances as would, by the exercise of ordinary diligence and judgment, lead to that knowledge; and vague rumor or suspicion is not a sufficient foundation upon which to charge a purchaser with knowledge of a title in a third person.<sup>81</sup> Notice of a sale does not imply knowledge of an outstanding and unrecorded conveyance.<sup>82</sup>

(3) *Knowledge of Agent to Procure Insurance Touching Subject Matter.*—Where, by the terms of an insurance contract, the person obtaining the insurance was to be deemed the agent of the insured in all matters immediately connected with the procurement of the policy, representations by that person in procuring the policy are to be regarded as made by him in the capacity of agent of the insured, and his knowledge or information, pending negotiations for insurance, touching the subject matter of the contract, is to be deemed the knowledge or information of the insured, but when the contract is consummated by the delivery of the policy, he ceases to be the agent of the insured, if his employment is solely to procure insurance, and notice given to him thereafter if the termination of the policy is not notice to, and is not binding upon the insured.<sup>83</sup>

(4) *Knowledge of Conditions upon Which License Granted.*—A person cannot, through the intermediary of an agent, obtain a privilege—a mere license—and then plead that he did not know upon what conditions it was granted.<sup>84</sup>

(5) *Knowledge of Navigation under License from or Trading with Enemy.*—Navigating under a license from the enemy is cause of confiscation, and is closely connected in principle with the offense of trading with the enemy; in both cases, the knowledge of the agent will affect the principal, although he may, in reality, be ignorant of the fact.<sup>85</sup>

trust stock, is notice to them. *Duncan v. Jaudon*, 15 Wall. 165, 21 L. Ed. 142.

Notice to the board of directors of a bank, when stock was transferred to a person, that he held it as trustee only, was notice to the bank; and no subsequent change of directors could require a new notice of this fact. So that, if the bank had sustained any injury, by reason of a subsequent board not knowing that such person held the stock in trust, it would result from the negligence of its own agents, and could not be visited upon the complainants. *Mechanics' Bank v. Seton*, 1 Pet. 299, 7 L. Ed. 152. See, generally, the title BANKS AND BANKING, vol. 3, p. 1; TRUSTS AND TRUSTEES.

**Fraud.**—Notice of fraud to an agent is notice to the principal. *Melhuise v. Fryor*, 173 U. S. 38, 52, 43 L. Ed. 606.

The knowledge of counsel in a particular transaction is notice to his client. And though the client may not actively participate in accomplishing a fraud, yet if he be looking on at what is done by another who is his confidential agent and professional adviser generally, and has been his agent and adviser in regard to a particular matter now called in question as fraudulently accomplished, and if, when all is accomplished, the client take and profit by the fruits of all that has been done, he will be taken as affected with knowledge possessed by such agent.

*May v. Le Claire*, 11 Wall. 217, 20 L. Ed. 50. See, generally, the title ATTORNEY AND CLIENT, vol. 2, p. 703.

Notice to the agent is notice to the principal, and a mortgagee, with notice of the fraudulent discharge of a prior mortgage, is not a bona fide purchaser. *Connecticut, etc., Ins. Co. v. Burnstine*, 131 U. S., appx. clii, 24 L. Ed. 706. See, generally, the titles FRAUD AND DECEIT, vol. 6, p. 394; MORTGAGES AND DEEDS OF TRUST, vol. 8, p. 452.

**81. Notice of prior unrecorded conveyance.**—*Stanley v. Schwalby*, 162 U. S. 255, 276, 40 L. Ed. 960, citing *The Distilled Spirits*, 11 Wall. 356, 367, 20 L. Ed. 167; *Wilson v. Wall*, 6 Wall. 83, 18 L. Ed. 727. See the titles DEEDS, vol. 5, p. 245; RECORDING ACTS.

**82. Notice of sale.**—*Stanley v. Schwalby*, 162 U. S. 255, 276, 40 L. Ed. 960; *Mills v. Smith*, 8 Wall. 27, 19 L. Ed. 346.

**83. Knowledge of agent to procure insurance touching subject matter.**—*Grace v. American Cent. Ins. Co.*, 109 U. S. 278, 27 L. Ed. 932. See the title INSURANCE, vol. 7, p. 66.

**84. Knowledge of conditions upon which license granted.**—*Boering v. Chesapeake Beach R. Co.*, 193 U. S. 442, 48 L. Ed. 742. See the title LICENSES, vol. 7, p. 869.

**85. Knowledge of navigation under license from or trading with enemy.**—The

(6) *Knowledge of Defect in Construction of Pier*.—Where a pier of a bridge was built under the supervision of an agent of the contractors for the bridge, and in accordance with his directions, he is held to have knowledge of any defect in the pier, and his knowledge in this particular is the knowledge of the contractors.<sup>86</sup>

## X. Criminal Liability for Acts of Agent.

For a fraud committed by a partner or an agent, the principal is not liable criminally<sup>87</sup> Whether a principal can be criminally prosecuted for a libel published by his agent without his participation, is a question on which the authorities are not agreed.<sup>88</sup>

## XI. Ratification of Unauthorized Acts of Agent.

**A. In General.**—Where an agent exceeds his authority, the principal is not bound unless he ratifies.<sup>89</sup> Upon being informed, he must exercise his election. His acceptance or rejection determines his rights and obligations.<sup>90</sup>

**B. Who May Ratify.**—A corporation, like an individual, may ratify the acts of its agent done in excess of authority.<sup>91</sup>

**C. What Acts May Be Ratified.**—A question of ratification can only arise where acts are done by an agent for his principal without authority. Such acts may be ratified and confirmed by the principal.<sup>92</sup> But where an act is done by the agent for himself and not the principal, there is no question of ratification.<sup>93</sup>

Hiram, 1 Wheat. 440, 4 L. Ed. 131. See the title WAR.

**86. Knowledge of defect in construction of pier.**—*Railroad Co. v. Smith*, 21 Wall. 255, 22 L. Ed. 513.

**87. Criminal liability of principal for acts of agent—Fraud.**—Story on Agency, §§ 452, 454; *Hoover v. Wise*, 91 U. S. 308, 311, 23 L. Ed. 392. See, generally, the title PARTNERSHIP, ante, p. 73.

**88. Libel.**—*Lake Shore, etc., R. Co. v. Prentice*, 147 U. S. 101, 37 L. Ed. 97.

Where it has been held that a principal can be so prosecuted, it is admitted to be an anomaly in the criminal law. *Lake Shore, etc., R. Co. v. Prentice*, 147 U. S. 101, 111, 37 L. Ed. 97. See, generally, the title LIBEL AND SLANDER, vol. 7, p. 857.

**89. Ratification—In general.**—*The Sally Magee*, 3 Wall. 451, 18 L. Ed. 197; *Hatch v. Coddington*, 95 U. S. 48, 57, 24 L. Ed. 339. See ante, "Where Agent Exceeds Authority," IX, B, 1, b, (4); post, "Effect of Ratification," XI, E.

**90. Necessity of election.**—*The Sally Magee*, 3 Wall. 451, 18 L. Ed. 197; *Hatch v. Coddington*, 95 U. S. 48, 57, 24 L. Ed. 339.

Where agents bought coffee at a price exceeding the limit prescribed by the principals, and the latter, upon learning the fact—no matter when that was, or what the circumstances—repudiated the purchase, the title of the agents thereupon became absolute, and none passed to the principals for whom the purchase was made. *The Sally Magee*, 3 Wall. 451, 18 L. Ed. 197.

**91. Who may ratify.**—*Supervisors v. Schenck*, 5 Wall. 772, 18 L. Ed. 556; *Railway Co. v. Allerton*, 18 Wall. 233, 21 L. Ed. 902. See, generally, the titles COR-

PORATIONS, vol. 4, p. 621; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 8, p. 957.

Unauthorized acts of directors in increasing the capital stock of a corporation may perhaps be made effective by the subsequent ratification of the stockholders. *Railway Co. v. Allerton*, 18 Wall. 233, 21 L. Ed. 902. See, generally, the title STOCK AND STOCKHOLDERS.

**92. Acts done for principal without authority.**—*National Bank v. Insurance Co.*, 103 U. S. 783, 26 L. Ed. 459; *Clarke v. Van Riemsdyk*, 9 Cranch 153, 3 L. Ed. 688; *Clews v. Jamieson*, 182 U. S. 461, 45 L. Ed. 1183.

Under the act of June 7th, 1862, "for the collection of the direct tax in insurrectionary district, etc.," it was held that the payment of the tax which the act requires to be made by the owner, need not, necessarily, be made by him in person. It is enough if it be made by any person for him on the ground that an act done by one for the benefit of another is valid if ratified, either expressly or by implication, and that such ratification will be presumed in furtherance of justice. *Bennett v. Hunter*, 9 Wall. 326, 19 L. Ed. 672; *Tacey v. Irwin*, 18 Wall. 549, 21 L. Ed. 786.

**93. Act done by agent for himself.**—*National Bank v. Insurance Co.*, 103 U. S. 783, 26 L. Ed. 459.

A borrowing by an insurance agent to enable him to remit to his company the proceeds of his business is prima facie the borrowing of the agent himself rather than the company, and will be so treated unless the contrary is shown. Any other rule would be dangerous in the extreme. *National Bank v. Insurance Co.*, 103 U. S. 783, 26 L. Ed. 459.



A ratification being, in its effect upon the act of an agent, equivalent to the possession by him of a previous authority, and operating upon the act ratified in the same manner as though the authority of the agent to do the act existed originally,<sup>94</sup> can only be made when the party ratifying possessed the power to perform the act ratified, not merely at the time the act was done, but also at the time the ratification was made.<sup>95</sup> Ratification is inoperative if the contract ratified was illegal, immoral, or against public policy.<sup>96</sup> As a general rule a ratification of a grantor's unauthorized delivery of a deed can be made by the grantee, but such ratification cannot relate back so as to cut out a mortgage for value executed and registered before the ratification was made.<sup>97</sup> Although an agent has no express authority to draw a bill of exchange, yet the principal may ratify and confirm the agent's acts in drawing such bill, so as to bind him, as if such authority had been originally given.<sup>98</sup>

**D. What Constitutes Ratification**—1. DEFINITION.—To ratify is to give validity to the act of another.<sup>99</sup> Ratification is the adoption, by a principal, as his own, of an act done by his agent without authority,<sup>1</sup> and is equivalent to the possession by the agent of a previous authority.<sup>2</sup>

2. ELEMENTS—*a. Knowledge of Facts by Principal.*—A ratification of the unauthorized acts of an agent, in order to be effectual and binding upon the principal, must be made with a full knowledge of all the material facts upon which the unauthorized action was taken.<sup>3</sup> If the material facts be either suppressed or unknown, the ratification is treated as invalid, because founded on

**94. Ratification equivalent to previous authority.**—See post, "Effect of Ratification," XI, E.

**95. Act which principal has power to perform.**—*Marsh v. Fulton County*, 10 Wall. 676, 19 L. Ed. 1040; *Supervisors v. Schenck*, 5 Wall. 772, 18 L. Ed. 556; *Cook v. Tullis*, 18 Wall. 332, 21 L. Ed. 933; *Norton v. Shelby County*, 118 U. S. 425, 451, 30 L. Ed. 178; *Western Nat. Bank v. Armstrong*, 152 U. S. 346, 352; 38 L. Ed. 470.

The ratification is the first proceeding by which the principal ratifying becomes a party to the transaction, and he cannot acquire or confer the rights resulting from that transaction unless in a position to enter directly upon a similar transaction himself. Thus, if an individual pretending to be the agent of another should enter into a contract for the sale of land of his assumed principal, it would be impossible for the latter to ratify the contract if, between its date and the attempted ratification, he had himself disposed of the property. *Cook v. Tullis*, 18 Wall. 332, 21 L. Ed. 933. See post, "Exception to Rule," VIII, E, 2.

Where the supervisors of a county possessed no authority to make a subscription or issue bonds to a railroad company, in the first instance, without the previous sanction of the qualified voters of the county, they cannot ratify a subscription by the county already made without such authorization. *Marsh v. Fulton County*, 10 Wall. 676, 19 L. Ed. 1040. See, also, *Norton v. Shelby County*, 118 U. S. 425, 30 L. Ed. 178. See, generally, the title MUNICIPAL, COUNTY, STATE AND FEDERAL AID, vol. 8, p. 618.

**96. Transaction illegal, immoral, etc.**—*Supervisors v. Schenck*, 5 Wall. 772, 18 L. Ed. 556.

A transaction originally unlawful—such as a person's unlawful trading in behalf of another with an enemy—cannot be made lawful by any ratification. *United States v. Grossmayer*, 9 Wall. 72, 19 L. Ed. 627. See, generally, the titles ILLEGAL CONTRACTS, vol. 6, p. 737; WAR.

**97. Delivery of deed.**—*Parmelee v. Simpson*, 5 Wall. 81, 18 L. Ed. 542. See, generally, the titles DEEDS, vol. 5, p. 245; MORTGAGES AND DEEDS OF TRUST, vol. 8, p. 452; RECORDING ACTS.

**98. Drawing of bill of exchange.**—*Clarke v. Van Riemsdyk*, 9 Cranch 153, 3 L. Ed. 688. See, generally, the title BILLS, NOTES AND CHECKS, vol. 3, p. 257.

**99. Definition—Giving validity to act of another.**—*Norton v. Shelby County*, 118 U. S. 425, 451, 30 L. Ed. 178.

**1. Adoption of unauthorized acts.**—*National Bank v. Insurance Co.*, 103 U. S. 783, 26 L. Ed. 459; *Insurance Co. v. McCain*, 96 U. S. 84, 24 L. Ed. 653; *Creswell v. Lanahan*, 101 U. S. 347, 25 L. Ed. 853.

**2. Equivalent to previous authority.**—See post, "Effect of Ratification," XI, E.

**3. Knowledge of facts by principal.**—**General rule.**—*Story on Agency*, 9th Ed., § 239, notes 1 and 2; *Owings v. Hull*, 9 Pet. 607, 9 L. Ed. 246; *Bennecke v. Insurance Co.*, 105 U. S. 355, 26 L. Ed. 990; *Bloomfield v. Charter Oak Bank*, 121 U. S. 121, 30 L. Ed. 923; *Drakely v. Gregg*, 8 Wall. 242, 19 L. Ed. 409; *Clews v. Jamieson*, 182 U. S. 461, 45 L. Ed. 1183; *Law v. Cross*, 1 Black 533, 17 L. Ed. 185; Super-

mistake or fraud.<sup>4</sup> Knowledge of the facts, being an essential element of ratification, this knowledge must be shown,<sup>5</sup> or such facts proved that its existence is a necessary inference from them.<sup>6</sup>

b. *Consideration*.—No new or additional consideration is required to support a ratification, in order to bind the principal, because in adopting a contract the principal accepts with it the original consideration on which it was founded, as a sufficient consideration for his adoption of it.<sup>7</sup>

c. *Acts Capable of Being Ratified*.—See ante, "What Acts May Be Ratified," XI, C.

3. **EXPRESS RATIFICATION**.—The unauthorized acts of an agent may be ratified by the express adoption or consent thereto by the principal.<sup>8</sup>

4. **IMPLIED RATIFICATION**—a. *In General*.—Ratification of the acts of an agent done in excess of authority, may, in many cases, be inferred from acquiescence in those acts by the principal. Such ratification may be shown by the acts and conduct of the principal inconsistent with any other hypothesis than that he approved and intended to adopt what had been done in his name,<sup>9</sup> and

visors *v.* Schenck, 5 Wall. 772, 18 L. Ed. 556; United States *v.* Beebe, 180 U. S. 343, 354, 45 L. Ed. 563; Robb *v.* Vos, 155 U. S. 13, 39 L. Ed. 52; The Sally Magee, 3 Wall. 451, 18 L. Ed. 197; Western Nat. Bank *v.* Armstrong, 152 U. S. 346, 352, 38 L. Ed. 470; Pittsburgh, etc., R. Co. *v.* Keokuk, etc., Bridge Co., 131 U. S. 371, 381, 33 L. Ed. 157; Union Pac. R. Co. *v.* Chicago, etc., R. Co., 163 U. S. 564, 596, 41 L. Ed. 265.

Ignorance, mistake, or misapprehension of any of the essential circumstances relating to the particular transaction alleged to have been ratified, will absolve the principal from all liability by reason of any supposed adoption of or assent to the previously unauthorized acts of the agent. Owings *v.* Hull, 9 Pet. 607, 9 L. Ed. 246; Bennecke *v.* Insurance Co., 105 U. S. 355, 26 L. Ed. 990.

The rule is as true in the case of the government as in that of an individual. Knowledge is necessary in any event. Story on Agency, 9th Ed., § 239, notes 1 and 2. If there be want of it, though such want arises from the neglect of the principal, no ratification can be based upon any act of his. United States *v.* Beebe, 180 U. S. 343, 354, 45 L. Ed. 563. See ante, "Liability of Principal to Third Persons," IX, B, 1.

4. **Reason for rule**.—Owings *v.* Hull, 9 Pet. 607, 9 L. Ed. 246; Bennecke *v.* Insurance Co., 105 U. S. 355, 26 L. Ed. 990.

5. **Proof of knowledge**.—United States *v.* Beebe, 180 U. S. 343, 354, 45 L. Ed. 563.

6. **Inference from facts proved**.—United States *v.* Beebe, 180 U. S. 343, 354, 45 L. Ed. 563; Bell *v.* Cunningham, 3 Pet. 69, 7 L. Ed. 606.

7. **Consideration**.—Drakely *v.* Gregg, 8 Wall. 242, 19 L. Ed. 409. See, generally, the title **CONTRACTS**, vol. 4, p. 552.

8. **Express ratification**.—Supervisors *v.* Schenck, 5 Wall. 772, 18 L. Ed. 556; Hansen *v.* Boyd, 161 U. S. 397, 40 L. Ed. 746; Tacey *v.* Irwin, 18 Wall. 549, 21 L. Ed. 786; Bennett *v.* Hunter, 9 Wall. 326, 19 L.

Ed. 672; Hatch *v.* Coddington, 95 U. S. 48, 57, 24 L. Ed. 339.

The language of the principal in letters to his agent, after an unauthorized discharge of a judgment by the latter, held to amount to a ratification. Erwin *v.* Blake, 8 Pet. 18, 26, 27, 8 L. Ed. 852.

A resolution of a corporation, referring to an unauthorized contract entered into by its president, which speaks of the contract as made, not merely purposed, and asserts an impossibility to comply with its terms, not of an impossibility to enter into the engagement, and authorizes its agent to procure a surrender of the contract upon such terms as might be agreed upon, amounts to a ratification and a recognition of the contract as a binding obligation. Hatch *v.* Coddington, 95 U. S. 48, 57, 24 L. Ed. 339.

9. **Implied ratification**.—In general.—Supervisors *v.* Schenck, 5 Wall. 772, 18 L. Ed. 556; Bronson *v.* Chappell, 12 Wall. 681, 20 L. Ed. 436; Hansen *v.* Boyd, 161 U. S. 397, 40 L. Ed. 746; Bell *v.* Cunningham, 3 Pet. 69, 7 L. Ed. 606; The Mayor *v.* Ray, 19 Wall. 468, 22 L. Ed. 164; Bissell *v.* Jeffersonville, 24 How. 287, 300, 16 L. Ed. 664; Clews *v.* Jamieson, 182 U. S. 461, 45 L. Ed. 1183; Gold-Mining Co. *v.* National Bank, 96 U. S. 640, 24 L. Ed. 648; Law *v.* Cross, 1 Black 533, 17 L. Ed. 185; Insurance Co. *v.* McCain, 96 U. S. 84, 24 L. Ed. 653; Creswell *v.* Lanahan, 101 U. S. 347, 25 L. Ed. 853; Wright *v.* Ellison, 1 Wall. 16, 17 L. Ed. 555; Feild *v.* Farrington, 10 Wall. 141, 144, 19 L. Ed. 923; Indianapolis Rolling Mills *v.* St. Louis, etc., Railroad, 120 U. S. 256, 30 L. Ed. 639; Fitzgerald, etc., Const. Co. *v.* Fitzgerald, 137 U. S. 98, 34 L. Ed. 608; Robb *v.* Vos, 155 U. S. 13, 39 L. Ed. 52; Smith *v.* Morse, 9 Wall. 76, 19 L. Ed. 597; Tacey *v.* Irwin, 18 Wall. 549, 21 L. Ed. 786; Bennett *v.* Hunter, 9 Wall. 326, 19 L. Ed. 672; Union Pac. R. Co. *v.* Chicago, etc., R. Co., 163 U. S. 564, 596, 41 L. Ed. 265; Erwin *v.* Blake, 8 Pet. 18, 26, 8 L. Ed. 852; Pittsburg, etc., R. Co. *v.* Keokuk, etc., Bridge Co., 131 U. S. 371, 381, 33 L. Ed. 157.



will be presumed in furtherance of justice.<sup>10</sup> The principle as to implied ratification of the acts of an agent is as applicable to corporations as to individuals.<sup>11</sup>

b. *Acceptance or Retention of Benefits of Agent's Act*.—It is a general rule, applicable to all persons and corporations, that whoever, knowing the facts of the case, accepts and retains the benefits of the acts of an agent on his account, cannot repudiate such acts.<sup>12</sup>

c. *Failure to Repudiate Agent's Act*.—(1) *General Rule*.—A principal must disavow an unauthorized act of his agent after the fact has come to his knowledge, or he will be deemed to have ratified it by acquiescence. Silence of the principal, after receiving a statement of the agent as to his acts, is equivalent to an adoption of the acts of the agent, and closes the mouth of the principal ever afterwards,<sup>13</sup> and especially will a ratification be implied from the prin-

**10. Presumption in furtherance of justice.**—*Tacey v. Irwin*, 18 Wall. 549, 21 L. Ed. 786; *Bennett v. Hunter*, 9 Wall. 326, 19 L. Ed. 672.

**11. Principle applicable to corporations as well as individuals.**—*Supervisors v. Schenck*, 5 Wall. 772, 18 L. Ed. 556; *Union Pac. R. Co. v. Chicago, etc., R. Co.*, 163 U. S. 564, 41 L. Ed. 265. See the titles CORPORATIONS, vol. 4, p. 621; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 8, p. 957.

Where the officers of the corporation openly exercise powers affecting the interests of third persons, which presupposes a delegated authority for the purpose, and other corporate acts subsequently performed show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed. *Supervisors v. Schenck*, 5 Wall. 772, 18 L. Ed. 556.

Where shares in a railroad company were received by the officers of a county in exchange for their bonds, and were never returned, and the proper officers of the county voted for directors at two elections, and the supervisors paid two annual installments of interest, the supreme court of Illinois held that those acts, unexplained, were as satisfactory evidence of a design to ratify the issue of the bonds as if it had been done by an order of the supervisors. *Supervisors v. Schenck*, 5 Wall. 772, 18 L. Ed. 556. See, generally, the title COUNTIES, vol. 4, p. 825.

**12. Acceptance or retention of benefits of agent's act.**—*Sedwick on Statutory and Constitutional Law*, 90; *The Mayor v. Ray*, 19 Wall. 468, 22 L. Ed. 164; *Bissell v. Jeffersonville*, 24 How. 287, 300, 16 L. Ed. 664. See post, "Failure to Repudiate Agent's Act," XI, D, 4, c.

Where a principal knowing the facts of the case, retains and uses money received by an agent for his account, he cannot repudiate the contract on which it is received. *The Mayor v. Ray*, 19 Wall. 468, 22 L. Ed. 164; *Bissell v. Jeffersonville*, 24 How. 287, 300, 16 L. Ed. 664.

In an action for the price of goods which the purchaser by his own agents ex-

amined and selected, and which he himself afterwards received and kept without objection, it is no defense that the price as agreed on was above that of the market; there having been neither fraud, misrepresentation, nor warranty in the case. *Miller v. Tiffany*, 1 Wall. 298, 17 L. Ed. 540.

**13. Failure to repudiate agent's act.**—*General rule.*—*Clews v. Jamieson*, 182 U. S. 461, 45 L. Ed. 1183; *Gold-Mining Co. v. National Bank*, 96 U. S. 640, 24 L. Ed. 648; *Law v. Cross*, 1 Black 533, 17 L. Ed. 185; *Insurance Co. v. McCain*, 96 U. S. 84, 24 L. Ed. 653; *Creswell v. Lanahan*, 101 U. S. 347, 25 L. Ed. 853; *Wright v. Ellison*, 1 Wall. 16, 17 L. Ed. 555; *Feild v. Farrington*, 10 Wall. 141, 19 L. Ed. 923; *Hepburn v. Dunlop*, 1 Wheat. 179, 4 L. Ed. 65; *Union Pac. R. Co. v. Chicago, etc., R. Co.*, 163 U. S. 564, 596, 41 L. Ed. 265; *Galigher v. Jones*, 129 U. S. 193, 32 L. Ed. 658.

When an agent exceeds his authority, the principal is not bound unless he ratifies. Upon being informed, he must exercise his election. Whatever may be the motives of his decision, the result is the same. His acceptance or rejection determines his rights and obligations. *The Sally Magee*, 3 Wall. 451, 18 L. Ed. 197. See, also, *Law v. Cross*, 1 Black 533, 17 L. Ed. 185.

*Mr. Livermore*, in his *Treatise on Agency*, vol. 1, p. 50, says that "when the relation of principal and agent does in fact exist, although in the particular transaction the agent has exceeded his authority, an intention to ratify will always be presumed from the silence of the principal who has received a letter informing him what has been done on his account." *Feild v. Farrington*, 10 Wall. 141, 19 L. Ed. 923.

**Application of rule.**—The receipt, without objection, by an insurance company of a statement from a person who had been acting as its agent, that the premium to him, and its failure then to notify the for the renewal of a policy had been paid assured that the powers of the agent had terminated, is equivalent to an adoption of the act of the agent, and estops the company, when sued on the policy, from



principal's silence and inaction when the unauthorized acts of the agent are beneficial to him and he receives and retains such benefits without objection.<sup>14</sup> But a mere retention by the principal of a report that an unauthorized act had been done on his account is entirely consistent with the hypothesis that he did not approve and did not intend to adopt what he had previously declined to authorize.<sup>15</sup>

(2) *Time of Repudiating Agent's Act.*—In order to escape the presumption of ratification a principal must disaffirm the unauthorized act of his agent, promptly, and within a reasonable time after the fact has come to his knowledge.<sup>16</sup>

denying his authority. *Insurance Co. v. McCain*, 96 U. S. 84, 24 L. Ed. 653.

A sheriff sold land under an execution against the representatives of the deceased owner, the heirs having a right to redeem in one year. The agent of the purchaser, within the year, assigned the certificate of sale to one of the heirs, who was acting for the rest, and who gave his note for the amount, but did not pay it at maturity. The transaction, though it was not approved, was not disaffirmed by the purchaser within the period allowed for redemption. Held, that a person who bought the title of the original purchaser several years afterwards, when the land had greatly risen in value, could not recover it as against the heirs or their vendees. *Lafin v. Herrington*, 1 Black 326, 17 L. Ed. 45. See, generally, the titles **EXECUTORS AND ADMINISTRATORS**, vol. 6, p. 119; **SHERIFFS', CONSTABLES' AND MARSHALS' SALES**.

A power of attorney was given empowering the attorney to sue for, and to compound and agree for, all debts due to the principal, and, in general, to do all other lawful acts needful for those purposes, as fully as the principal could do. Under this authority, the attorney entered into an agreement to receive land in discharge of a debt due to his principal, which agreement was communicated in due time to the principal. Held, that the principal's acquiescence for many years in the agreement without any act of disaffirmance, amounted to a ratification. *Hepburn v. Dunlop*, 1 Wheat. 179, 190, 4 L. Ed. 65.

**14. Retention of benefits of unauthorized acts.**—*Wright v. Ellison*, 1 Wall. 16, 17 L. Ed. 555; *Indianapolis Rolling Mill v. St. Louis, etc., Railroad*, 120 U. S. 256, 30 L. Ed. 639; *Gold-Mining Co. v. National Bank*, 96 U. S. 640, 24 L. Ed. 648; *Pittsburgh, etc., R. Co. v. Keokuk, etc., Bridge Co.*, 131 U. S. 371, 381, 33 L. Ed. 157; *Fidelity, etc., Co. v. Courtney*, 186 U. S. 342, 350, 46 L. Ed. 1193; *Erwin v. Blake*, 8 Pet. 18, 26, 27, 8 L. Ed. 852. See ante, "Acceptance or Retention of Benefits of Agent's Act," XI, D, 4, b.

The rule is said to be a "stringent one upon the principal in such cases, where, with full knowledge of the acts of the agent, he receives a benefit from them, and fails to repudiate the acts." A principal cannot, by holding his peace, and ap-

parent acquiescence, have the benefit of the contract if it should afterwards turn out to be profitable, and retain a right to repudiate if otherwise. *Law v. Cross*, 1 Black 533, 539, 17 L. Ed. 185; *Clews v. Jamieson*, 182 U. S. 461, 483, 45 L. Ed. 1183.

If a principal, after a knowledge that his orders have been violated by his agent, receive merchandise purchased for him, contrary to orders, and sell the same, without signifying any intention of disavowing the acts of the agent, an inference in favor of the ratification of the acts of the agent may fairly be drawn by the jury; but if the merchandise were received by the principal, under a just confidence that his orders to his agent had been faithfully executed, such an inference would be, in a high degree, unreasonable. *Bell v. Cunningham*, 3 Pet. 69, 7 L. Ed. 606.

**To sell and convey.**—Where a party having an inchoate title to land gave a power to "sell and convey" it, declaring, however, in the power, subsequently, that the attorney was authorized "to sell and convey such interest as I have and such title as I may have, and no other or better title," and that he would not hold himself "personally liable or responsible" for the acts of his attorney in conveying the land, "beyond quitclaiming whatever title I have," and the party afterwards acquired complete title, and the attorney conveyed by quitclaim for full consideration, which consideration passed to the principal; held, that the grantor could not, six years afterwards, disavow the act of his attorney and convey the land to another person. *Smith v. Sheeley*, 12 Wall. 358, 20 L. Ed. 430.

**15. Mere retention of report of unauthorized act.**—*Hansen v. Boyd*, 161 U. S. 397, 410, 40 L. Ed. 746.

The mere silence of the principal under such circumstances is certainly not necessarily indicative of an intention to adopt the unauthorized act of his agent, and is, therefore, insufficient of itself to warrant an instruction that it constituted in law an adoption of such act. The question whether the evidence establishes ratification should be submitted to the jury. *Hansen v. Boyd*, 161 U. S. 397, 410, 411, 40 L. Ed. 746.

**16. Time of repudiating agent's act.**—**General rule.**—*Clews v. Jamieson*, 182 U. S. 461, 45 L. Ed. 1183; *Gold-Mining Co.*

d. *Action on Contract by Principal*.—The bringing of a suit by a principal upon the contract of his agent which was unauthorized at the time and in excess of the authority conferred upon the agent, is a ratification of the unauthorized act, and it is no answer to the ratification that prior to its taking place the principal is not bound, and hence there is no right on the part of the other party to enforce as against him the unauthorized act of his agent.<sup>17</sup>

5. *PARTIAL RATIFICATION*.—A principal cannot ratify a transaction of his agent in part, and repudiate it as to the rest.<sup>18</sup> If he ratifies that which favors him, he ratifies the whole.<sup>19</sup>

6. *PROVINCE OF COURT AND JURY*.—The question whether the evidence established a ratification, i. e., whether or not there has been such acquiescence on the part of the principal, as to amount to a ratification of an unauthorized act

*v. National Bank*, 96 U. S. 640, 24 L. Ed. 648; *Law v. Cross*, 1 Black 533, 17 L. Ed. 185; *Feild v. Farrington*, 10 Wall. 141, 19 L. Ed. 923; *Indianapolis Rolling Mill v. St. Louis, etc., Railroad*, 120 U. S. 256, 30 L. Ed. 639; *Fitzgerald, etc., Const. Co. v. Fitzgerald*, 137 U. S. 98, 34 L. Ed. 608; *Creswell v. Lanahan*, 101 U. S. 347, 25 L. Ed. 853; *Pittsburgh, etc., R. Co. v. Keokuk, etc., Bridge Co.*, 131 U. S. 371, 381, 33 L. Ed. 157; *Galigher v. Jones*, 129 U. S. 193, 32 L. Ed. 658. See, also, *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 592, 23 L. Ed. 328.

*Applications of rule*.—Where an agent, without authority, borrows moneys in the name of his principal, and the latter, when they have been applied to his use and payment is demanded of him, fails, within a reasonable time thereafter, to disavow the act of his agent, the jury is authorized to consider the principal as assenting to what was done in his name. *Gold-Mining Co. v. National Bank*, 96 U. S. 640, 24 L. Ed. 648. See, also, *Indianapolis Rolling Mill v. St. Louis, etc., Railroad*, 120 U. S. 256, 260, 30 L. Ed. 639; *Pittsburgh, etc., R. Co. v. Keokuk, etc., Bridge Co.*, 131 U. S. 371, 381, 33 L. Ed. 157.

In *Story on Agency*, § 259, it is said that, "In the ordinary course of business between merchants and their correspondents, it is understood to be the duty of one party receiving a letter from the other to answer the same within a reasonable time, and if he does not, it is presumed he admits the propriety of the acts of his correspondent, and confirms and adopts them." *Feild v. Farrington*, 10 Wall. 141, 19 L. Ed. 923.

Disaffirmance six months after knowledge of transaction held to be too late to rebut presumption of ratification. *Indianapolis Rolling Mill v. St. Louis, etc., Railroad*, 120 U. S. 256, 30 L. Ed. 639.

That the power of a collecting agent by the general law is limited to receiving for the debt of his principal that which the law declares to be a legal tender, or which is by common consent considered and treated as money, and passes as such at par, is established by all the authorities. The only condition they impose upon the principal, if anything else is received by his agent, is that he shall in-

form the debtor that he refuses to sanction the unauthorized transaction within a reasonable period after it is brought to his knowledge. *Ward v. Smith*, 7 Wall. 447, 452, 19 L. Ed. 297. See the title *PAYMENT*, ante, p. 319.

17. *Action on contract by principal*.—The principles set out in the text are well known, and may be found laid down in the following text-books: *Story on Agency*, 9th Ed., § 90, note 7; §§ 248, 251, 251a, and note; §§ 258, 259; *Livermore on Agency*, p. 44; *Dunlap's Paley on Agency*, 4th Am. Ed., marginal page 324, note. *Clews v. Jamieson*, 182 U. S. 461, 45 L. Ed. 1183; *Robb v. Vos*, 155 U. S. 13, 39 L. Ed. 52; *Smith v. Morse*, 9 Wall. 76, 19 L. Ed. 597. See, also, *Fleckner v. United States Bank*, 8 Wheat. 338, 363, 5 L. Ed. 631; *Law v. Cross*, 1 Black 533, 539, 17 L. Ed. 185.

The rule is that any decisive act by a party, with knowledge of his rights and of the facts, determines his election in the case of inconsistent remedies, and that one of the most unequivocal methods of showing ratification of an agent's act is the bringing of an action based upon such an act. *Robb v. Vos*, 155 U. S. 13, 39 L. Ed. 52. See the title *ELECTION OF REMEDIES*, vol. 5, p. 719.

Where an agreement providing for the settlement of certain claims, and the submission of other claims to arbitration is signed by an agent for his principal in the name of the latter, and the latter accepts the settlement and brings an action upon the covenant contained in the submission, he thereby adopts and ratifies the acts of the agent. *Smith v. Morse*, 9 Wall. 76, 19 L. Ed. 597.

18. *Partial ratification*.—*Story's Agency*, § 250; *Curtis v. Innerarity*, 6 How. 146, 12 L. Ed. 380.

19. *Ratification of beneficial portion ratifies whole*.—*Gaines v. Miller*, 111 U. S. 395, 28 L. Ed. 466.

If a transaction was beyond the power of the agent, and the principal intends to repudiate it, he is bound to repudiate it in toto. He cannot accept that which is beneficial, and avoid that which is burdensome. *Rader v. Maddox*, 150 U. S. 128, 131, 37 L. Ed. 1025.

of an agent, is generally a question to be left to the jury.<sup>20</sup>

**E. Effect of Ratification.**—1. **GENERAL RULE.**—All the elements of a ratification by a principal of an unauthorized act of his agent, who in fact is assuming to act in his behalf, being present,<sup>21</sup> the general rule is that such ratification operates upon the act ratified precisely as though authority to do the act had been previously given. When the act is so ratified it is as binding upon the principal as if he had given an original authority to that effect and a ratification relates back to the time of the act which is ratified. A subsequent ratification is equivalent to a prior order.<sup>22</sup> Questions of ratification most fre-

**20. Province of court and jury.**—*Law v. Cross*, 1 Black 533, 17 L. Ed. 185; *Gold-Mining Co. v. National Bank*, 96 U. S. 640, 24 L. Ed. 648; *Bell v. Cunningham*, 3 Pet. 69, 7 L. Ed. 606; *Hansen v. Boyd*, 161 U. S. 397, 411, 40 L. Ed. 746.

Where a principal, after knowledge that his orders had been violated by his agent, receives merchandise purchased for him, contrary to orders, and sells the same, without signifying any intention of disavowing the acts of the agent, it is for the jury to determine whether such receipt and sale of the merchandise by the principal amounts to a ratification of the unauthorized acts of the agent. *Bell v. Cunningham*, 3 Pet. 69, 7 L. Ed. 606.

The supreme court reversed a judgment, and ordered a venire de novo in a case where, in its opinion, the evidence below tended to prove a ratification and adoption by one person of a contract made by another, which ratification and adoption the defendant maintained that the evidence did prove, or at least, tended to prove. The federal supreme court, however, in the reversal, carefully avoided the expression of any opinion as to whether the evidence, which it said tended to prove such ratification and adoption, did, or did not actually prove it. *Drakely v. Gregg*, 8 Wall. 242, 19 L. Ed. 409.

**21. Elements of ratification.**—See ante, "What Acts May Be Ratified," XI, C; "Elements," XI, D, 2.

**22. Effect of ratification—General rule.**—*Cook v. Tullis*, 18 Wall. 332, 21 L. Ed. 933; *Boyle v. Zacharie*, 6 Pet. 635, 8 L. Ed. 527; *Clews v. Jamieson*, 182 U. S. 461, 45 L. Ed. 1183; *Clarke v. Van Riemsdyk*, 9 Cranch 153, 3 L. Ed. 688; *Marsh v. Fulton County*, 10 Wall. 676, 19 L. Ed. 1040; *Drakely v. Gregg*, 8 Wall. 242, 19 L. Ed. 409; *United States v. City Bank*, 21 How. 356, 16 L. Ed. 130; *Pickering v. Lomax*, 145 U. S. 310, 36 L. Ed. 716; *Clark v. Reeder*, 158 U. S. 505, 39 L. Ed. 1079; *Bronson v. Chappell*, 12 Wall. 681, 20 L. Ed. 436; *Eureka Co. v. Bailey Co.*, 11 Wall. 488, 20 L. Ed. 209; *Supervisors v. Schenck*, 5 Wall. 772, 18 L. Ed. 556; *Veazie v. Williams*, 8 How. 134, 157, 12 L. Ed. 1018; *Jones v. Guaranty, etc., Co.*, 101 U. S. 622, 25 L. Ed. 1030; *Tacey v. Irwin*, 18 Wall. 549, 21 L. Ed. 786; *Bennett v. Hunter*, 9 Wall. 326, 19 L. Ed. 672; *Norton v. Shelby County*, 118 U. S. 425, 451, 30 L. Ed. 178; *Western Nat. Bank v. Armstrong*, 152 U. S. 346, 352, 38 L. Ed. 470; In-

*Insurance Co. v. Davis*, 95 U. S. 425, 24 L. Ed. 453. See ante, "Liability of Principal to Third Persons," IX, B, 1; "Effect of War," XII, A, 4.

When a person enters into a contract assuming to act for another, and the latter assents to the agency by approving and taking the benefit of the contract, he will be bound by any conduct on the assumed agent's part which might entitle the other party to the contract to a rescission. *Clark v. Reeder*, 158 U. S. 505, 523, 39 L. Ed. 1079.

The defendant in an action in the circuit court had, with others, received the proceeds of a joint and several promissory note discounted for them at the Bank of the Metropolis, and this note was afterwards renewed by their attorney, under a power of attorney authorizing him to give a joint note; but he gave a joint and several note, the proceeds of which the attorney received, and appropriated to pay the note already discounted at the bank; the interest of the sum borrowed was paid out of the money of the parties to the note. Held, that although the power of attorney may not have been executed in exact conformity to its terms, and may not have authorized the giving of a joint and several note (a question the court did not decide), yet the receipt of the proceeds of the note by the attorney, and the appropriation thereof to the payment of the former note, was sufficient evidence to sustain the money counts in the declaration. *Moore v. Bank*, 13 Pet. 302, 10 L. Ed. 172.

**Agent of corporation.**—A contract in writing may be binding on a corporation though a private seal of one of its officers was used instead of the corporate seal, and though no record may be found authorizing the officer to make the contract, if other evidence proves that he had such authority, or that the company ratified his act afterwards. *Eureka Co. v. Bailey Co.*, 11 Wall. 488, 20 L. Ed. 209.

A corporation can act only by its agents. Where there is a technical defect touching the execution of a mortgage, it is cured by acquiescence and ratification by the mortgagor. *Jones v. Guaranty, etc., Co.*, 101 U. S. 622, 25 L. Ed. 1030. See, generally, the titles CORPORATIONS, vol. 4, p. 621; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 8, p. 957.

**Drawing bill of exchange.**—Although an



quently arise in respect to the acts or omissions of agents, but the general rule is the same in all cases where the act done was one which it was competent for the party attempting to be charged to do.<sup>23</sup> Where a principal ratifies and takes the benefit of the fraudulent act of his agent, he is liable to the person wronged thereby, however innocent himself of any intent to defraud.<sup>24</sup>

2. EXCEPTION TO RULE.—The ratification operates upon the act ratified precisely as though authority to do the act had been previously given, except where the rights of third parties have intervened between the act and the ratification. The retroactive efficacy of the ratification is subject to this qualification. The intervening rights of third persons cannot be defeated by the ratification.<sup>25</sup>

## XII. Termination of Agency.

**A. Modes of Terminating Agency**—1. DEATH OF PRINCIPAL—*a. In General.*—The powers of an agent cease on the death of his principal, the principal's death operating as a revocation of the agent's authority to act for him or

agent has no express authority to draw a bill of exchange, yet where the transactions and acts of his principals show a full ratification and confirmation of his acts in drawing such bill, the principals will be bound in like manner as if they had been given original authority. *Clarke v. Van Riemsdyk*, 9 Cranch 153, 3 L. Ed. 688.

**Ratifying deed of settlement.**—Where an agent ratifies a deed of settlement on behalf of his principal, the subsequent action of the principal in asserting a right in severalty to property, which he could only do upon his approval of such ratification by his agent, will estop him from denying or repudiating the ratification. *Stark v. Starr*, 94 U. S. 477, 24 L. Ed. 276.

23. *Supervisors v. Schenck*, 5 Wall. 772, 18 L. Ed. 556.

When the principal, upon a full knowledge of all the circumstances of the case, deliberately ratifies the acts, doings, or omissions of his agent, he will be bound thereby as fully, to all intents and purposes, as if he had originally given him direct authority in the premises, to the extent which such acts, doings, or omissions reach. *Supervisors v. Schenck*, 5 Wall. 772, 18 L. Ed. 556.

24. **Ratification of agent's fraudulent act.**—*Veazie v. Williams*, 8 How. 134, 12 L. Ed. 1018.

Where an agent in conducting a sale for his principal commits a fraud upon the purchaser by puffing or by-bidding, and the principal ratifies the sale and receives the benefits of it, he is answerable civiliter to the purchaser for the fraudulent acts of his agent, and should either restore the consideration and take back the property, or indemnify the purchaser to the extent of his suffering. *Veazie v. Williams*, 8 How. 134, 157, 12 L. Ed. 1018. See ante, "Torts," IX. B. 1, c. See, generally, the titles AUCTIONS AND AUCTIONEERS, vol. 2, p. 743; FRAUD AND DECEIT, vol. 6, p. 394.

25. **Exception to rule.**—*Cook v. Tullis*, 18 Wall. 332, 338, 21 L. Ed. 933; *Pickering v. Lomax*, 145 U. S. 310, 36 L. Ed.

716; *Parmelee v. Simpson*, 5 Wall. 81, 18 L. Ed. 542. See, also, *Fleckner v. United States Bank*, 8 Wheat. 338, 363, 5 L. Ed. 631.

It is essential that the principal should be able not merely to do the act ratified at the time the act was done, but also at the time the ratification was made. The ratification is the first proceeding by which he becomes a party to the transaction, and he cannot acquire or confer the rights resulting from that transaction unless in a position to enter directly upon a similar transaction himself. Thus, if an individual pretending to be the agent of another should enter into a contract for the sale of land of his assumed principal, it would be impossible for the latter to ratify the contract if, between its date and the attempted ratification, he had himself disposed of the property. He could not defeat the intermediate sale made by himself, and impart validity to the sale made by the pretended agent, for his power over the property or to contract for its sale would be gone. On the same principle liens by attachment or judgment upon the property of a debtor are not affected by his subsequent ratification of a previous unauthorized transfer of the property. *Cook v. Tullis*, 18 Wall. 332, 21 L. Ed. 933. See ante, "What Acts May Be Ratified," XI, C.

An agent, with whom his principal had deposited certain government bonds, used some of them without the permission of the owner, substituting in their place a note and mortgage. The principal, upon hearing of the transaction, promptly ratified it, but prior to such ratification and subsequent to the substitution of the note and mortgage, the agent became insolvent. Held, that the rights of the trustees in bankruptcy, though relating back to a date prior to the ratification, did not touch the transaction in question or prevent the ratification from having complete retroactive efficacy, there being no pretense that the property substituted was less valuable than that taken, or that the estate of the bankrupt was less available

his estate.<sup>26</sup> An act of agency done, subsequent to the decease of the principal, is void though his death be unknown to the agent.<sup>27</sup>

b. *Effect of Death of Person Giving Power of Attorney*<sup>28</sup>—(1) *General Rule*.—The general rule is that a letter of attorney is revoked by the death of the party who makes it.<sup>29</sup> This is true though the power be irrevocable during the life of the party.<sup>30</sup> Where several persons execute a power of attorney, it would seem that the death of some of the parties revokes the power as to all.<sup>31</sup> The general rule that a power of attorney, though irrevocable by the party, during his life, is extinguished by his death, is not affected by the circumstance that testamentary powers are executed after the death of the testator.<sup>32</sup>

to his creditors. *Cook v. Tullis*, 18 Wall. 332, 21 L. Ed. 933. See, generally, the titles *BANKRUPTCY*, vol. 2, p. 792; *INSOLVENCY*, vol. 7, p. 1.

**26. Death of principal.**—*Long v. Thayer*, 150 U. S. 520, 37 L. Ed. 1167; *Galt v. Galloway*, 4 Pet. 332, 344, 7 L. Ed. 876. See post, "Express Revocation of Authority," XII, A, 2.

Payments made to the agent would not be sufficient to discharge a third person's obligation to the principal's estate, even if such payments were made by him in actual ignorance of the principal's death. *Long v. Thayer*, 150 U. S. 520, 37 L. Ed. 1167.

The death of one partner or joint owner operates, in the case of a partnership, to dissolve the partnership, and in the case of a joint tenancy to sever the joint interest; and the authority of an agent appointed by a firm or joint owners thereupon ceases, where such authority is not coupled with an interest. *Long v. Thayer*, 150 U. S. 520, 37 L. Ed. 1167. See post, "Exception to Rule," XII, A, 1, b, (2); "In General," XII, A, 2, a. See the titles *JOINT TENANTS AND TENANTS IN COMMON*, vol. 7, p. 533; *PARTNERSHIP*, ante, p. 73.

**27. Where agent ignorant of principal's death.**—*Galt v. Galloway*, 4 Pet. 332, 7 L. Ed. 876; *Long v. Thayer*, 150 U. S. 520, 37 L. Ed. 1167.

**28.** See, generally, the title *POWERS*, ante, p. 588.

**29. Death of person giving power of attorney—General rule.**—*Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. Ed. 589; *Hanrick v. Patrick*, 119 U. S. 156, 30 L. Ed. 396.

"The legal reason of the rule is a plain one. It seems founded on the presumption that the substitute acts by virtue of the authority of his principal, existing at the time the act is performed, and on the manner in which he must execute his authority, as stated in *Combes' Case*, 9 Co. 766. In that case, it is resolved that 'when any one has authority, as attorney, to do any act, he ought to do it in his name who gave the authority.' The reason of this resolution is obvious. The title can regularly pass out of the person in whom it is vested, only by a conveyance in his own name; and this cannot be executed by an-

other for him, when it could not, in law, be executed by himself. A conveyance in the name of a person, who was dead at the time, would be a manifest absurdity." *Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. Ed. 589.

The general doctrine that a power must be executed in the name of the person who gives it, a doctrine founded on the nature of the transaction, is most usually ingrafted in the power itself. Its usual language is, that the substitute shall do that which he is empowered to do, in the name of his principal. He is put in the place and stead of his principal, and is to act in his name. Now as an authority must be pursued, in order to make the act of the substitute the act of the principal, it is necessary in the case of authority to make and execute a bill of sale that such bill of sale should be in the name of the principal; and it would be a gross absurdity, that a deed should purport to be executed by him, even by attorney, after his death; for the attorney is in the place of the principal, capable of doing that alone which the principal might do. *Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. Ed. 589.

**30. Power irrevocable during life of party.**—*Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. Ed. 589; *Hunt v. Rousmanier*, 1 Pet. 1, 7 L. Ed. 27; *Hanrick v. Patrick*, 119 U. S. 156, 30 L. Ed. 396. See post, "Exception to Rule," XII, A, 1, b, (2); "Exception to General Rule," XII, A, 2, b, (2).

**31. Effect of death of some of persons giving power.**—*Hanrick v. Patrick*, 119 U. S. 156, 30 L. Ed. 396.

**32.** *Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. Ed. 589.

The law, in allowing a testamentary disposition of property, not only permits a will to be considered as a conveyance, but gives it an operation which is not allowed to deeds which have their effect during the life of the person who executes them. An estate given by will may take effect at a future time, or on a future contingency, and in the meantime, descends to the heir. The power is, necessarily, to be executed after the death of the person who makes it, and cannot exist during his life. It is the intention that it shall be executed after his death. The conveyance made by the person to whom it is



(2) *Exception to Rule.*—The general rule that a power ceases with the life of the person giving it, admits of one exception. If a power be coupled with an "interest," it survives the person giving it, and may be executed after his death.<sup>33</sup> "A power coupled with an interest," is a power which accompanies or is connected with an interest. The power and the interest are united in the same person. By the word "interest" is to be understood an interest in the subject on which the power is to be exercised, and not an interest in that which is produced by the exercise of the power. The interest which can protect the power, after the death of the person who creates it, must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing.<sup>34</sup>

given takes effect by virtue of the will, and the purchaser holds his title under it. Every case of a power given in a will is considered in a court of chancery as a trust for the benefit of the person for whose use the power is made, and as a devise or bequest to that person. *Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. Ed. 589. See the title *WILLS*.

**33. Exception to rule—Power coupled with an "interest."**—*Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. Ed. 589. See, also, *Long v. Thayer*, 150 U. S. 520, 37 L. Ed. 1167.

In *Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. Ed. 589, the facts were as follows: R. applied to H. for a loan, offering to give in addition to his notes, a bill of sale, or a mortgage of his interest, in a vessel, then at-sea, as collateral security for the repayment of the money. The sum requested was lent, and R. executed two notes for the amount. R. also executed a power of attorney, authorizing H. to make and execute a bill of sale of three-fourths of the said vessel to himself, or to any other person; and in the event of the said vessel, or her freight, being lost, to collect the money which should become due on a policy by which the vessel and freight were insured. This instrument contained also a proviso reciting that the power was given for collateral security for the payment of the notes already mentioned, and was to be void on their payment; on the failure to do which, H. was to pay the amount thereof, and all expenses, out of the proceeds of the said property, and to return the residue to R. Some time after the above transaction H. lent to R. an additional sum, taking his note for payment, and a similar power to dispose of his interest in another vessel, then also at sea. A short time after this second transaction, R. died insolvent, having paid only a small portion of the amount due on the notes. H. gave notice of his claim; and on the return of the two vessels, took possession of them and offered the interest of R. in them for sale. R.'s representatives forbade the sale, and a bill was brought to compel them to join in it. It was held that the instrument contained no words of conveyance or of assignment, but was a simple power to sell and convey, and that the power given was

a naked power, not coupled with an interest, which though irrevocable by R. himself, expired on his death. See, also, *Hunt v. Rousmaniere*, 1 Pet. 1, 7 L. Ed. 27.

**34. Meaning of expression "power coupled with an interest."**—*Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. Ed. 589; *Taylor v. Burns*, 203 U. S. 120, 51 L. Ed. 116. See, also, *Walker v. Walker*, 125 U. S. 339, 31 L. Ed. 769.

The power and interest are united in the same person. But if it is to be understood by the word "interest," an interest in that which is to be produced by the exercise of the power, then they are never united. The power to produce the interest must be exercised, and by its exercise, is extinguished. The power ceases when the interest commences, and therefore, cannot, in accurate law language, be said to be "coupled" with it. *Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. Ed. 589.

"The substantial basis of the opinion of the court on this point, is found in the legal reason of the principle. The interest or title in the thing being vested in the person who gives the power, remains in him, unless it be conveyed with the power, and can pass out of him only by a regular act in his own name. The act of the substitute, therefore, which, in such a case, is the act of the principal, to be legally effectual, must be in his name, must be such an act as the principal himself would be capable of performing, and which would be valid, if performed by him. Such a power necessarily ceases with the life of the person making it. But if the interest, or estate, passes with the power, and vests in the person by whom the power is to be exercised, such person acts in his own name. The estate, being in him, passes from him, by a conveyance in his own name. He is no longer a substitute, acting in the place and name of another, but is a principal, acting in his own name, in pursuance of powers which limit his estate. The legal reason which limits a power to the life of the person giving it, exists no longer, and the rule ceases with the reason on which it is founded. The intention of the instrument may be effected, without violating any legal principle." *Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. Ed. 589.

**Illustrations.**—"This idea may be in some



2. EXPRESS REVOCATION OF AUTHORITY—*a. In General.*—It is the general rule that the principal has a right to determine or revoke the authority given to his agent at his own mere pleasure in the absence of any specific agreement with respect to the time the agency shall continue.<sup>35</sup> The reason for the rule is that since the authority is conferred by his mere will, and is to be executed for his own benefit and his own purposes, the agent cannot insist upon acting when the principal has withdrawn his confidence, and no longer desires his aid.<sup>36</sup> Where, in a contract between a principal and his agent, the latter is left free to terminate the relation upon reasonable notice, such agreement must be construed to confer the same right upon the principal, there being no provisions to the contrary.<sup>37</sup> But the revocation by the principal of the agent's authority cannot injuriously affect the rights of third persons, or existing contracts made by the agent under the power originally conferred upon him.<sup>38</sup> And a person not being notified of revocation of the authority of an agent, is justified in acting upon the presumption of its continuance.<sup>39</sup> An offer to sell at a fixed price, whether accompanied with an agency to sell to others or not, may be revoked at any time prior to the acceptance of the offer, unless there is an

degree illustrated by examples of cases in which the law is clear, and which are incompatible with any other exposition of the term 'power coupled with an interest.' If the word 'interest', thus used, indicated a title to the proceeds of the sale, and not a title to the thing to be sold, then a power to A., to sell for his own benefit, would be a power coupled with an interest; but a power to A. to sell for the benefit of B., would be a naked power, which could be executed only in the life of the person who gave it. Yet, for this distinction, no legal reason can be assigned. Nor is there any reason for it in justice; for, a power to A., to sell for the benefit of B., may be as much a part of the contract on which B. advances his money as if the power had been made to himself. If this were the true exposition of the term, then a power to A., to sell for the use of B., inserted in a conveyance to A., of the thing to be sold, would not be a power coupled with an interest, and, consequently, could not be exercised, after the death of the person making it; while a power to A., to sell and pay a debt to himself, though not accompanied with any conveyance which might vest the title in him, would enable him to make the conveyance, and to pass a title, not in him, even after the vivifying principle of the power had become extinct. But every day's experience teaches us that the law is not as the first case put would suppose. We know that a power to A. to sell for the benefit of B., engrafted on an estate conveyed to A., may be exercised at any time, and is not affected by the death of the person who created it. It is, then, a power coupled with an interest, although the person to whom it is given had no interest in its exercise. His power is coupled with an interest in the thing, which enables him to execute it in his own name, and is, therefore, not dependent on the life of the person who created it." *Hunt v. Rousmanier*, 8 Wheat. 174, 175, 5 L. Ed. 589.

**35. Express revocation.—In general.**—*Willcox, etc., Sewing Machine Co. v. Ewing*, 141 U. S. 627, 35 L. Ed. 882; *Walker v. Walker*, 125 U. S. 339, 31 L. Ed. 769; *Curran v. Arkansas*, 15 How. 304, 314, 14 L. Ed. 705.

Where, under a contract of agency, an agent agrees to do certain things during the first year, the agent is not compelled to continue in the service of the principal after that year and the principal is likewise at liberty to abrogate the contract after that time. *Willcox, etc., Sewing Machine Co. v. Ewing*, 141 U. S. 627, 35 L. Ed. 882. See ante, "Death of Principal," XII, A, 1.

**36. Reason for rule.**—Story on Agency, §§ 462, 463; *Willcox, etc., Sewing Machine Co. v. Ewing*, 141 U. S. 627, 35 L. Ed. 882.

**37. Principal has same right to terminate as agent.**—*Willcox, etc., Sewing Machine Co. v. Ewing*, 141 U. S. 627, 35 L. Ed. 882.

**38. Revocation cannot injure existing contracts or rights of third persons.**—*Willcox, etc., Sewing Machine Co. v. Ewing*, 141 U. S. 627, 35 L. Ed. 882; *Curran v. Arkansas*, 15 How. 304, 314, 14 L. Ed. 705.

If a person deposits his property in the hands of an agent, he may revoke the agency and withdraw his property at his pleasure. But if he should request third persons to accept the agent's bills, informing them, at the same time, that he had placed property in the hands of that agent to meet the bills at their maturity, and upon the faith of such assurance the agent's bills are accepted, the principal cannot, by revoking the agency, acquire the right to withdraw his property from the hands of the agent. *Curran v. Arkansas*, 15 How. 304, 314, 14 L. Ed. 705.

**39. Continuance of agency presumed until notice of revocation.**—Story on Agency, §§ 90, 93; *Johnson v. Christain*, 128 U. S. 374, 32 L. Ed. 412; *Hatch v. Coddingdon*, 95 U. S. 48, 24 L. Ed. 339; *Insurance Co. v. McCain*, 96 U. S. 84, 24 L.

express agreement on good consideration to accept within a limited time, or when other acts are done which the person making the offer consents to be bound by,<sup>40</sup> and it would seem that where a consideration is given by an agent for his employment as such, or where the agency is coupled with an interest in the subject matter of the agency, it may not be revoked at the mere pleasure of the principal.<sup>41</sup>

b. *Power to Revoke Letter of Attorney*<sup>42</sup>—(1) *General Rule*.—As the power of one man to act for another depends on the will and license of that other, the power ceases, when the will, or this permission, is withdrawn. The general rule, therefore, is, that a letter of attorney may, at any time, be revoked by the party who makes it.<sup>43</sup> Under the rule that a power must cease and determine when there is nothing left for it to act upon, it has been held that a power of attorney to sell and convey lands is revoked by the conveyance of such lands by the person giving the power before the power is executed.<sup>44</sup>

(2) *Exception to General Rule*.—The general rule that a letter of attorney may, at any time, be revoked by the party who makes it, which results from the nature of the act, has sustained some modification. Where a letter of attorney forms a part of a contract, and is a security for money, or for the performance of any act which is deemed valuable, it is generally made irrevocable,

Ed. 653; *Bronson v. Chappell*, 12 Wall. 681, 20 L. Ed. 436.

40. *Stitt v. Huidekopers*, 17 Wall. 384, 21 L. Ed. 644. See the title CONTRACTS, vol. 4, p. 552.

41. *Where consideration given or agency coupled with an interest in subject matter*.—*Walker v. Walker*, 125 U. S. 339, 31 L. Ed. 769. See ante, "Exception to Rule," XII, A, 1, b, (2); post, "Exception to General Rule," XII, A, 2, b, (2).

On the 19th of March, 1881, a statute was enacted by the general assembly of Missouri, authorizing and empowering the fund commissioners of the state, if they deemed it expedient, to employ a competent agent to prosecute to final settlement before congress and the proper departments at Washington certain specified claims of the state against the government of the United States. The agent thus appointed was to give security for the faithful performance of all his duties. He was to prosecute the claims at his own expense, and receive, as full compensation for his services, such commissions on the amount collected by him as might be agreed upon between himself and the fund commissioners, not exceeding 5 per cent. on claims for money that had already been paid out by the state, and 15 per cent on the others. On the 28th of November, 1884, the fund commissioners, acting under the authority of this statute, employed W. as the agent of the state in that behalf, and agreed that he should receive for his services and expenses the maximum of compensation provided for. On the 28th of March, 1885, the act of March 19, 1881, was repealed without any saving clause, and on the same day another statute was passed, providing for the authentication and payment of certain claims against the state for military services, and which were of the class in re-

spect to which W. had been employed as agent. It was held that the employment of W. was "one of agency, pure and simple," which the state could revoke at its will, as it did by the repealing act. The fund commissioners were only authorized to employ an agent for the state, and to agree with him as to the commissions he should receive on the amount collected as full compensation for his services, and all expenses incurred by him in that behalf. This they did, and there could be no doubt that the agency thus created was withdrawn by the repealing act of 1885, unless a consideration was given for it, or it was so coupled with an interest in the subject matter of the agency, that is to say, in the claims to be collected, as to make it irrevocable. There was no consideration in money paid for the employment. The agreement to prosecute the claims faithfully is no more than would be implied in law from the acceptance of the appointment; and the provision for the payment of expenses is only a declaration that the commissions stipulated for shall be in full for services and disbursements. There is nothing, therefore, in the consideration for the employment to prevent this agency from being revoked like any other. *Walker v. Walker*, 125 U. S. 339, 31 L. Ed. 769, distinguishing *Hall v. Wisconsin*, 103 U. S. 5, 26 L. Ed. 302; *Jeffries v. Mutual Life Ins. Co.*, 110 U. S. 305, 28 L. Ed. 156. See, also, *Ball v. Halsell*, 161 U. S. 72, 82, 40 L. Ed. 622.

42. See, generally, the title POWERS, ante, p. 588.

43. *Power to revoke letter of attorney—general rule*.—*Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. Ed. 589; *Taylor v. Burns*, 203 U. S. 120, 51 L. Ed. 116.

44. *Power revoked by prior conveyance by donor*.—*Love v. Simms*, 9 Wheat. 515, 6 L. Ed. 149.



in terms, or if not so, is deemed irrevocable in law,<sup>45</sup> and where the power of attorney is coupled with an interest, it cannot be revoked by the person giving the power.<sup>46</sup>

3. **DESTRUCTION OF SUBJECT MATTER.**—When the subject matter of an agency becomes extinct, the agency is terminated, and cannot be said to survive.<sup>47</sup>

4. **EFFECT OF WAR.**—It has been said that war suspends all commercial intercourse between the citizens of two belligerent countries or states, except so far as may be allowed by the sovereign authority, and that as a consequence of this fundamental proposition, it must follow that no active business can be maintained, either personally or by correspondence, or through an agent, by the citizens of one belligerent with the citizens of the other.<sup>48</sup> But the mere

**45. Exception to general rule.**—*Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. Ed. 589; *Hunt v. Rousmaniere*, 1 Pet. 1, 7 L. Ed. 27.

Although a letter of attorney depends, from its nature, on the will of the person making it, and may, in general, be recalled at his will; yet, if he binds himself, for a consideration, in terms, or by the nature of his contract, not to change his will, the law will not permit him to change it. *Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. Ed. 589.

R. applied to H. for a loan, offering to give in addition to his notes, a bill of sale, or a mortgage of his interest, in a vessel, then at sea, as collateral security for the repayment of the money. The sum requested was lent, and R. executed two notes for the amount. R. also executed a power of attorney, authorizing H. to make and execute a bill of sale of three-fourths of the said vessel to himself, or to any other person; and in the event of the said vessel or her freight being lost, to collect the money which should become due on a policy by which the vessel and freight were insured. This instrument contained also a proviso, reciting that the power was given for collateral security for the payment of the notes already mentioned, and was to be void on their payment; on the failure to do which, H. was to pay the amount thereof, and all expenses, out of the proceeds of the said property, and to return the residue to R. Some time after the above transaction H. lent to R. an additional sum, taking his note for payment, and a similar power to dispose of his interest in another vessel, then also at sea. The court held that the party giving the power could not, during his life, by any act of his own, have revoked this letter of attorney. *Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. Ed. 589.

**46. Power coupled with an interest.**—*Taylor v. Burns*, 203 U. S. 120, 51 L. Ed. 116.

As to what constitutes a "power coupled with an interest," see ante, "Exception to Rule," XII, A, 1, b, (2).

Where an instrument is simply a grant of authority to a person to "sell and negotiate" certain mines, it does not transfer to him the title to the property and is not a power coupled with an interest. Therefore such instrument is subject to revocation. *Taylor v. Burns*, 203 U. S. 120, 126, 51 L. Ed. 116.

**47. Destruction of subject matter.**—*General Interest Ins. Co. v. Ruggles*, 12 Wheat. 408, 6 L. Ed. 674.

Thus, the relation between the owner and master of a vessel is a special agency, in which the master is a special agent for navigating the vessel only, and where there has been an absolute destruction of the vessel, the subject matter of the agency becomes extinct, and the agency is terminated, as there is nothing upon which it could act. *General Interest Ins. Co. v. Ruggles*, 12 Wheat. 408, 6 L. Ed. 674. See ante, "Notice to Agent as Notice to Principal," IX, B, 6. See the title **MASTERS OF VESSELS**, vol. 8, p. 300.

**48. Effect of war—General rule.**—*Insurance Co. v. Davis*, 95 U. S. 425, 24 L. Ed. 453. See ante, "Effect of War on Creation of Agency," IV. See the titles **STATES; WAR**.

All commercial contracts with the subjects or in the territory of the enemy, whether made directly by one person, or indirectly through an agent, who is neutral, are illegal and void. No property passes and no rights are acquired under such contracts. *Woolseys Ins. Law*, § 117; *United States v. Lapene*, 17 Wall. 601, 21 L. Ed. 693; *Insurance Co. v. Davis*, 95 U. S. 425, 24 L. Ed. 453.

Every kind of trading or commercial dealing or intercourse, whether by transmission of money or of goods, or orders for the delivery of either, between two countries at war, directly or indirectly, or through the intervention of third persons or partnership, or by contracts in any form looking to or involving such transmission, is void. *Montgomery v. United States*, 15 Wall. 395, 21 L. Ed. 97.

B., a loyal citizen of the United States, at New Orleans, had been, prior to the rebellion, agent of a planter, J., who during the rebellion was a rebel, in the rebel region and lines, within which his plantation was. B. had been in the habit before the war of making advances to J. to assist him in getting forward his crops; and by an agreement with J. was to have a lien on the crops for the advances, and a power to sell for repayment. After the war broke out, B., at New Orleans (now reduced to the possession of the federal government), describing himself as "agent," of J., agreed to sell to M., a British subject, also domiciled in New Orleans, a



fact of the breaking out of a war between two countries in which the principal and agent respectively live, does not necessarily and as a matter of law revoke every agency,<sup>49</sup> provided it was created before the war began.<sup>50</sup> Whether an agency is revoked or not depends upon the circumstances surrounding the case and the nature and character of the agency.<sup>51</sup> In any case, in order to the continuance of the agency during the war, it must have the assent of the parties.<sup>52</sup> Certain kinds of agencies are undoubtedly revoked by the breaking out of hostilities. Thus, an agency for the purpose of carrying on an active and continuous business for the principal cannot continue during a war where the principal and agent reside in the different countries engaged in such war.<sup>53</sup>

crop on which he had made advances above its value, belonging to J., and then on his said plantation; describing the property as J.'s, and not in any way referring to his own lien on or interest in it. Held, that the sale was void, as being a trading with a public enemy. *Montgomery v. United States*, 15 Wall. 395, 21 L. Ed. 97.

**49. Agency not necessarily revoked by breaking out of war.**—*Williams v. Paine*, 169 U. S. 55, 70, 73, 42 L. Ed. 658.

**50. Agency created before commencement of war.**—*United States v. Grossmayer*, 9 Wall. 72, 19 L. Ed. 627; *Montgomery v. United States*, 15 Wall. 395, 21 L. Ed. 97; *Insurance Co. v. Davis*, 95 U. S. 425, 24 L. Ed. 453; *Williams v. Paine*, 169 U. S. 55, 42 L. Ed. 658; *United States v. Lapene*, 17 Wall. 601, 21 L. Ed. 693.

**51. Question dependent upon circumstances, etc.**—*Williams v. Paine*, 169 U. S. 55, 73, 42 L. Ed. 658.

**52. Assent of parties necessary to continuance of agency.**—*Insurance Co. v. Davis*, 95 U. S. 425, 429, 24 L. Ed. 453; *Williams v. Paine*, 169 U. S. 55, 71, 75, 42 L. Ed. 658.

Where it is obviously and plainly against the interest of the principal that the agency should continue, or where its continuance would impose some new obligation or burden, the assent of the principal to the continuance of the agency after the war broke out will not be presumed but must be proved, either by his subsequent ratification or on some other manner. And on the other hand, where it is to the manifest interest of the principal that the agency, constituted before the war, should continue, the assent of the principal will be presumed. Or, if the agent continues to act as such, and his so acting is subsequently ratified by the principal, then those acts are just as valid and binding upon the principal as if no war had intervened. *Williams v. Paine*, 169 U. S. 55, 73, 42 L. Ed. 658; *Insurance Co. v. Davis*, 95 U. S. 425, 24 L. Ed. 453.

**53. Agency for carrying on active business.**—*Williams v. Paine*, 169 U. S. 55, 72, 42 L. Ed. 658; *Insurance Co. v. Davis*, 95 U. S. 425, 24 L. Ed. 453.

In February, 1862, while the whole state of Louisiana, including the city of New Orleans, was under the civil and military control of the rebels of the late rebellion, a mercantile firm in New Orleans sent

their agent into certain interior parishes of the state to make purchases of cotton. After the agent had got into the interior parishes, but before he had bought any cotton, the city of New Orleans, where his principals were, was captured (April 27, 1862), by the forces of the United States, and remained from that time under the control of the government, the interior parishes, however, still remaining in the control of the rebels. Subsequent to this the agent made purchases of cotton from persons in these interior parishes, still, as just said, under the control of the rebels. Held, that the agency to purchase cotton was terminated by the hostile position of the parties, that the firm was guilty of trading with the enemy and that the property was rightly taken by the federal government. *United States v. Lapene*, 17 Wall. 601, 21 L. Ed. 693.

"Ordinarily the line of nonintercourse is the boundary line between the territories of contending nations. The recent war in the United States was a civil war, in which portions of the same nation were engaged in hostile strife with each other. The state of Louisiana, although one of the United States, was under the control of the confederate government and their armies, and was an enemy's country. While the city of New Orleans was under such control it was a portion of an enemy's country. When that city was captured by the forces of the United States, the line of non-intercourse was changed, and traffic before legal became illegal. This line was that of military occupation or control by the forces of the different governments, and not that of state lines. This principle was expressly decided in *Montgomery v. United States*, 15 Wall. 395, 21 L. Ed. 97. There the cotton sold was in the parish of La Fourche, a parish of the state of Louisiana, and belonged to Johnson, an enemy domiciled in an enemy's country, to wit, the parish of La Fourche, in the same state. The sale was made by an agent of Johnson, in the city of New Orleans, to Montgomery, a British subject. This court held the sale to be void and that no title passed to Johnson. Like that in *Montgomery's* case, the agency here was created while it was legal to create an agency. In each case, also, existed the important fact that the transaction of purchase took place after the parties became residents of hostile portions of the same

Agents of insurance companies come within this rule.<sup>54</sup> But agencies not of the class above mentioned or relating to contracts for ransom and other matters of absolute necessity, are not necessarily revoked and avoided by war.<sup>55</sup> Also an agency may continue during the war for the purpose of allowing the payment of debts to an agent of an alien enemy, where such agent resides in the same state with the debtor.<sup>56</sup> But this indulgence is subject to restrictions. In the first place, the payment must not be made or received with the view of transmitting the funds to the principal during the continuance of the war; though, if so transmitted without the debtor's connivance, he will not be responsible for it.<sup>57</sup> In the next place, in order to the subsistence of the agency during the war, it must have the assent of the parties thereto—the principal

state. Burridge was appointed the agent of Johnson in Montgomery's case, as was the agreement in this case made with Avengo, and the money advanced by him, while the parties were all residents of and under the control of the Confederate government. But the cotton was sold by Burridge, as here the cotton was purchased by the clerk after this relation had ceased. In each instance the purchase of the cotton was a transaction with an alien enemy." *United States v. Lapene*, 17 Wall. 601, 21 L. Ed. 693.

**54. Agents of insurance companies.**—*Insurance Co. v. Davis*, 95 U. S. 425, 429, 24 L. Ed. 453; *Williams v. Paine*, 169 U. S. 55, 70, 42 L. Ed. 658. See, also, *New York Life Ins. Co. v. Statham*, 93 U. S. 24, 23 L. Ed. 789.

A resident of Virginia, who had been before the war a local agent of a Northern insurance company, refused to receive the renewal premium, due Dec. 28, 1861, tendered him upon a policy of insurance upon the life of a resident of that state. His refusal was based upon the ground that he had received no renewal receipts from the company, without which he could not receive the premium, and that the money, if received, would be liable to confiscation by the Confederate government. The evidence further failed to show that the company had consented to his continuing to act as such agent during the war, or that he did so continue. Held, that, waiving the consideration of any question in regard to the validity of an insurance upon the life of an alien enemy, such tender of payment did not bind the company, the breaking out of the war having revoked the agency. *Insurance Co. v. Davis*, 95 U. S. 425, 24 L. Ed. 453. See the title INSURANCE, vol. 7, p. 66.

**55. Contracts of ransom, etc.**—*Insurance Co. v. Davis*, 95 U. S. 425, 24 L. Ed. 453; *Williams v. Paine*, 169 U. S. 55, 73, 42 L. Ed. 658.

**56. Agent to receive payment of debts.**—*Insurance Co. v. Davis*, 95 U. S. 425, 24 L. Ed. 453; *United States v. Grossmayer*, 9 Wall. 72, 19 L. Ed. 627; *United States v. Lapene*, 17 Wall. 601, 21 L. Ed. 693; *Williams v. Paine*, 169 U. S. 55, 71, 42 L. Ed. 658.

Notwithstanding the fact that an agency

cannot be created during hostilities, for the purpose of commercial intercourse between the citizens of belligerent states, yet a resident in the territory of one of the belligerents may have, in time of war, an agent residing in the territory of the other, to whom his debtor can pay his debt in money, or deliver to him property in discharge of it, but in such a case the agency must have been created before the war began, for there is no power to appoint an agent for any purpose after hostilities have actually commenced. *United States v. Grossmayer*, 9 Wall. 72, 19 L. Ed. 627; *Montgomery v. United States*, 15 Wall. 395, 21 L. Ed. 97; *Insurance Co. v. Davis*, 95 U. S. 425, 24 L. Ed. 453. See ante, "Effect of War on Creation of Agency," IV.

In February, 1862, while the whole state of Louisiana, including the city of New Orleans, was under the civil and military control of the rebels of the late rebellion, a mercantile firm in New Orleans sent their agent into certain interior parishes of the state to collect money due to the firm. After the agent had got into the interior parishes, the city of New Orleans, where his principals were, was captured (April 27, 1862), by the forces of the United States, and remained from that time under the control of the government, the interior parishes, however, still remaining in the control of the rebels. Held, that the agency to receive payment of debts due the firm continued notwithstanding the hostile position of the parties. *United States v. Lapene*, 17 Wall. 601, 21 L. Ed. 693.

**57. Funds must not be transmitted to principal during war.**—*Insurance Co. v. Davis*, 95 U. S. 425, 24 L. Ed. 453. *Williams v. Paine*, 169 U. S. 55, 71, 42 L. Ed. 658.

If the agent has property of the principal in his possession or control, good faith and fidelity to his trust will require him to keep it safely during the war, and to restore it faithfully at its close. That is all he is required or authorized to do in the absence of the principal's assent to the continuance of the agency. *Insurance Co. v. Davis*, 95 U. S. 425, 24 L. Ed. 453. See ante, "Good Faith in Dealing with Principal," IX, A, 1, c.



and the agent.<sup>58</sup> So also a power of attorney to sell and convey real estate executed before the war began is not revoked by the breaking out of war, especially where it is manifestly to the interest of the principal that the agency

**58. Assent of parties necessary to continuance of agency.**—*Insurance Co. v. Davis*, 95 U. S. 425, 24 L. Ed. 453.

As war suspends all intercourse between the principal and agent, preventing any instructions, supervision, or knowledge of what takes place, on the one part, and any report or application for advice on the other, this relation necessarily ceases on the breaking out of hostilities, even for the limited purpose before mentioned, unless continued by the mutual assent of the parties. It is not compulsory; nor can it be made so, on either side, to subserve the ends of third parties. If the agent continues to act as such, and his so acting is subsequently ratified by the principal or if the principal's assent is evinced by any other circumstances, then third parties may safely pay money, for the use of the principal, into the agent's hands; but not otherwise. It is not enough that there was an agency prior to the war. *Insurance Co. v. Davis*, 95 U. S. 425, 24 L. Ed. 453. See ante, "Ratification of Unauthorized Acts of Agent," XI.

"It would be contrary to reason that a man, without his consent, should continue to be bound by the acts of one whose relations to him have undergone such a fundamental alteration as that produced by a war between the two countries to which they respectively belong; with whom he can have no correspondence, to whom he can communicate no instructions, and over whom he can exercise no control. It would be equally unreasonable that the agent should be compelled to continue in the service of one whom the law of nations declares to be his public enemy." *Insurance Co. v. Davis*, 95 U. S. 425, 24 L. Ed. 453.

"The injustice of holding a principal bound by what an agent, acting without his assent, may do in such cases, is forcibly illustrated by Mr. Justice Davis, in delivering the opinion of this court in *Fretz v. Stover*, 22 Wall. 198, 22 L. Ed. 769. In that case, the agent had collected in confederate funds the amount due on a bond. Having asserted that the agent had no authority to do this, the learned justice adds: 'If it were otherwise, then, as long as the war lasted, every northern creditor of southern men was at the mercy of the agent he had employed before the war commenced. And his condition was a hard one. Directed by his government to hold no intercourse with his agent, and therefore unable to change instructions which were not applicable to a state of war, yet he was bound by the acts of his agent in the collection of his debts, the same as if peace prevailed. It would be a reproach to the law, if creditors, without fault of their own, could be subjected to such ruinous consequences.'"

*Insurance Co. v. Davis*, 95 U. S. 425, 24 L. Ed. 453.

**Circumstances sufficient to show consent.**—"What particular circumstances will be sufficient to show the consent of one person that another shall act as his agent to receive payment of debts in an enemy's country during war, may sometimes be difficult to determine. Emerigon says, that if a foreigner is forced to depart from one country in consequence of a declaration of war with his own, he may leave a power of attorney to a friend to collect his debts, and even to sue for them. *Traite des Assurances*, vol. 1, p. 567. But though a power of attorney to collect debts, given under such circumstances, might be valid, it is generally conceded that a power of attorney cannot be given, during the existence of war, by a citizen of one of the belligerent countries resident therein, to a citizen or resident of the other; for that would be holding intercourse with the enemy, which is forbidden. Perhaps it may be assumed that an agent ante bellum, who continues to act as such during the war, in the receipt of money or property on behalf of his principal, where it is the manifest interest of the latter that he should do so, as in the collection of rents and other debts, the assent of the principal will be presumed, unless the contrary be shown; but that, where it is against his interest, or would impose upon him some new obligation or burden, his assent will not be presumed, but must be proved, either by his subsequent ratification, or in some other manner." *Insurance Co. v. Davis*, 95 U. S. 425, 24 L. Ed. 453.

"In some way, however, it must appear that the alleged agent assumed to act as such, and that the alleged principal consented to his so acting. It is believed that no well-considered case can be found anterior to these life-insurance cases which have arisen out of the late Civil War, in which the existence or continuance of an agency, under the circumstances above referred to, have been established contrary to the assent of the alleged parties to that relation. *Conn v. Penn*, Pet. C. C. 496, is the leading authority on this subject in this country. The question in that case was whether the claimants of land in Pennsylvania, under contracts of purchase from the proprietaries (the Penns) before the Revolutionary War, were entitled to an abatement of interest during the war; and Justice Washington held that this depended on the question whether, during the war, the proprietaries, being alien enemies, 'had in the United States a known agent, or agents, authorized to receive the purchase money and quit rents due to them from the complainants.' the vendees. To enable the parties to adduce proof on



should continue, and where there is ample evidence to show his assent to such continuance.<sup>59</sup>

**B. Effect of Termination.**—The acts of an agent, subsequent to the termination of the agency, can neither bind nor prejudice the principal.<sup>60</sup> However, a third person is justified in acting upon the presumption of the continuance of an agency, until notified of the revocation of the agent's authority.<sup>61</sup>

this point, the court allowed further evidence to be taken. The same thing was held, at the same term, in the case of *Dennison v. Imbrie*, 3 Wash. 396, where Justice Washington says: 'We think that if the alien enemy has an agent in the United States, or if the plaintiff himself was in the United States, and either of these facts known to the debtor, interest ought not to abate.' It is obvious that, in these cases, the judge assumed that the relation of agency, if it existed, did so with the mutual consent of the parties thereto. And the same observation, it is believed, may be made with regard to all other cases on the subject, except some that have been very recently decided. The same inference may be deduced from the cases decided in this court when the subject of payment to agents in an enemy's country has been discussed. Amongst others we may refer to the following: *Ward v. Smith*, 7 Wall. 447, 19 L. Ed. 297; *Brown v. Hiatts*, 15 Wall. 177, 21 L. Ed. 128; *Montgomery v. United States*, 15 Wall. 395, 21 L. Ed. 97; *Fretz v. Stover*, 22 Wall. 198, 22 L. Ed. 769." *Insurance Co. v. Davis*, 95 U. S. 425, 24 L. Ed. 453.

"In some recent cases in certain of the states courts of last resort, for whose decisions we always entertain the highest respect, a different view has been taken;

but we are unable to concur therein. In our judgment, the unqualified assumption on which those decisions are based—namely, 'once an agent always an agent;' or, in other words, that an agency continues to exist notwithstanding the occurrence of war between the countries in which the principal and the agent respectively reside—is not correct, and that the continuance of the agency is subject to the qualification which we have stated above." *Insurance Co. v. Davis*, 95 U. S. 425, 24 L. Ed. 453.

**59. Power to sell and convey real estate not revoked.**—*Williams v. Paine*, 169 U. S. 55, 70, 73, 42 L. Ed. 658.

**60. Effect of termination—In general.**—*General Interest Ins. Co. v. Ruggles*, 12 Wheat. 408, 6 L. Ed. 674; *Grace v. American Cent. Ins. Co.*, 109 U. S. 278, 27 L. Ed. 932. See ante, "Liability of Principal to Third Persons," IX, B, 1; "Notice to Agent as Notice to Principal," IX, B, 6.

**61. Continuance of agency presumed until notice of revocation.**—*Johnson v. Christian*, 128 U. S. 374, 32 L. Ed. 412; *Hatch v. Coddington*, 95 U. S. 48, 24 L. Ed. 339; *Insurance Co. v. McCain*, 96 U. S. 84, 24 L. Ed. 653; *Bronson v. Chappell*, 12 Wall. 681, 20 L. Ed. 436. See ante, "In General," XII, A, 2, a.

# PRINCIPAL AND SURETY.

BY DAVID TWIGGS CHALMERS.

## I. The Relation of Principal and Surety, 715.

- A. Nature, 715.
- B. Source, 716.
- C. Distinctions, 716.
  - 1. Surety Distinguished from Guarantor, 716.
  - 2. Surety Distinguished from Indorser, 716.

## II. The Contract of Suretyship, 716.

- A. Nature and Scope of Contract, 716.
  - 1. Nature, 716.
  - 2. Scope, 716.
- B. Who Regarded as Sureties, 716.
  - 1. Vendor and Vendee of Mortgaged Property, 716.
  - 2. Married Women, 717.
  - 3. Partner, 717.
  - 4. Accommodation Indorsers, 717.
- C. Consideration, 717.
- D. Fraud and Deceit as Affecting Validity of Contract, 717.
  - 1. In General, 717.
  - 2. As to Creditor's Duty to Disclose Facts, 717.
  - 3. Duty of Surety, 718.
- E. Construction, 718.
  - 1. General Rule, 718.
  - 2. Matters Collateral and Incidental, 718.
  - 3. Contract Founded on Consideration, 718.
  - 4. Interpretation Prospective, 719.
  - 5. Question of Law, 719.
- F. Liability on Contract, 719.
  - 1. Measure of Surety's Liability, 719.
    - a. General Rule, 719.
    - b. Liability of Surety on Bond, 719.
    - c. Where Surety Has Become Principal, 720.
  - 2. Liability Based on Erroneous Accounts, 720.
  - 3. Liability under Inapplicable Statute, 720.
  - 4. Liability of Cosureties, 720.
  - 5. Fixing Liability, 720.
    - a. At Common Law, 720.
    - b. As to Notice of Principal's Default, 720.
    - c. Necessity for Demand, 720.
      - (1) In General, 720.
      - (2) What Constitutes, 720.
    - d. Discharge of Principal from Prison, 720.

## III. Discharge or Release of Surety, 721.

- A. Payment or Performance, 721.
- B. Discharge of Principal, 721.
  - 1. In General, 721.
  - 2. Discharge of Imprisoned Debtor, 721.
- C. Alteration of Contract, 722.
  - 1. General Rule, 722.

- 2. Reason for Rule, 722.
- 3. Alteration Beneficial to Surety, 722.
- 4. Alteration Merely Colorable, 723.
- 5. Erasure of Principal's Name in Bond, 723.
- 6. Extension of Time to Principal, 723.
- D. Acts or Omissions of Creditor or Obligee, 723.
  - 1. In General, 723.
  - 2. Extension of Time to Principal, 724.
    - a. General Rule, 724.
    - b. Limitations or Modifications of Rule, 724.
      - (1) Must Be Binding Legal Contract, 724.
      - (2) Necessity for Consideration, 724.
      - (3) Must Be without Surety's Consent, 724.
      - (4) Rights of Surety Must Be Impaired, 724.
      - (5) Agreement Must Be for Definite Delay, 725.
  - 3. Laches, 725.
- E. Effect of Discharge, 725.
  - 1. Discharge Final, 725.
  - 2. Effect on Principal, 725.

#### IV. Rights and Remedies of Sureties, 725.

- A. As against Principal, 725.
  - 1. In General, 725.
  - 2. Right to Reimbursement and Exoneration, 725.
  - 3. Subrogation to Rights of Creditor, 726.
  - 4. Indemnity of Surety, 726.
  - 5. Not Bound to Notify Principal of Payment, 726.
- B. As against Creditor, 726.
- C. As against Cosureties, 726.

#### V. Actions or Suits against Principal and Surety, 726.

- A. In General, 726.
- B. Liability of Principal for Costs, 726.
- C. Joint and Several Actions, 726.
- D. Parties, 726.
- E. Defenses, 727.
  - 1. In General, 727.
  - 2. Insolvency, 727.
  - 3. Fraud, 727.
- F. Pleading, 727.
  - 1. In General, 727.
  - 2. Declaration, 727.
- G. Evidence, 727.
  - 1. Burden of Proof, 727.
  - 2. Conclusiveness, 727.
- H. Judgment or Decree, 727.
  - 1. Against Principal, 727.
    - a. Admissibility in Evidence, 727.
    - b. Surety Not Necessarily Included, 727.
    - c. Attacking Judgment, 727.
  - 2. Against Surety, 728.
- I. Right of Creditor against Surety's Indemnity, 728.

#### CROSS REFERENCES.

See the titles BONDS, vol. 3, p. 382; CONTRIBUTION AND EXONERATION, vol. 4, p. 595; EQUITY, vol. 5, p. 803; GUARANTY, vol. 6, p. 580; LETTERS OF CREDIT, vol. 7, p. 854; LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, p. 900; MECHANICS' LIENS, vol. 8, p. 328; PARTIES, ante p. 34; PLEADING, ante, p. 418;



PRINCIPAL AND AGENT, ante, p. 640; PUBLIC OFFICERS; REPLEVIN; REVENUE LAWS; WITNESSES.

As to liability of sureties in admiralty, see the title ADMIRALTY, vol. 1, p. 173. As to effect on sureties of amendment to libel, see the title ADMIRALTY, vol. 1, p. 167. As to effect on surety of insertion of new obligor in bonds, see the title ALTERATION OF INSTRUMENTS, vol. 1, p. 265. As to filling blanks in bonds with names of sureties, see the title ALTERATION OF INSTRUMENTS, vol. 1, p. 269. As to intervention by sureties, see the title APPEAL AND ERROR, vol. 2, p. 72. As to liability of sureties on appeal bonds, see the title APPEAL AND ERROR, vol. 2, pp. 188, 189, 193. As to nonjoinder of sureties in motion for writ of error, see the title APPEAL AND ERROR, vol. 2, p. 152. As to rights of sureties on attachment bond given for partnership debt, see the title ATTACHMENT AND GARNISHMENT, vol. 2, pp. 686, 687. As to release of sureties on bail bond, see the title BAIL AND RECOGNIZANCE, vol. 2, p. 777. As to control of sureties over one admitted to bail, see the title BAIL AND RECOGNIZANCE, vol. 2, p. 775. As to liability of sureties on bail bond, see the title BAIL AND RECOGNIZANCE, vol. 2, p. 776. As to effect on surety of discharge of bankrupt, see the title BANKRUPTCY, vol. 2, pp. 859, 860. As to time of filing claim of loss in order to fix liability of surety on bank officers bond, see the title BANKS AND BANKING, vol. 3, p. 104. As to liability of sureties on bond of bank cashier, see the title BANKS AND BANKING, vol. 3, p. 99. As to liability of surety's representative when the surety dies before the principal, see the title BONDS, vol. 3, p. 424. As to conditional delivery of bond by surety, see the title BONDS, vol. 3, p. 392. As to surety undertaking as partner with debtor, see the title BONDS, vol. 3, p. 409. As to objection for misjoinder or nonjoinder in a suit against sureties on a bond, see the title BONDS, vol. 3, p. 428. As to remedy against personal assets of deceased surety where obligee has elected to take a joint judgment on a joint and several obligation, see the title BONDS, vol. 3, p. 444. As to judgments against sureties on bonds, see the title BONDS, vol. 3, p. 443. As to compromise with principal as barring recovery against sureties on bond, see the title COMPROMISE AND SETTLEMENT, vol. 3, p. 995. As to law governing liability of sureties on official bond, see the title CONFLICT OF LAWS, vol. 3, p. 1049. As to right to sue principal and surety jointly, see the title COURTS, vol. 4, p. 1151. As to admissibility of declarations of cosurety and principal, see the title DECLARATIONS AND ADMISSIONS, vol. 5, p. 227. As to due process of law in regard to giving a surety notice, see the title DUE PROCESS OF LAW, vol. 5, p. 645. As to estoppel of one who acknowledges himself as principal from saying that he is surety only, see the title ESTOPPEL, vol. 5, p. 923. As to liability of surety on administration bond, see the title EXECUTORS AND ADMINISTRATORS, vol. 6, p. 175. As to liability of surety of administrator de bonis non, see the title EXECUTORS AND ADMINISTRATORS, vol. 6, p. 189. As to motive of trespass on part of surety, see the title EVIDENCE, vol. 5, p. 1062. As to mode of procedure against sureties on forthcoming bonds, see the title FORTHCOMING AND DELIVERY BONDS, vol. 6, p. 390. As to surety on guardian's bond, see the title GUARDIAN AND WARD, vol. 6, p. 601. As to sureties on the bonds of public officers, see the title PUBLIC OFFICERS. As to surety on bond of revenue collector, see the title REVENUE LAWS. As to right of surety to control application of payments by administrator, see the title PAYMENT, ante, p. 319.

## I. The Relation of Principal and Surety.

**A. Nature.**—The undertaking of the surety is essentially a pledge to make good the misfeasance or nonfeasance of his principal to an amount coextensive with the penalty of his bond.<sup>1</sup> Sureties agree to stand for their principal because of their confidence in him.<sup>2</sup>

1. *Nature.*—Leggett v. Humphreys, 21 How. 66, 76, 16 L. Ed. 50. See post, "Nature," II, A. 1.

2. *Because of their confidence in prin-*

*cipal.*—Where a bond was given by the agent of an unincorporated joint-stock company, to the directors for the time being, for faithful performance of his

**B. Source.**—"The obligation of suretyship arises only from positive contract."<sup>3</sup>

**C. Distinctions.**—1. SURETY DISTINGUISHED FROM GUARANTOR.—See the title GUARANTY, vol. 6, p. 584.

2. SURETY DISTINGUISHED FROM INDORSER.—"Indorsers, it is sometimes said, are sureties, but their contract, which is a new one as compared with the maker of the note, differs in some important respects from that of the surety, who is a joint promisor with the principal, as the holder of such an instrument is under no obligation to use diligence to enforce payment against the maker in order to hold the indorser."<sup>4</sup>

## II. The Contract of Suretyship.

**A. Nature and Scope of Contract.**—1. NATURE.—By a contract of guaranty or suretyship, one person undertakes to be responsible for debts to be contracted by another.<sup>5</sup>

2. SCOPE.—A surety does not undertake to be responsible for debts contracted by his principal jointly with a third person as partners or otherwise.<sup>6</sup>

**B. Who Regarded as Sureties.**—1. VENDOR AND VENDEE OF MORTGAGED PROPERTY.—Where a mortgagor conveys the mortgaged property, the grantee assuming payment of the mortgage, such grantor and grantee as between themselves become respectively surety and principal for the payment of the debt.<sup>7</sup>

duties, etc., and the directors were appointed annually, and changed, before a breach of the condition of the bond, the agent and his sureties were held liable to an action brought by the obligees, after they had ceased to be directors, because the sureties did not become sureties in consequence of their confidence in the directors but of the confidence in the agent whose sureties they were. *Anderson v. Longden*, 1 Wheat. 85, 4 L. Ed. 42.

**3. Obligation arises from contract.**—*United States v. Price*, 9 How. 83, 91, 13 L. Ed. 56.

**4. Surety distinguished from indorser.**—*Ross v. Jones*, 22 Wall. 576, 589, 22 L. Ed. 730.

"Confirmation that the indorser is not a surety in the general sense is also derived from the fact that he stands in the attitude of the drawer of a new bill, and that he is not primarily liable to make the payment, but only in case of the default of the maker and proof of due presentment, protest, and notice of dishonor, and that even then he cannot be joined with the maker, as the surety proper may be, because the maker and indorser are liable on different contracts." *Ross v. Jones*, 22 Wall. 576, 589, 22 L. Ed. 730. See, generally, the title **BILLS, NOTES AND CHECKS**, vol. 3, p. 257.

**5. Nature of contract.**—*Waterman v. Alden*, 143 U. S. 196, 201, 36 L. Ed. 123; See ante, "Nature," I, A.

**6. Scope of contract.**—*Waterman v. Alden*, 143 U. S. 196, 201, 36 L. Ed. 123; *Miller v. Stewart*, 9 Wheat. 680, 703, 6 L. Ed. 189.

**Liability for balances on account of other contracts.**—The sureties in the bond of a contractor, given to secure the performance of a contract for the supply of the rations for the troops of the United States, are not responsible for any bal-

ance in the hands of the contractor, at the expiration of the contract, or advances made to him, not on account of that particular contract exclusively, but on account of that and other contracts, as a common fund for supplies, where accounts of the supplies, the expenditures and the funds, had all been throughout blended indiscriminately by both parties, and no separate portion had been designated, or set apart for the contract. To say that the sureties in the bond should be liable for the whole balance would be to say that they should be liable for advances made under any other contracts, and if not liable for the whole, the very case supposed in the instruction precludes the possibility of any legal separation of the items of the balance; each and all of them are blended, per my et per tout, as a common fund. The case, indeed, in the principles which must govern it, ranges itself under that large class of cases, where a party bound for the fidelity of a clerk or other agent of A., as keeper of his money or accounts, is held not liable for acts done as the keeper of the money of A. and B. *United States v. Jones*, 8 Pet. 399, 8 L. Ed. 988. See the title **WORKING CONTRACTS**.

"A surety for the faithful service of B as clerk to C, who afterwards enters into partnership with D, is not liable for unfaithful conduct to C and D." The same law has been explicitly and repeatedly ruled by this court, as will be seen in the cases of *Miller v. Stewart* (9 Wheat. 680, 6 L. Ed. 189); of *McGill v. United States Bank* (12 Wheat. 511, 6 L. Ed. 711); and the *United States v. Boyd* (15 Pet. 187, 10 L. Ed. 706)." *Leggett v. Humphreys*, 21 How. 66, 76, 16 L. Ed. 50.

**7. Grantor and grantee as surety and principal.**—*Union Mut. Life Ins. Co. v. Hanford*, 143 U. S. 187, 191, 36 L. Ed. 118.



This does not, however, without the assent of the creditor convert the vendor from a principal debtor to a surety merely as between the creditor and debtor.<sup>8</sup> The grantee may become the principal debtor of the creditor and the grantor the surety only by the mutual agreement of all three.<sup>9</sup>

2. **MARRIED WOMEN.**—A woman who has executed a mortgage upon her separate property to secure a debt of her husband, becomes as to that debt a surety. She does not become personally bound for the payment of the debt, but her property mortgaged is bound. As such surety, she is entitled to all the rights and privileges of a personal surety, and will be discharged by anything that will discharge a surety who is personally bound.<sup>10</sup>

3. **PARTNER.**—Where one partner agrees to assume all the firm liabilities and to save the other partner harmless, he becomes a surety for such partner.<sup>11</sup>

4. **ACCOMMODATION INDORSERS.**—The fact that parties were accommodation indorsers does not make them cosureties, bound to contribute equally to the payment of the bills, without a special agreement to that effect.<sup>12</sup>

**C. Consideration.**—As to consideration sufficient to bind sureties, see the title **BONDS**, vol. 3, p. 394.

**D. Fraud and Deceit as Affecting Validity of Contract**—1. **IN GENERAL.**—"If a party, taking a guaranty from a surety, conceals from him facts which go to increase his risk and suffers him to enter into the contract under false impressions, as to the real state of the facts, such a concealment will amount to a fraud, because the party is bound to make the disclosure."<sup>13</sup>

2. **AS TO CREDITOR'S DUTY TO DISCLOSE FACTS.**—A surety is a favored debtor. His rights are zealously guarded both at law and in equity. The slightest fraud on the part of the creditor, touching the contract, annuls it. But the creditor is under no obligation, legal or moral, to search for the surety, and warn him of the danger of the step he is about to take. He is not bound to inform the intended surety of matters affecting the credit of the debtor, or of any circumstances unconnected with the transaction in which he is about to engage.<sup>14</sup>

See the title **MORTGAGES AND DEEDS OF TRUST**, vol. 8, p. 452.

8. **As between creditor and debtor.**—*Shepherd v. May*, 115 U. S. 505, 511, 29 L. Ed. 456.

"It cannot, we think, be reasonably claimed that a debtor is converted into a surety by his creditor's acceptance of an additional promise from a third person to pay the debt due him by his debtor. There is no element of suretyship in such a contract, unless it be that the additional debtor might be regarded as surety for the original debtor." *Cucullu v. Hernandez*, 103 U. S. 105, 116, 26 L. Ed. 322.

9. **Mutual agreement of all three.**—*Shepherd v. May*, 115 U. S. 505, 511, 29 L. Ed. 456.

10. **Married woman as surety.**—*Cross v. Allen*, 141 U. S. 528, 534, 35 L. Ed. 843. See the title **HUSBAND AND WIFE**, vol. 6, p. 716.

11. **By an agreement a partner contracted to pay all the debts and liabilities of every kind of the firm, to assume the liabilities and to save J. (the other partner) harmless.** This was broken by a failure to pay the parties to whom the firm was liable, and it was not necessary to a breach that J. should show that he had first paid those parties. It was not an agreement merely to indemnify J. from damage, but to assume the indebtedness

and discharge him from liability. *Johnson v. Risk*, 137 U. S. 300, 308, 34 L. Ed. 683. See the title **PARTNERSHIP**, ante, p. 73.

12. **Accommodation indorsers not necessarily cosureties.**—*McCarty v. Roots*, 21 How. 432, 441, 16 L. Ed. 162. See the title **BILLS, NOTES AND CHECKS**, vol. 3, p. 257.

13. **Principal must not fraudulently cover all material facts.**—*Griswold v. Hazard*, 141 U. S. 260, 286, 35 L. Ed. 678. See post, "In General," III, D, 1; "Fraud," V, E, 3.

Where one signed a bond for discharge from *ne exeat* which made him absolutely liable as surety for any amount adjudged to be due from the debtor, though he believed it was simply to secure the debtor's appearance, there being an agreement to discharge the writ which was unknown to him, this amounts to a fraud in law upon such surety. *Griswold v. Hazard*, 141 U. S. 260, 284, 35 L. Ed. 678. See the title **FRAUD AND DECEIT**, vol. 6, p. 411.

14. **Creditor under no obligation to warn surety.**—*Magee v. Manhattan Life Ins. Co.*, 92 U. S. 93, 98, 99, 23 L. Ed. 699.

"The mere relation of principal and surety does not require the voluntary disclosure of all the material facts in all cases. The same rule as to disclosure



3. **DUTY OF SURETY.**—There is a duty incumbent on the surety. He must not rest supine, close his eyes, and fail to seek important information within his reach. If he does this, and a loss occurs, he cannot, in the absence of fraud on the part of the creditor, set up as a defense facts then first learned which he ought to have known and considered before entering into the contract.<sup>15</sup>

**E. Construction**—1. **GENERAL RULE.**—The contract of a surety is to be construed strictly, and is not to be extended beyond the fair scope of its terms.<sup>16</sup> It is one strictissimi juris, and cannot be changed by implication.<sup>17</sup> This rule applies to principals as well as sureties.<sup>18</sup>

2. **MATTERS COLLATERAL AND INCIDENTAL.**—But this rule of construction only applies to the contract itself and not to matters collateral or incidental to it.<sup>19</sup>

3. **CONTRACT FOUNDED ON CONSIDERATION.**—“The rule of strictissimi juris is a stringent one, and is liable at times to work a practical injustice. It is one which ought not to be extended to contracts not within the reason of the rule, particularly when the bond is underwritten by a corporation which has undertaken for a profit to insure the obligee against a failure of performance on the part of the principal obligor.”<sup>20</sup> And the rule which permits a surety to stand

does not apply in cases of principal and surety as in cases of insurance on ships or lives.” *Magee v. Manhattan Life Ins. Co.*, 92 U. S. 93, 99, 23 L. Ed. 699. See, generally, the titles **INSURANCE**, vol. 7, p. 66; **MARINE INSURANCE**, vol. 8, p. 149.

15. **Surety must be alert and careful.**—*Magee v. Manhattan Life Ins. Co.*, 92 U. S. 93, 98, 23 L. Ed. 699.

The act of July 20, 1868, provides that distillers must file bonds which must be approved though not until it appears that the distiller is the owner in fee, unincumbered of the land on which the distillery is. If the sureties have not taken care to see that the bond was not approved until all the conditions were complied with, it is their fault and they are not discharged if the land is incumbered. *Osborne v. United States*, 19 Wall. 577, 22 L. Ed. 208. See the title **REVENUE LAWS**.

16. **Contract strictly construed.**—*Miller v. Stewart*, 9 Wheat. 680, 6 L. Ed. 189; *United States v. Ulrici*, 111 U. S. 38, 42, 28 L. Ed. 344; *Leggett v. Humphreys*, 21 How. 66, 16 L. Ed. 50; *United States v. Boecker*, 21 Wall. 652, 22 L. Ed. 472; *United States v. Sutton*, 111 U. S. 42, 28 L. Ed. 346; *United States v. Boyd*, 15 Pet. 187, 10 L. Ed. 706; *United States v. Price*, 9 How. 83, 91, 13 L. Ed. 56; *Sprigg v. Bank*, 14 Pet. 201, 10 L. Ed. 419. See post, “General Rule,” II, F, 1, a.

17. *The Oregon*, 158 U. S. 186, 209, 39 L. Ed. 943; *Crane v. Buckley*, 203 U. S. 441, 447, 51 L. Ed. 260; *Mauran v. Bullus*, 16 Pet. 528, 10 L. Ed. 1056. See the titles **BONDS**, vol. 3, p. 408; **GUARANTY**, vol. 6, p. 585.

Where the condition of a bond made by principal and surety was absolute that the principals should pay all indebtedness, the obligors waiving notice of nonpayment of all notes executed, indorsed or

guaranteed, as the surety did not make or indorse the notes his waiver could only apply to a default by the principal. *Streeper v. Victor Sewing Machine Co.*, 112 U. S. 676, 687, 28 L. Ed. 852; *Murphy v. Victor Sewing Machine Co.*, 112 U. S. 688, 692, 28 L. Ed. 856.

18. **“Even as between principals, a court will not bind parties to conditions or obligations to which they have not bound themselves, according to a fair interpretation of their contract.”** *McMicken v. Webb*, 6 How. 292, 298, 12 L. Ed. 443.

19. **Does not apply to collateral and incidental matters.**—“It is quite true that ‘the extent of the liability to be incurred must be expressed by the surety, or necessarily comprised in the terms used in the obligation or contract,’ that is, ‘the obligation is not to be extended to any other subject, to any other person, or to any other period of time than is expressed or necessarily included in it.’ ‘In this sense only,’ continued Mr. Burge, *Law of Suretyship*, 1st Am. Ed., p. 40, ‘must be understood the expression that the contract of the surety is to be construed strictly. It is subject to the same rules of construction and interpretation as every other contract.’ Besides, the rule of construction applies only to the contract itself, and not to matters collateral and incidental, or which arise in execution of it, which are to be governed by the same rules that apply in like circumstances, whatever the relation of the parties.” *Warner v. Connecticut Mut. Life Ins. Co.*, 109 U. S. 357, 363, 27 L. Ed. 962.

20. **Rule otherwise where contract founded on consideration.**—*Guaranty Co. v. Pressed Brick Co.*, 191 U. S. 416, 426, 48 L. Ed. 242; *Hill v. American Surety Co.*, 200 U. S. 197, 202, 50 L. Ed. 436. See the title **BANKS AND BANKING**, vol. 3, p. 100.

upon his strict legal rights, when applicable, does not prevent a construction of the bond with a view to determining the fair scope and meaning of the contract in the light of the language used and the circumstances surrounding the parties.<sup>21</sup>

4. INTERPRETATION PROSPECTIVE.—When the terms of the sureties' contract have respect to the conduct or fidelity of the principal, or to any other matter usually contemplated as arising in the future, such contract is to be interpreted prospectively, and not retrospectively.<sup>22</sup>

5. QUESTION OF LAW.—The construction of a surety's contract is for the court.<sup>23</sup>

**F. Liability on Contract**—1. MEASURE OF SURETY'S LIABILITY—*a. General Rule.*—The obligation of a surety in general goes to the same extent as that of his principal,<sup>24</sup> nothing being clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract.<sup>25</sup>

*b. Liability of Surety on Bond.*—Thus the recovery against the sureties on a bond is limited to the penalty.<sup>26</sup>

Generally, all instruments of suretyship are construed strictly, as mere matters of legal right; the rule is otherwise, where they are founded on a valuable consideration. *Mauran v. Bullus*, 16 Pet. 528, 537, 10 L. Ed. 1056.

21. *Hill v. American Surety Co.*, 200 U. S. 197, 203, 50 L. Ed. 436.

22. **Contract interpreted prospectively.**—*Meyers v. Block*, 120 U. S. 206, 214, 30 L. Ed. 642.

23. **Question for the court.**—*Bell v. Bruen*, 1 How. 169, 186, 11 L. Ed. 89.

24. **Obligation same as principal's.**—*Benjamin v. Hillard*, 23 How. 149, 164, 16 L. Ed. 518; *United States v. Jones*, 8 Pet. 399, 8 L. Ed. 988; *United States v. Allsbury*, 4 Wall. 186, 18 L. Ed. 321. See the title BONDS, vol. 3, p. 412.

"The natural limit of the obligation of a surety is to be found in the obligation of the principal; and when that is extinguished, the surety is in general liberated. In some codes, the obligation of a surety cannot extend beyond or exist under conditions more onerous than that of his principal." *Cage v. Cassidy*, 23 How. 109, 116, 16 L. Ed. 430.

"Sureties are as much bound by the true intent and meaning of their contracts which they voluntarily subscribe as principals." *Read v. Bowman*, 2 Wall. 591, 603, 17 L. Ed. 812.

25. *Smith v. United States*, 2 Wall. 219, 234, 17 L. Ed. 788; *Martin v. Thomas*, 24 How. 315, 317, 16 L. Ed. 689; *Smith v. United States*, 2 Wall. 219, 235, 17 L. Ed. 788; *McMicken v. Webb*, 6 How. 292, 12 L. Ed. 443; *Leggett v. Humphreys*, 21 How. 66, 75, 16 L. Ed. 50; *Bein v. Heath*, 12 How. 168, 179, 13 L. Ed. 939; *Magee v. Manhattan Life Ins. Co.*, 92 U. S. 93, 98, 23 L. Ed. 699; *United States v. Hough*, 103 U. S. 71, 73, 26 L. Ed. 305; *Pickersgill v. Lahens*, 15 Wall. 140, 144, 21 L. Ed. 119; *Prairie State Bank v. United States*, 164 U. S. 227, 237, 41 L. Ed. 412; *Meyers v. Block*, 120 U. S. 206,

213, 30 L. Ed. 642. See post, "General Rule," III, C, 1. And see the title BONDS, vol. 3, p. 408.

Where persons are mere sureties on a note, the creditor cannot by setting up another contract as formed or as intended to be formed between himself and the principal, transfer the responsibility of these sureties to such contract differing in its terms from that which they had in fact executed. *McMicken v. Webb*, 6 How. 292, 298, 12 L. Ed. 443.

"Neither a court of law nor equity, said this court, in *McMicken v. Webb*, 6 How. 292, 296, 12 L. Ed. 443, will lend its aid to affect sureties beyond the plain and necessary import of their undertaking, nor add a new term or condition to what they have stipulated. Sureties must be permitted to remain in precisely the situation they have placed themselves; and it is no justification or excuse with another for attempting to change their situation to allege or show that they would be benefited by such change." Cited in *Smith v. United States*, 2 Wall. 219, 235, 17 L. Ed. 788. See ante, "General Rule," II, E, 1.

"In *Miller v. Stewart*, 9 Wheat. 680, 703, 6 L. Ed. 189, this court said: 'Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent, and in the manner, and under the circumstances pointed out in his obligation, he is bound, and no further. \* \* \* It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract, and if he does not assent to any variation of it and a variation is made, it is fatal.'" Cited in *United States v. Boecker*, 21 Wall. 652, 657, 22 L. Ed. 472.

26. **Liability of surety on bond.**—*McGill v. United States Bank*, 12 Wheat. 511, 6

c. *Where Surety Has Become Principal*.—The rule that sureties are not liable beyond their contract does not apply where the surety has by his own act exchanged his character of surety for that of principal, and has then applied to a court of equity to reinstate him to his character of surety in violation of his own express contract.<sup>27</sup>

2. **LIABILITY BASED ON ERRONEOUS ACCOUNTS**.—The principal and sureties of a bond cannot be compelled to pay an alleged indebtedness based upon a statement of account, when there are palpable errors upon the face of the statement; or when the defendants are prepared to show by affirmative evidence that there are in fact errors in the accounts.<sup>28</sup>

3. **LIABILITY UNDER INAPPLICABLE STATUTE**.—Sureties on a bond for the stay of execution upon a judgment given under an inapplicable statute are not liable.<sup>29</sup>

4. **LIABILITY OF COSURETIES**.—Cosureties are bound to contribute equally to the debt they have jointly undertaken to pay; but the undertaking must be joint, not separate and successive.<sup>30</sup>

5. **FIXING LIABILITY**—a. *At Common Law*.—At common law, the sureties on a bond were liable to a suit without issuing an execution against the principal.<sup>31</sup>

b. *As to Notice of Principal's Default*.—In order for the liability of sureties on a bond to become fixed, it is not necessary that they should have notice of the default of the principal.<sup>32</sup>

c. *Necessity for Demand*—(1) *In General*.—A breach of a bond to account for money does not occur and hence no liability attaches until a demand to refund has been made on the principal or his sureties.<sup>33</sup>

(2) *What Constitutes*.—Service of the writ on the sureties is sufficient demand to refund.<sup>34</sup>

d. *Discharge of Principal from Prison*.—A departure from prison rules after

L. Ed. 711; *Humphreys v. Leggett*, 9 How. 297, 13 L. Ed. 145; *Dumont v. United States*, 98 U. S. 142, 144, 25 L. Ed. 65; *Leggett v. Humphreys*, 21 How. 66, 76, 16 L. Ed. 50. See the title BONDS, vol. 3, p. 408.

27. **Surety exchanged character for that of principal**.—*Sprigg v. Bank*, 14 Pet. 201, 10 L. Ed. 419.

When one who is, in reality, only surety is willing to place himself in the situation of principal, by expressly declaring upon his contract, that he binds himself as such, there cannot be any hardship in holding him to the character in which he assumes to place himself; as to that particular contract, he undertakes as a partner with the debtor; and has no more right to disclaim the character of principal, than the creditor has to treat him as principal, if he had set out in the obligation, that he was only surety. *Sprigg v. Bank*, 10 Pet. 257, 9 L. Ed. 416.

**Fraud where debtor attempts to change his contract**.—It is a fraud on the part of a debtor to attempt to convert his contract as principal into that of a surety only. *Sprigg v. Bank*, 14 Pet. 201, 10 L. Ed. 419. See, generally, the title FRAUD AND DECEIT, vol. 6, p. 394.

**When principal and surety are bound, jointly and severally**, in a bond, although there is no express admission on the face of the instrument that all are principals, yet the surety cannot aver by pleading,

that he is surety only. *Sprigg v. Bank*, 10 Pet. 257, 9 L. Ed. 416.

28. **Not liable upon erroneous accounts**.—*United States v. Dumas*, 149 U. S. 278, 286, 37 L. Ed. 734.

29. **Not liable on bond under inapplicable statute**.—*Lamaster v. Keeler*, 123 U. S. 376, 391, 31 L. Ed. 238.

30. **Liability of cosureties**.—*McDonald v. Magruder*, 3 Pet. 470, 7 L. Ed. 744. See post, "As against Cosureties," IV, C.

31. **Liability at common law**.—*Smith v. Gaines*, 93 U. S. 341, 342, 23 L. Ed. 901.

32. **Notice of principal's default not necessary**.—*Streeper v. Victor Sewing Machine Co.*, 112 U. S. 676, 687, 28 L. Ed. 852.

In an action on a bond for goods sold to the principal at a specified credit, the liabilities of the sureties on such bond are not affected by the fact that the plaintiffs failed to give notice to the sureties that the principals in the bond had not paid for the goods at the expiration of the term of credit agreed on. *Clark v. Gerstley*, 204 U. S. 504, 505, 51 L. Ed. 589.

33. **No breach until demand made**.—*United States v. Curtis*, 100 U. S. 119, 124, 25 L. Ed. 571. See, generally, the title DEMAND, vol. 5, p. 287.

34. **Service on sureties sufficient demand**.—*United States v. Curtis*, 100 U. S. 119, 124, 25 L. Ed. 571.



being discharged in due course of law under the Virginia Insolvent Act, though such discharge was fraudulently obtained, is not such a breach of his bond by the debtor as will impose on his security a liability for the debt.<sup>35</sup>

### III. Discharge or Release of Surety.

**A. Payment or Performance.**—Sureties on ordinary bonds or commercial contracts are released by payment of the debt or performance of the act stipulated.<sup>36</sup>

**B. Discharge of Principal**—1. **IN GENERAL.**—The discharge of the principal in general discharges the surety.<sup>37</sup>

2. **DISCHARGE OF IMPRISONED DEBTOR.**—The discharge under an act of congress of the principal from imprisonment does not release the debt against the surety.<sup>38</sup>

**35. Under Virginia insolvent act.**—*Simms v. Slacum*, 3 Cranch 300, 306, 2 L. Ed. 446. See post, "Discharge of Imprisoned Debtor," III, B, 2.

**36. Payment or performance releases sureties.**—*Reese v. United States*, 9 Wall. 13, 21, 19 L. Ed. 541.

**Reformation of alternative condition.**—Where the condition of a bond is in the alternative, the surety is discharged by the performance of one of its alternative conditions. *Dumont v. United States*, 98 U. S. 142, 25 L. Ed. 65. See the title **BONDS**, vol. 3, p. 409.

**37. Discharge of principal by resignation.**—Where one of two administrators resigns by proceedings in conformity with statute and a new bond is given by the other, the sureties on the first bond are discharged from further liability. *Veach v. Rice*, 131 U. S. 293, 316, 33 L. Ed. 163.

The mere taking of a new bond does not, necessarily, release the old sureties, and especially when the new bond is taken by authority of law, for the purpose of strengthening the existing security, but when the second or subsequent bond is given for a new and different undertaking, it operates, ipso facto, as a discharge of the prior parties, and hence when the provisions of the act are fully complied with, the securities on the first bond are discharged from all further liability on account of their principal. *Veach v. Rice*, 131 U. S. 293, 317, 33 L. Ed. 163.

**Discharge of principal discharges surety pro tanto.**—On a note given by Ficklin to his own firm of McMicken and Ficklin, with Webb and Smith as sureties, Ficklin, as a partner, is entitled to one-half, upon the dissolution of the firm, and thereupon, pro tanto, the obligation of these sureties would cease, as Ficklin could have no right of action against himself to compel payment to himself. *McMicken v. Webb*, 6 How. 292, 299, 12 L. Ed. 443.

**38. Discharge of principal from imprisonment.**—*Hunter v. United States*, 5 Pet. 173, 185, 8 L. Ed. 86. See ante, "Discharge of Principal from Prison," II, F, 5, d.

"The act of the government, in releasing

both the principal and surety from imprisonment, was designed for the benefit of the unfortunate debtors, and no unnecessary obstructions should be opposed to the exercise of so humane a policy. If the discharge of the principal, under such circumstances, should be a release of the debt against the surety, the consequence would be that the principal must remain in jail, until the process of the law was exhausted against his surety. This would operate against the liberty of the citizen; and should be avoided, unless required to secure the public interest. A discharge from prison by operation of law, does not prevent the judgment creditor from prosecuting his judgment against the estate of the defendant. To this rule, a discharge under the special provisions of a bankrupt law may form an exception. In the cases under consideration, the defendants were discharged under laws which expressly reserved the right to the government to enforce the judgment against the property of the defendants." *Hunter v. United States*, 5 Pet. 173, 186, 8 L. Ed. 86.

The act "for the relief of persons imprisoned for debts due to the United States," is not for the relief of their sureties; and does not contain a single expression conducing to the opinion that the mind of the legislature was directed towards the sureties, or contemplated their discharge. The only motive for the act being to relieve debtors, who surrender all their property, from the then useless punishment of imprisonment, there can be no motive for converting this act of mere humanity into the discharge of other debtors, whose condition it does not in any measure deteriorate. *United States v. Stansbury*, 1 Pet. 573, 575, 7 L. Ed. 267.

The discharge, by the secretary of the treasury, of a principal in a bond to the United States, who is imprisoned under a ca. sa. issued against him, and who has assigned all his property for the use of the United States, does not impair or affect the rights of the United States to proceed against his sureties, for the

**C. Alteration of Contract**—1. **GENERAL RULE.**—It is a sound and well-settled principle of law, that any agreement with the creditor, which varies essentially the terms of the contract, without the assent of the surety, will discharge such surety from responsibility.<sup>39</sup>

2. **REASON FOR RULE.**—The reason for this rule is obvious. When the change is made the sureties are not bound by the contract in its original form, for that has ceased to exist. They are not bound by the contract in its altered form, for to that they have never assented.<sup>40</sup>

3. **ALTERATION BENEFICIAL TO SURETY.**—The agreement that the change in the contract is beneficial to the surety is of no avail.<sup>41</sup> It is for the surety alone to

amount due upon the judgment, and unpaid. *United States v. Stansbury*, 1 Pet. 573, 7 L. Ed. 267.

**39. Alteration discharges surety.**—*Sprigg v. Bank*, 14 Pet. 201, 10 L. Ed. 419; *Read v. Bowman*, 2 Wall. 591, 603, 17 L. Ed. 812; *Smith v. United States*, 2 Wall. 219, 237, 17 L. Ed. 788; *Wood v. Steele*, 6 Wall. 80, 18 L. Ed. 725; *Edmondston v. Drake*, 5 Pet. 624, 8 L. Ed. 251; *Prairie State Bank v. United States*, 164 U. S. 227, 233, 41 L. Ed. 412; *Magee v. Manhattan Life Ins. Co.*, 92 U. S. 93, 98, 23 L. Ed. 699. See ante, "General Rule," II, F, 1, a; post, "General Rule," III, D, 2, a.

"*Non hæc in fœdera veni.*"—"Any variation in the agreement to which the surety has subscribed, which is made without the surety's knowledge or consent, and which may prejudice him, or which may amount to a substitution of a new agreement for the one he subscribed, will discharge the surety, upon the principle of the maxim *non hæc in fœdera veni.*" *Smith v. United States*, 2 Wall. 219, 237, 17 L. Ed. 788.

**A contractor engaged in constructing a dock** gave bond to the government for the faithful performance of his contract. By a subsequent agreement the location of the dock was changed requiring the contractor to make additional excavations and connections with the water at an increased expense and giving an increased time of performance. It was held that such agreement discharged the sureties on the bond. *United States v. Freel*, 186 U. S. 309, 46 L. Ed. 1177. See the title **WORKING CONTRACTS**.

**Principal's authority extended.**—Where a bond is given, conditioned for the faithful performance of the duties of the office of deputy collector of direct taxes for eight certain townships, and the instrument of the appointment, referred to in the bond, was afterwards altered, so as to extend to another township, without the consent of the surety, held, that the surety was discharged from his responsibility for moneys subsequently collected by his principal. *Miller v. Stewart*, 9 Wheat. 680, 6 L. Ed. 189.

**Prima facie, the withdrawal of a fund which is a security** for the thing in respect of the not doing of which he is now

called upon to pay damages, is a prejudice to the surety. He is not in the same situation with regard to his principal in which he ought to be placed; he is deprived of the security of the fund out of which the company might in the first instance have indemnified themselves. *Prima facie*, the surety was prejudiced by the existing state of things. Whether there could have been any proof to show that, notwithstanding the appearance of prejudice, in reality none was or could be sustained, it is not at all necessary to inquire. It is, however, exceedingly difficult to conceive any state of things in which it must not to a considerable extent be a prejudice to a surety to have a fund withdrawn which would be in reality the security to the company with whom he is contracting, and to the surety who guarantees. *Prairie State Bank v. United States*, 164 U. S. 227, 235, 41 L. Ed. 412.

**40. Reason for rule.**—*Reese v. United States*, 9 Wall. 13, 21, 19 L. Ed. 541.

"Responsibility of a surety rests upon the validity and terms of his contract, but when it is changed without his knowledge or authority, it becomes a new contract, and is invalid, because it is deficient in the essential element of consent." *Smith v. United States*, 2 Wall. 219, 234, 17 L. Ed. 788.

Alteration varies in terms of the obligation, and the contract thereby ceases to be the contract for the due performance of which the party became surety. *Smith v. United States*, 2 Wall. 219, 237, 17 L. Ed. 788.

**41. "The argument \* \* \* that the advances beyond the stipulations of the contract were calculated to be beneficial to the sureties, can be of no avail.** In almost every case where the surety has been released, either in consequence of time being given to the principal debtor, or of a compromise being made with him, it has been contended that what was done was beneficial to the surety—and the answer has always been, that the surety himself was the proper judge of that—and that no arrangement, different from that contained in his contract, is to be forced upon him; and bearing in mind that the surety, if he pays the debt, ought to have the benefit of all the securities possessed

judge whether his position is altered for the worse.<sup>42</sup>

4. ALTERATION MERELY COLORABLE.—But where the alteration is merely colorable and the rights of the surety remain the same as they were before, he is not discharged.<sup>43</sup>

5. ERASURE OF PRINCIPAL'S NAME IN BOND.—Where the name of the principal on a bond is erased without the knowledge or consent of the sureties, such sureties are thereby discharged.<sup>44</sup>

6. EXTENSION OF TIME TO PRINCIPAL.—See post, "Extension of Time to Principal," III, D, 2.

**D. Acts or Omissions of Creditor or Obligee**—1. IN GENERAL.—It is a general rule that any wrongful acts or omissions by the creditor to the surety will discharge such surety.<sup>45</sup> But a surety who signs an unconditional promise is not discharged from liability thereon by reason of any expectation, reliance or condition, unless notice thereof be given to the promisee; or, in other words, that the contract stands as expressed in the writing in the absence of conditions which are

by the creditor, the question always is, whether what has been done lessens that security." *Prairie State Bank v. United States*, 164 U. S. 227, 233, 41 L. Ed. 412.

42. A surety has a right to stand upon the very terms of his contract and though he may sustain no injury by a change in the contract or even if it is for his benefit, if he does not assent to any variation and an alteration is made he is discharged. *Martin v. Thomas*, 24 How. 315, 317, 16 L. Ed. 689; *Green v. Biddle*, 8 Wheat. 1, 83, 5 L. Ed. 547; *Reese v. United States*, 9 Wall. 13, 21, 19 L. Ed. 541. See post, "Alteration Merely Colorable," III, C, 4.

A surety must be permitted to remain in precisely the situation in which he has placed himself; and it is no justification or excuse with another, for attempting to change his situation, to allege or show that he would be benefited by such change. He is said to possess an interest in the letter of his contract. *McMicken v. Webb*, 6 How. 292, 298, 12 L. Ed. 443; *Union Mut. Life Ins. Co. v. Hanford*, 143 U. S. 187, 191, 36 L. Ed. 118; *Prairie State Bank v. United States*, 164 U. S. 227, 233, 41 L. Ed. 412.

43. Merely colorable alteration.—*Cross v. Allen*, 141 U. S. 528, 537, 35 L. Ed. 843. See ante, "Alteration Beneficial to Surety," III, C, 3.

"In cases where it is, without inquiry, evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged." *Prairie State Bank v. United States*, 164 U. S. 227, 237, 41 L. Ed. 412.

A surety is not discharged by a contract between his principal and their common obligee, which does not place him in a different position from that which he occupied before the contract was made. *Roach v. Summers*, 20 Wall. 165, 22 L. Ed. 252.

Alteration outside of contract.—"The bond in suit was thereupon agreed to be given as security for the payment of the merchandise to be sold by the plaintiffs

to the principals, and which the principals were bound to pay for in four months after the date of each respective purchase. This is a clear and separate contract between the plaintiffs and the signers of the bond, and there is nothing in the declaration or bond which shows the existence of any other agreement than that mentioned therein, or that an alteration in the prices of the goods sold to the principals by the plaintiffs could, or would, have any effect upon the liability of the sureties. The bond being complete in itself on its face, it cannot be seen that any future alteration of the prices for the sale of the merchandise, arrived at between the plaintiffs and the principals in the bond, would be material to or alter the liability of the sureties for the payment of the merchandise sold and delivered at the prices agreed upon, after four months from the date of purchase. There is no allegation in these pleas that any separate agreement was in writing, and the bond itself does not show the existence of any other agreement or the sale of the property upon any other conditions than those mentioned in the bond itself." *McGuire v. Gerstley*, 204 U. S. 489, 501, 51 L. Ed. 581; *Seitz v. Brewers', etc., Machine Co.*, 141 U. S. 510, 35 L. Ed. 837.

44. Erasure of principal's name in bond.—*Rogers v. The Marshal*, 1 Wall. 644, 652, 17 L. Ed. 714; *Martin v. Thomas*, 24 How. 315, 317, 16 L. Ed. 689. See the title ALTERATION OF INSTRUMENTS, vol. 1, p. 265.

45. Creditor must act in good faith.—"The contract of suretyship," says Mr. Story, 'imports entire good faith and confidence between the parties in regard to the whole transaction. Any concealment of material facts, or any express or implied misrepresentation of such facts, or any undue advantage taken of the surety by the creditor, either by surprise or by withholding proper information, will undoubtedly furnish a sufficient ground to invalidate the contract.'" *Griswold v. Hazard*, 141 U. S. 260, 286, 35 L.



known to the recipient of the promise.<sup>46</sup> Sureties on a bond are not discharged by hidden defects in the bond which were unknown to the obligee.<sup>47</sup>

2. **EXTENSION OF TIME TO PRINCIPAL**.—a. *General Rule*.—It is a general rule that extending a further time of payment to a principal will discharge the surety.<sup>48</sup>

b. *Limitations or Modifications of Rule*.—(1) *Must Be Binding Legal Contract*.—"An agreement between the creditor and principal must, to exonerate the surety, be one 'binding in law upon the parties.'"<sup>49</sup>

(2) *Necessity for Consideration*.—An agreement between a creditor and the principal debtor for delay, or otherwise changing the nature of the contract, in order to discharge the surety, must be an agreement having a sufficient consideration to support it.<sup>50</sup>

(3) *Must Be without Surety's Consent*.—Extension of time by the creditor to the principal debtor must be without the surety's assent in order to discharge him.<sup>51</sup>

(4) *Rights of Surety Must Be Impaired*.—Extending the time of payment of a bond, and a mere delay in enforcing it, will not discharge a surety; unless some agreement has been made injurious to the interest of the surety.<sup>52</sup> Thus the giving of a customary credit, with no evidence of loss thereby occasioned, is not

Ed. 678. See ante, "In General," II, D, 1.

**46. Promisee must have notice of conditions relied on by surety.**—*Joyce v. Auten*, 179 U. S. 591, 595, 45 L. Ed. 332; *Dair v. United States*, 16 Wall. 1, 21 L. Ed. 491; *Goodman v. Simonds*, 20 How. 343, 366, 15 L. Ed. 934.

A receiver was directed in making a sale to retain a lien as well as to take personal security. The surety of the purchaser knew that such order had been made, expected that it would be complied with and signed as surety relying upon compliance but he did not notify either his principal or the receiver that he signed upon such conditions. Under these circumstances the surety was not discharged by the receiver's failure to reserve a lien. *Joyce v. Auten*, 179 U. S. 591, 595, 45 L. Ed. 332.

**47. Defect in bond unknown to obligee.**—*Dair v. United States*, 16 Wall. 1, 5, 21 L. Ed. 491.

**48. Extension of time discharges surety.**—*Sprigg v. Bank*, 10 Pet. 257, 9 L. Ed. 416; *Green v. Biddle*, 8 Wheat. 1, 83, 5 L. Ed. 547. See ante, "General Rule," III, C, 1. See the title **GUARANTY**, vol. 6, p. 595.

"If a creditor, by positive contract with the principal debtor, and without the consent of the surety, extends the time of payment by the principal debtor, he thereby discharges the surety; because the creditor, by so giving time to the principal, puts it out of the power of the surety to consider whether he will have recourse to his remedy against the principal, and because the surety cannot have the same remedy against the principal as he would have had under the original contract." *Union Mut. Life Ins. Co. v. Hanford*, 143 U. S. 187, 191, 36 L. Ed. 118.

**49. Contract must bind parties.**—*Specht v. Howard*, 16 Wall. 564, 566, 21 L.

Ed. 348; *McLemore v. Powell*, 12 Wheat. 554, 6 L. Ed. 726; *United States Bank v. Hatch*, 6 Pet. 250, 259, 8 L. Ed. 387; *Gordon v. Third Nat. Bank*, 144 U. S. 97, 103, 36 L. Ed. 360; *Creath v. Sims*, 5 How. 192, 208, 12 L. Ed. 111.

**50. Agreement must have consideration to support it.**—*Creath v. Sims*, 5 How. 192, 208, 12 L. Ed. 111; *McLemore v. Powell*, 12 Wheat. 554, 6 L. Ed. 726; *United States Bank v. Hatch*, 6 Pet. 250, 259, 8 L. Ed. 387; *Guaranty Co. v. Pressed Brick Co.*, 191 U. S. 416, 423, 48 L. Ed. 242; *Miller v. Stewart*, 9 Wheat. 680, 6 L. Ed. 189; *Smith v. United States*, 2 Wall. 219, 17 L. Ed. 788; *Reese v. United States*, 9 Wall. 13, 19 L. Ed. 541; *Gordon v. Third Nat. Bank*, 144 U. S. 97, 103, 36 L. Ed. 360.

Where the plaintiff in a suit voluntarily abstains from pressing the principal debtor, but receives no consideration for such indulgence, nor puts any limitation upon his right to proceed upon his execution, whenever it may be his pleasure to do so, this conduct furnishes no reason for the exemption of the surety from liability, and especially where the surety had united with his principal in a forthcoming bond. *Creath v. Sims*, 5 How. 192, 12 L. Ed. 111.

**51. Must be without surety's consent.**—*Shepherd v. May*, 115 U. S. 505, 511, 29 L. Ed. 456; *Guaranty Co. v. Pressed Brick Co.*, 191 U. S. 416, 423, 48 L. Ed. 242; *Miller v. Stewart*, 9 Wheat. 680, 6 L. Ed. 189; *Smith v. United States*, 2 Wall. 219, 17 L. Ed. 788; *Reese v. United States*, 9 Wheat. 13, 19 L. Ed. 541; *Uniontown Bank v. Mackey*, 140 U. S. 220, 225, 35 L. Ed. 485.

**52. Agreement must be injurious to surety.**—*Sprigg v. Bank*, 14 Pet. 201, 10 L. Ed. 419.

sufficient to discharge the surety.<sup>53</sup> Nor is the taking of collateral security, such as a mortgage.<sup>54</sup>

(5) *Agreement Must Be for Definite Delay*.—An extension of time by the obligee to the principal debtor in a bond does not discharge the sureties where no definite term of extension is stated.<sup>55</sup>

3. LACHES.—Mere laches, unaccompanied with fraud, forms no discharge of a contract of suretyship, between private individuals.<sup>56</sup>

**E. Effect of Discharge**—1. **DISCHARGE FINAL**.—When a surety has been released, such release is final, and no act of the principal can cause his liability to reattach.<sup>57</sup>

**In Equity**.—"That equity will not hold a surety liable, where he is discharged at law, seems to be well settled both in England and in this country."<sup>58</sup>

2. **EFFECT ON PRINCIPAL**.—"It is a general rule that discharge of a surety does not discharge a principal."<sup>59</sup>

#### IV. Rights and Remedies of Sureties.

**A. As against Principal**—1. **IN GENERAL**.—The sureties cannot be concluded by a fabricated account of their principal with his creditors; they may always inquire into the reality and truth of the transactions existing between them.<sup>60</sup> "A surety may file a bill to compel the debtor on a bond in which he has joined to pay the debt when due, whether the surety has been actually sued for it or not."<sup>61</sup>

2. **RIGHT TO REIMBURSEMENT AND EXONERATION**.—If sureties are obliged to pay the debt of their principal upon his failure to pay it at maturity, they have a right to recover from him the sum so paid.<sup>62</sup> They can enforce the obligation

**53. Giving of customary credit**.—*Guaranty Co. v. Pressed Brick Co.*, 191 U. S. 416, 426, 48 L. Ed. 242.

A contractor under contract with the government gave a bond with a guaranty company as surety to the effect that he would faithfully perform his contract and make prompt payment to all persons furnishing him labor, materials, etc. The taking of thirty and sixty days notes given by the obligor to a materialman for materials furnished makes no difference to the surety and he is not discharged. *Guaranty Co. v. Pressed Brick Co.*, 191 U. S. 416, 423, 48 L. Ed. 242.

**A mere proposition to give time**, and suspend the right to sue, upon certain conditions and contingencies, which are not proved to have been complied with, or to have happened, will not discharge the sureties. *United States v. Nicholls*, 12 Wheat. 505, 6 L. Ed. 709.

**54. An acceptance of a mortgage by the creditor**, which could not be enforced until the lapse of a certain time, does not release the sureties upon a bond, because in order to discharge the surety by giving time, the time which is given must operate upon the instrument which the surety has signed. Here the mortgage is only a collateral security beneficial to the security. *United States v. Hodge*, 6 How. 279, 12 L. Ed. 437.

**55. No definite time**.—*Clark v. Gerstley*, 204 U. S. 504, 505, 51 L. Ed. 589.

An actual forbearance to sue on a note without any definite agreement to forbear does not discharge a surety. *Uniontown*

*Bank v. Mackey*, 140 U. S. 220, 225, 35 L. Ed. 485.

**56. Laches does not discharge contract**.—*United States v. Kirkpatrick*, 9 Wheat. 720, 735, 6 L. Ed. 199. See the title LACHES, vol. 7, p. 790.

**57. Subsequent acts of principal do not affect release**.—Where a surety has been discharged by the principal, such principal's subsequent fulfillment of his obligations in indemnifying his surety will in no wise affect the validity of his release. *Leggett v. Humphreys*, 21 How. 66, 80, 16 L. Ed. 50.

Where the vendors give bond for the making of a deed upon condition that the vendees shall make a part payment at a certain time, and the sureties on such bond are discharged by the vendees' failure to perform, though the vendors by accepting subsequent payments waive their right to rescind, such waiver does not bind the sureties who have been relieved from liability. *Coughran v. Bigelow*, 164 U. S. 301, 310, 41 L. Ed. 442.

**58. Equity will not hold surety when discharged at law**.—*United States v. Price*, 9 How. 83, 92, 13 L. Ed. 56.

**59. Discharge of surety does not discharge principal**.—*New Orleans v. Gaines*, 138 U. S. 595, 610, 34 L. Ed. 1102.

**60. Surety should know relations between principal and creditor**.—*United States v. Boyd*, 5 How. 29, 12 L. Ed. 36.

**61. Has right to compel payment by principal**.—*New Orleans v. Gaines*, 131 U. S. 191, 212, 33 L. Ed. 99.

**62. Right to reimbursement**.—*Bendey v.*

only to the extent of what they paid and interest.<sup>63</sup>

3. SUBROGATION TO RIGHTS OF CREDITOR.—See the title SUBROGATION.

4. INDEMNITY OF SURETY.—A surety, who holds several securities by way of indemnity, may resort to either of them for payment.<sup>64</sup>

5. NOT BOUND TO NOTIFY PRINCIPAL OF PAYMENT.—A surety who pays a debt is not bound to give notice of such payment to the principal.<sup>65</sup>

**B. As against Creditor.**—In a controversy to make a surety liable for an alleged breach by the principal of his bond, such surety is entitled to have the benefit of any irregularity which his principal could have resisted.<sup>66</sup>

**C. As against Cosureties.**—Where one cosurety by payment either actual or by giving his note extinguishes the liability of the other cosurety, he is entitled to reimburse from such cosurety.<sup>67</sup> But he must have paid an excess beyond his share of the debt.<sup>68</sup>

## V. Actions or Suits against Principal and Surety.

**A. In General.**—Due diligence should be used to obtain satisfaction of the debt from the principal before recourse is had to the surety.<sup>69</sup>

**B. Liability of Principal for Costs.**—In an action against a surety the principal is liable to the surety for costs in case the judgment should be against him.<sup>70</sup>

**C. Joint and Several Actions.**—Where a bond is joint and several, each of the sureties is bound for the whole.<sup>71</sup>

The practice in Louisiana allows the sureties to be sued without joining the principal.<sup>72</sup>

**A joint suit in the District of Columbia,** against the surety of a trustee (the trustee in his lifetime having had notice of everything), may be at law.<sup>73</sup>

**D. Parties.**—Sureties are not bound by a proceeding to which they were not and could not be parties.<sup>74</sup> In Louisiana the sureties on an injunction bond are

Townsend, 109 U. S. 665, 667, 27 L. Ed. 1065.

Where a railroad company has filed an injunction bond conditioned to pay a judgment debt should the injunction be dissolved, the surety on such bond is entitled to be indemnified by a receiver of the railroad appointed under a mortgage foreclosure. *Union Trust Co. v. Morrison*, 125 U. S. 591, 31 L. Ed. 825.

Where the surety of a surety pays the debt of a principal, under a legal obligation, from which the principal was bound to relieve him, such a payment is a sufficient consideration to raise an implied assumpsit to repay the amount, although the payment was made without a request from the principal. *Hall v. Smith*, 5 How. 96, 12 L. Ed. 66.

63. *Baker v. Humphrey*, 101 U. S. 494, 501, 25 L. Ed. 1065.

64. **Indemnity of surety.**—*Muller v. Dows*, 94 U. S. 444, 24 L. Ed. 207. See the titles INDEMNITY, vol. 6, p. 903; ILLEGAL CONTRACTS, vol. 6, p. 742.

65. **Not bound to give notice of payment to principal.**—*Moncure v. Dermott*, 13 Pet. 345, 357, 10 L. Ed. 193.

66. **Entitled to any benefit principal had.**—*Very v. Watkins*, 23 How. 469, 475, 16 L. Ed. 522.

67. **Giving note same as actual payment.**—“Where a surety, by giving his note, extinguishes the liability of his cosurety, he can maintain an action against the cosurety for money paid; be-

cause the effect is the same that would have been wrought by the actual payment of the money.” *Insurance Co. v. Dutcher*, 95 U. S. 269, 273, 24 L. Ed. 410. See ante, “Liability of Cosureties,” II, F, 4.

68. Each of two cosureties executed mortgages to each other. The condition of each mortgage was that the mortgagor would perform his part of the agreement and indemnifying the mortgagee against the consequences of a failure to do so. The mortgages were not created for the security of the principal debt, but as security for a debt possibly to arise from one surety to the other. Unless one of them is compelled to pay an excess beyond his agreed share of the debt, he has no right to resort to the security. *Hampton v. Phipps*, 108 U. S. 260, 266, 27 L. Ed. 719.

69. **Principal should be sued first.**—*Union Bank v. Geary*, 5 Pet. 99, 114, 8 L. Ed. 60.

70. **Principal liable to surety for costs.**—*Riddle v. Moss*, 7 Cranch 206, 3 L. Ed. 317.

71. **Liability of sureties on joint and several bond.**—*Cox v. United States*, 6 Pet. 172, 8 L. Ed. 359.

72. **In Louisiana.**—*United States v. Hodge*, 6 How. 279, 12 L. Ed. 437.

73. **District of Columbia.**—*Brent v. Maryland*, 18 Wall. 430, 21 L. Ed. 777.

74. **Sureties not bound when not parties.**—*Ex parte Sawyer*, 21 Wall. 235, 240, 22 L. Ed. 617.



treated as parties to the suit.<sup>75</sup>

**E. Defenses**—1. **IN GENERAL**.—The surety is entitled to have the principal present that he may assist in making his defense, that he may assist in taking the account of what is due if the defense fail, that the decree in that event may be primarily against him for payment, and that the amount may be conclusively fixed for which he will be liable over to the surety, if the latter should be compelled to pay the debt.<sup>76</sup>

2. **INSOLVENCY**.—"The insolvency of the principal debtor is no defense to the surety, either at law or in equity."<sup>77</sup>

3. **FRAUD**.—"To render the general allegation of concealment sufficient in a pleading, it is necessary also to aver that the creditor either procured the surety's signature, or was present when the instrument was executed, and then misrepresented or concealed essential facts which should have been disclosed; otherwise the allegation of fraud is only the pleader's deduction."<sup>78</sup>

**F. Pleading**—1. **IN GENERAL**.—In becoming a surety one submits himself to be governed by the fixed rules which regulate the practice of the court.<sup>79</sup>

2. **DECLARATION**.—Where there was no clause in the declaration stating that the surety undertook to pay if the plaintiff did not, an action of debt will not lie against such surety.<sup>80</sup>

**G. Evidence**—1. **BURDEN OF PROOF**.—In an action against the sureties on a contractor's bond, the burden of proof is upon the United States to show demand of performance and refusal on the part of the contractor.<sup>81</sup>

2. **CONCLUSIVENESS**.—In an action by the United States against the sureties on a bond to secure the performance of a contract to carry mail, a certified copy of the account of the principal debtor as a failing contractor from the books of the auditor for the postoffice department, telegrams from the postmaster of San Francisco that the principal had failed to perform his service and the finding of the postmaster general to the same effect, make out a prima facie case for the government.<sup>82</sup>

**H. Judgment or Decree**—1. **AGAINST PRINCIPAL**.—a. *Admissibility in Evidence*.—A judgment against the principal debtor proving prima facie his breach of the bond, is admissible in evidence against the surety.<sup>83</sup>

b. *Surety Not Necessarily Included*.—A decree against the principal alone does not necessarily include the sureties.<sup>84</sup>

c. *Attacking Judgment*.—"In cases where a surety attacks a judgment against his principal upon the ground that it was obtained for the purpose of defrauding him, it must be made to appear either that no debt existed against the principal, or that the amount was grossly exaggerated for the purpose of defrauding the surety."<sup>85</sup>

75. **In Louisiana**.—Bein v. Heath, 12 How. 168, 177, 13 L. Ed. 939. See the title PARTIES, ante, p. 34.

76. **Principal should assist in defense**.—Robertson v. Carson, 19 Wall. 94, 105, 22 L. Ed. 178.

77. **Insolvency of principal no defense**.—Hardeman v. Harris, 7 How. 726, 728, 12 L. Ed. 889. See the title INSOLVENCY, vol. 7, p. 1.

78. **Averments necessary to render concealment sufficient**.—Magee v. Manhattan Life Ins. Co., 92 U. S. 93, 99, 23 L. Ed. 699. See ante, "Fraud and Deceit as Affecting Validity of Contract," II, D. And see the title FRAUD AND DECEIT, vol. 6, p. 394.

79. **Pleading**.—Hiriart v. Ballou, 9 Pet. 156, 166, 9 L. Ed. 85. See, generally, the title PLEADING, ante, p. 418.

80. **Defective declaration**.—Thompson

v. Jameson, 1 Cranch 282, 289, 2 L. Ed. 109. See the titles DEBT, THE ACTION OF, vol. 5, p. 205; PLEADING, ante, p. 418.

81. **Burden of proof on United States**.—United States v. Corwin, 129 U. S. 381, 383, 32 L. Ed. 710. See, generally, the title PRESUMPTIONS AND BURDEN OF PROOF, ante, p. 618.

82. **Conclusiveness of evidence**.—United States v. McCoy, 193 U. S. 593, 598, 48 L. Ed. 805. See the title EVIDENCE, vol. 5, p. 1004.

83. **Judgment against principal admissible against surety**.—Moses v. United States, 166 U. S. 571, 600, 41 L. Ed. 1119.

84. **Decree does not necessarily include surety**.—Ex parte Sawyer, 21 Wall. 235, 240, 22 L. Ed. 617.

85. **Attacking judgment on ground of fraud**.—Dickerman v. Northern Trust Co.

2. **AGAINST SURETY.**—"A judgment against the sureties, rendered without their consent, and especially after a defense made in good faith by them, is at least *prima facie* sufficient to authorize them to recover of their principal the amount which they have been called upon to pay thereon; and if the principal had knowledge of the pendency of the action, even though he was not served with process therein, the judgment rendered against the sureties, without fault on their part, would be conclusive in an action by them to recover money which they had paid on account of such judgment."<sup>86</sup>

1. **Right of Creditor against Surety's Indemnity.**—The general doctrine that a creditor has a right to claim the benefit of a security given by his debtor to a surety for the latter's indemnity, and which may be used if necessary for the payment of the debt, is not questioned. The security in such case is in the nature of trust property, and the right of the creditor arises from the natural justice of allowing him to have applied to the discharge of his demand the property deposited with the surety for that purpose if required by the default of the principal.<sup>87</sup>

**PRINCIPAL CHALLENGE.**—See note 1.

**PRINCIPLE OF A MACHINE.**—See the title **PATENTS**, ante, p. 136.

**PRINT.**—See note 2.

**PRINTING.**—As to costs for, see the title **APPEAL AND ERROR**, vol. 2, p. 426. As to printing record, see the title **APPEAL AND ERROR**, vol. 2, p. 246.

**PRIORITIES.**—See the titles **ASSIGNMENTS**, vol. 2, p. 586; **ASSIGNMENTS FOR BENEFIT OF CREDITORS**, vol. 2, p. 627; **ATTACHMENT AND GARNISHMENT**, vol. 2, pp. 683, 696; **BANKRUPTCY**, vol. 2, p. 917; **BOTTOMRY AND RESPONDENTIA**, vol. 3, p. 457; **CHattel MORTGAGES**, vol. 3, p. 758; **COUPONS**, vol. 4, p. 854; **EXECUTIONS**, vol. 5, p. 114; **EXECUTORS AND ADMINISTRATORS**, vol. 5, p. 159; **FACTORS AND COMMISSION MERCHANTS**, vol. 6, p. 239; **JUDGMENTS AND DECREES**, vol. 7, p. 650; **LANDLORD AND TENANT**, vol. 7, p. 842; **LIENS**, vol. 7, p. 895; **MARITIME LIENS**, vol. 8, p. 235; **MECHANICS' LIENS**, vol. 8, p. 331; **MORTGAGES AND DEEDS OF TRUST**, vol. 8, p. 477; **PARTNERSHIP**, ante, p. 129.

176 U. S. 181, 192, 44 L. Ed. 423. See, generally, the title **JUDGMENTS AND DECREES**, vol. 7, p. 544.

86. **Conclusiveness.**—Sayward v. Denny, 158 U. S. 180, 185, 39 L. Ed. 941.

87. **Creditor has right to surety's security.**—Chamberlain v. St. Paul, etc., R. Co., 92 U. S. 299, 306, 23 L. Ed. 715. See, generally, the title **INDEMNITY**, vol. 6, p. 903.

1. **Principal challenge.**—See Reynolds v. United States, 98 U. S. 145, 25 L. Ed. 244. And see the title **JURY**, vol. 7, p. 769.

2. **Print.**—See **OBSCENITY**, vol. 8, p. 953.

As to duties on prints and printed matter, see Arthur v. Moller, 97 U. S. 365, 24 L. Ed. 1046; Forbes Lithograph Mfg. Co. v. Worthington, 132 U. S. 655, 660, 33 L.

Ed. 453. And see, generally, the title **REVENUE LAWS**.

**Printed.**—See the title **COPYRIGHT**, vol. 4, p. 602. And see Higgins v. Keuffel, 140 U. S. 428, 35 L. Ed. 470.

**Printer.**—In Pennoyer v. Neff, 95 U. S. 714, 721, 24 L. Ed. 565, it is said: "The majority of the court are also of opinion that the provision of the statute requiring proof of the publication in a newspaper to be made by the 'affidavit of the printer, or his foreman, or his principal clerk,' is satisfied when the affidavit is made by the editor of the paper. The term **printer**, in their judgment, is there used not to indicate the person who sets up the type—he does not usually have a foreman or clerks—it is rather used as synonymous with publisher."

## PRISONS AND PRISONERS.

BY JOSEPH W. TIMBERLAKE.

### I. Establishment and Maintenance of Prisons, 729.

- A. Duty of County to Erect and Maintain Jails, 729.
- B. Establishment of Federal Prisons, 729.
  - 1. In General, 729.
  - 2. Use of State Jails for Federal Prisoners, 729.

### II. Prison Officers, 730.

- A. Sheriff, 730.
- B. Jailer, 730.
- C. Territorial Marshals, 730.

### III. Regulations and Management, 730.

### IV. Custody and Control of Prisoners, 731.

- A. In General, 731.
- B. Prisoners in Custody of United States, 731.

### V. Convict Labor, 731.

### VI. Prison Bounds or Rules, 732.

### VII. Discharge, 732.

- A. In General, 732.
- B. Discharge under "Poor Debtor Acts," 732.
- C. Habeas Corpus Proceedings, 732.

### VIII. Escape, 732.

#### CROSS REFERENCES.

See the titles BONDS, vol. 3, p. 382; CIVIL RIGHTS, vol. 3, p. 814; COMMITMENT AND PRELIMINARY EXAMINATION OF ACCUSED, vol. 3, p. 951; CONSPIRACY, vol. 3, p. 1099; CONSTITUTIONAL LAW, vol. 4, p. 1; COUNTIES, vol. 4, p. 825; CRIMINAL LAW, vol. 5, p. 43; DOCUMENTARY EVIDENCE, vol. 5, p. 431; ESCAPE, vol. 5, p. 893; EXECUTIONS AGAINST THE BODY AND ARREST IN CIVIL CASES, vol. 6, p. 80; FALSE IMPRISONMENT, vol. 6, p. 242; HABEAS CORPUS, vol. 6, p. 610; IMPRISONMENT FOR DEBT, vol. 6, p. 892; PARDON, ante, p. 1; RESCUE; SENTENCE AND PUNISHMENT; SHERIFFS AND CONSTABLES; UNITED STATES MARSHALS; WAR.

As to fees of marshal for delivering prisoners and convicts, see the title UNITED STATES MARSHALS. As to prisoners of war, see the title WAR.

#### I. Establishment and Maintenance of Prisons.

##### A. Duty of County to Erect and Maintain Jails.—See note.<sup>1</sup>

**B. Establishment of Federal Prisons**—1. IN GENERAL.—Congress can cause a prison to be erected at any place within the jurisdiction of the United States, and direct that all persons sentenced to imprisonment under the laws of the United States shall be confined there.<sup>2</sup>

2. USE OF STATE JAILS FOR FEDERAL PRISONERS.—Congress may arrange with

1. Duty of county commissioners to build and furnish jails.—See *Delaware County Comm'rs v. Diebold Safe, etc. Co.*, 133 U. S. 473, 488, 33 L. Ed. 674. And see the title COUNTIES, vol. 4, p. 841.

As to assignment by contractor of a

contract made with county commissioners for the construction of a jail, see the title ASSIGNMENTS, vol. 2, pp. 567, 570.

2. Establishment of federal prisons.—In general.—Ex parte Karstendick, 93 U. S. 396, 400, 23 L. Ed. 889.



a state for the use of its prisons, and require the courts of the United States to execute their sentences of imprisonment in them.<sup>3</sup>

## II. Prison Officers.

**A. Sheriff.**—The sheriff is, in law, the keeper of the county jail, and has supervision and control of all the prisoners within the jail.<sup>4</sup>

**B. Jailor.**—A jailor of a county jail is a public officer,<sup>5</sup> and the nature of his office requires not only the actual safe-keeping of the prisoners committed to his charge,<sup>6</sup> but that in order to the proper discharge of those duties some book or list should be kept by him or under his supervision showing the names of the prisoners received and discharged, together with the dates of such reception and discharge.<sup>7</sup> The jailor of a county jail is the sheriff's deputy, appointed and removable at his pleasure.<sup>8</sup> But the keeper of a state jail, in respect to prisoners in custody under process of the United States, is neither in fact nor in law the deputy of the United States marshal who commits the prisoners to such jail.<sup>9</sup>

**C. Territorial Marshals.**—By Rev. Stat., § 1892, the duty is imposed upon certain territorial marshals of caring for and controlling penitentiaries erected by the United States in organized territories. That is, in such case, the marshal is made the keeper or warden of the territorial penitentiary.<sup>10</sup>

## III. Regulations and Management.

Under § 1893, Rev. Stat., it is the duty of the attorney general to prescribe all needful rules and regulations for the government of penitentiaries erected by the United States in organized territories.<sup>11</sup>

**3. Use of state jails for federal prisoners.**—Ex parte Karstendick, 93 U. S. 396, 400, 23 L. Ed. 889.

As to sentence of persons convicted of crimes against the United States to imprisonment in state jails and penitentiaries under §§ 5540, 5541, 5542 and 5546 of the Revised Statutes, see the title SENTENCE AND PUNISHMENT.

As to the resolution of congress of 1789 recommending the several states to permit the reception of federal prisoners in their jails, see *Randolph v. Donaldson*, 9 Cranch 76, 84, 3 L. Ed. 662.

**Marshals authorized to hire temporary jails.**—See *Randolph v. Donaldson*, 9 Cranch 76, 84, 3 L. Ed. 662.

**4. Sheriff keeper of county jail.**—*Randolph v. Donaldson*, 9 Cranch 76, 86, 3 L. Ed. 662. See post, "Jailor," II, B. See the title SHERIFFS AND CONSTABLES.

**5. Public officer.**—*White v. United States*, 164 U. S. 100, 103, 41 L. Ed. 365.

**6. Duty as to prisoners.**—*White v. United States*, 164 U. S. 100, 103, 41 L. Ed. 365.

**7. Duty to keep record book.**—*White v. United States*, 164 U. S. 100, 103, 41 L. Ed. 365.

As to the admissibility in evidence of entries of a public jailor in a record book, of the names of prisoners, and the dates of the receiving and discharging of them, see the title DOCUMENTARY EVIDENCE, vol. 5, pp. 442, 443.

**8. Jailor sheriff's deputy.**—*Randolph v. Donaldson*, 9 Cranch 76, 86, 3 L. Ed. 662. See ante, "Sheriff," II, A.

As to liability of sheriff for escapes permitted by his deputy, see the title ESCAPE, vol. 5, p. 895.

**9. Keeper of state jail not deputy of marshal.**—*Randolph v. Donaldson*, 9 Cranch 76, 86, 3 L. Ed. 662.

As to liability of marshal for escape of prisoner committed to state jail, see the title ESCAPE, vol. 5, p. 895.

**10. Marshal warden of territorial penitentiary.**—*United States v. Baird*, 150 U. S. 54, 55, 56, 37 L. Ed. 995.

As such keeper or warden, the marshal is not entitled to commissions upon disbursements for the support of the penitentiary under the general fee bill, Rev. Stat., § 829, it being provided by § 1893, Rev. Stat., that the attorney general shall fix the reasonable compensation of the marshal and his deputies for their services when acting in such capacity. *United States v. Baird*, 150 U. S. 54, 56, 37 L. Ed. 995.

The marshal in such case holds practically two distinct offices, namely, marshal of the territory, for which he receives the fees of the office, and also keeper or warden of the territorial penitentiary, for which he receives a compensation of \$1,200 per year, as fixed by the attorney general. *United States v. Baird*, 150 U. S. 54, 56, 37 L. Ed. 995.

As to the fees of United States marshals generally and as to fees for executing warrants of commitment of prisoners to prisons and penitentiaries, see the title UNITED STATES MARSHALS.

**11. Regulation of territorial penitentiaries.**—*United States v. Baird*, 150 U. S. 54, 56, 37 L. Ed. 995.

#### IV. Custody and Control of Prisoners.

**A. In General.**—See ante, "Prison Officers," II; post "Prison Bounds or Rules," VI. The certified copy of the record of the sentence to imprisonment, if valid upon its face, is sufficient to authorize the keeper to hold the prisoner without any warrant or mittimus.<sup>12</sup> Whenever a criminal, convicted of any offense against the United States, is imprisoned in the jail or penitentiary of any state or territory, such criminal is in all respects subject to the same discipline and treatment as convicts sentenced by the courts of the state and territory in which such jail or penitentiary is situated; and while so confined therein he is exclusively under the control of the officers having charge of the same, under the laws of such state or territory.<sup>13</sup>

**B. Prisoners in Custody of United States.**—Congress has the right to enact laws for the arrest and commitment of those accused of crimes and offenses against the United States and for holding them in safe custody until indictment and trial; and persons arrested and held pursuant to such laws are in the exclusive custody of the United States, and are not subject to the judicial process or executive warrant of any state.<sup>14</sup> The United States, having the absolute right to hold such prisoners, have an equal duty to protect them, while so held, against assault or injury from any quarter. The existence of that duty on the part of the government necessarily implies a corresponding right of the prisoners to be so protected; and this right of the prisoners is a right secured to them by the constitution and laws of the United States.<sup>15</sup>

#### V. Convict Labor.

The act of the legislature of the territory of Arizona relating to convict labor and the leasing of the same, which authorizes the board of control of the territorial prison to contract for the lease of the labor of the inmates thereof, expressly requires a good and sufficient bond to be given by the person leasing such labor for the faithful performance of his contract, which bond is to be approved by the board. The board cannot dispense with such bond, and no contract made

**12. Sufficiency of authority to hold prisoners.**—Ex parte Wilson, 114 U. S. 417, 421, 29 L. Ed. 89. See the title COMMITMENT AND PRELIMINARY EXAMINATION OF ACCUSED, vol. 3, p. 951.

**13. Federal prisoners in state jails.**—Act of 1834, 4 Stat. 739; Rev. Stat., § 5539; United States v. Pidgeon, 153 U. S. 48, 61, 38 L. Ed. 631; Ex parte Karstendick, 93 U. S. 396, 398, 23 L. Ed. 889.

**14. Prisoners in custody of United States.**—Logan v. United States, 144 U. S. 263, 284, 36 L. Ed. 429; Ableman v. Booth, 21 How. 506, 16 L. Ed. 169; Tarble's Case, 13 Wall. 397, 20 L. Ed. 597; Robb v. Connolly, 111 U. S. 624, 28 L. Ed. 542.

**15. Protection of prisoners.**—Logan v. United States, 144 U. S. 263, 284, 36 L. Ed. 429, reviewing in detail the following cases: United States v. Reese, 92 U. S. 214, 217, 23 L. Ed. 563; United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; Strauder v. West Virginia, 100 U. S. 303, 25 L. Ed. 664; Ex parte Virginia, 100 U. S. 339, 25 L. Ed. 676; United States v. Harris, 106 U. S. 629, 27 L. Ed. 290; Civil Rights Cases, 109 U. S. 3, 27 L. Ed. 836; Ex parte Yarbrough, 110 U. S. 651, 28 L. Ed. 274; United States v. Waddell, 112 U.

S. 76, 28 L. Ed. 673, and Baldwin v. Franks, 120 U. S. 678, 30 L. Ed. 766. See the title CIVIL RIGHTS, vol. 3, p. 820.

"The United States are bound to protect against lawless violence all persons in their service or custody in the course of the administration of justice. This duty and the correlative right of protection are not limited to the magistrates and officers charged with expounding and executing the laws, but apply, with at least equal force, to those held in custody on accusation of crime, and deprived of all means of self-defense." Logan v. United States, 144 U. S. 263, 295, 36 L. Ed. 429.

"The right in question does not depend upon any of the amendments to the constitution, but arises out of the creation and establishment by the constitution itself of a national government, paramount and supreme within its sphere of action." Logan v. United States, 144 U. S. 263, 294, 36 L. Ed. 429.

The crime of conspiring to kill and of killing persons in the custody of United States marshals is within the reach of the constitutional powers of congress, and is covered by § 5508 of the Revised Statutes. Logan v. United States, 144 U. S. 263, 295, 36 L. Ed. 429. See the title CONSPIRACY, vol. 3, p. 1099.

by them leasing the convicts will bind the territory until a bond such as the statute requires is executed by the lessee and approved by the board.<sup>16</sup>

## VI. Prison Bounds or Rules.

Acts of the legislatures before the abolition of imprisonment for debt allowed the prison rules and the liberty of the jail yard to a debtor whose body is in execution, on his giving bond, with sufficient security, not to go out of the rules or bounds of the prison; that is, while a prisoner. The condition usually inserted was not to depart therefrom until he shall be discharged by due course of law, or shall pay the debt.<sup>17</sup> Also provision was made giving debtors, imprisoned under executions from the courts of the United States, the privilege of jail limits in the several states.<sup>18</sup> Departing from the rules, after being discharged in due course of law, is not a breach of the condition of the prison bounds bond.<sup>19</sup> As to whether a discharge from prison rules under an act for the relief of poor debtors is a breach of the conditions of a prison bounds bond, see the title IMPRISONMENT FOR DEBT, vol. 6, p. 895. As to breach of prison limits bond by escape, see the title ESCAPE, vol. 5, pp. 893, 894.

## VII. Discharge.

**A. In General.**—Under the resolution passed by congress in 1789, relating to the use of state jails, and the law of Mississippi passed in 1822, a sheriff has no right to discharge a prisoner in custody by process from the circuit court, unless such discharge is sanctioned by an act of congress, or the mode of it adopted as a rule by the circuit court of the United States.<sup>20</sup>

**B. Discharge under "Poor Debtor Acts."**—As to discharge under "poor debtor acts" of persons imprisoned for debt, see the title IMPRISONMENT FOR DEBT, vol. 6, pp. 892, 894.

**C. Habeas Corpus Proceedings.**—As to release or discharge of prisoners by habeas corpus proceedings, see the title HABEAS CORPUS, vol. 6, p. 610.

## VIII. Escape.

As to escape of persons confined as prisoners, see the title ESCAPE, vol. 5, p. 893.

**PRIVATE.**—See the title ARMY AND NAVY, vol. 2, p. 527.

**PRIVATE ACT OR STATUTE.**—See the title STATUTES.

**PRIVATE CONVEYANCES.**—See the title ACCIDENT INSURANCE, vol. 1, p. 59.

**PRIVATE CORPORATION.**—See the title CORPORATIONS, vol. 4, pp. 628, 632.

**PRIVATEER.**—See the titles PRIZE; SALVAGE.

**16. Convict labor.**—*Nugent v. Arizona Imp. Co.*, 173 U. S. 338, 346, 43 L. Ed. 721, construing the act of the legislative assembly of the territory of Arizona, approved March 8, 1895.

**17. Prison bounds or rules—Prison bounds bond.**—*Simms v. Slacum*, 3 Cranch 300, 306, 2 L. Ed. 446; *Ammidon v. Smith*, 1 Wheat. 447, 457, 4 L. Ed. 132. See the titles EXECUTION AGAINST THE BODY AND ARREST IN CIVIL CASES, vol. 6, p. 80; IMPRISONMENT FOR DEBT, vol. 6, p. 892.

**18. Debtors imprisoned under execution from federal courts.**—*United States v. Knight*, 14 Pet. 301, 10 L. Ed. 465. And in that case it was held, that the act of

congress of May 19th, 1828, gives the debtors imprisoned under executions from the courts of the United States, at the suit of the United States, the privilege of jail limits in the several states, as they were fixed by the laws of the several states at the date of that act. The act was valid. *Wayman v. Southard*, 10 Wheat. 1, 10, 6 L. Ed. 253; *Beers v. Haughton*, 9 Pet. 329, 332, 9 L. Ed. 145, cited and affirmed.

**19. Departure after discharge no breach of bond.**—*Simms v. Slacum*, 3 Cranch 300, 308, 2 L. Ed. 446.

**20. Discharge of federal prisoners from state jails.**—*McNutt v. Bland*, 2 How. 9, 11 L. Ed. 159.



**PRIVATE EXAMINATION.**—See the title **ACKNOWLEDGEMENTS**, vol. 1, pp. 83, 89.

**PRIVATE INTERNATIONAL LAW.**—See the title **CONFLICT OF LAWS**, vol. 3, p. 1020.

**PRIVATE LAND CLAIMS.**—See the title **PUBLIC LANDS**, and references given.

**PRIVATE NUISANCE.**—See the title **NUISANCES**, vol. 8, p. 935.

**PRIVATE PROPERTY.**—Private property is that which is one's own; something that belongs or inheres exclusively in an individual person.<sup>1</sup>

**PRIVATE SALE.**—See the titles **EXECUTORS AND ADMINISTRATORS**, vol. 6, p. 149; **JUDICIAL SALES**, vol. 7, p. 715.

**PRIVATE SURVEY.**—See the title **BOUNDARIES**, vol. 3, p. 486.

## PRIVATE WAYS.

**Creation.**—See elsewhere.<sup>2</sup>

**Extent.**—See elsewhere.<sup>3</sup>

**Protection.**—A court of equity will protect a right of way over land by causing the removal of buildings which obstruct it.<sup>4</sup>

**PRIVATE WHARF.**—See note 5.

**PRIVATE WRONG.**—See note 6.

**PRIVY—PRIVITY.**—See note 7.

1. *Scranton v. Wheeler*, 179 U. S. 141, 170, 45 L. Ed. 126, dissenting opinion.

2. **Private ways—Creation.**—See the titles **CANALS**, vol. 3, p. 547; **EASEMENTS**, vol. 5, p. 691.

As to creation of private way in grant of mineral lands, see the title **MINES AND MINERALS**, vol. 8, p. 389.

3. **Extent.**—See the titles **CANALS**, vol. 4, p. 549; **FERRIES**, vol. 6, p. 278.

4. **Protection.**—*Gormley v. Clark*, 134 U. S. 338, 33 L. Ed. 909.

5. **Private wharf.**—In *Parkersburg, etc., Trans. Co. v. Parkersburg*, 107 U. S. 691, 699, 27 L. Ed. 584, it is said: "It is undoubtedly a general rule of law, in reference to all public wharves, that wharfage must be reasonable. A **private wharf**—that is, a wharf which the owner has constructed and reserves for his private use—is not subject to this rule; for, if any other person wishes to make use of it for a temporary purpose, the parties are at liberty to make their own bargain." See, generally, the title **WHARVES AND WHARFINGERS**.

6. **Private wrong.**—In *Huntington v. Attrill*, 146 U. S. 657, 668, 36 L. Ed. 1123, it is said: "The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual, according to the familiar classification of Blackstone: 'Wrongs are divisible into two sorts of

species: **private wrongs** and **public wrongs**. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals, and are thereupon frequently termed civil injuries; the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community, and are distinguished by the harsher appellation of crimes and misdemeanors.'" 3 Bl. Comm. 2. See, generally, the title **PENALTIES AND FORFEITURES**, ante, p. 357.

7. **Privy—Privity.**—See the titles **ESTOPPEL**, vol. 5, pp. 918, 933, 997; **NEGLECT**, vol. 8, p. 887; **PARTIES**, ante, p. 34; **RES ADJUDICATA**.

In *Stacy v. Thrasher*, 6 How. 44, 59, 12 L. Ed. 337, it is said: "The term **privity** denotes mutual succession or relationship to the same rights of property." (Greenl. Ev., § 523.) **Privies** are divided by Lord Coke into three classes—1st, **privies in blood**; 2d, **privies in law**; and 3d, **privies by estate**." See, also, *Litchfield v. Crane*, 123 U. S. 549, 31 L. Ed. 199.

**Privy or knowledge of the owner.**—In a statute relieving the owner of a vessel from liability for a loss occasioned without his **privity** or knowledge, it is said: "When the owner is a corporation, the **privity** or knowledge must be that of the managing officers of the corporation." *Craig v. Continental Ins. Co.*, 141 U. S. 638, 646, 35 L. Ed. 886.

## PRIVILEGE.

BY FRANK MOORE.

### I. Privilege of Suitors and Witnesses, 734.

- A. Suitors, 734.
- B. Privilege of Witnesses, 735.
- C. Distinction between Arrest on Mesne and Final Process, 735.

### II. Privilege of Persons in Public Service, 735.

- A. In General, 735.
- B. Privilege of Members of Legislative Bodies, 735.
  - 1. From Arrest and Service of Process, 735.
    - a. Origin and History of Privilege in England, 735.
    - b. Privilege of Members of National Congress, 736.
    - c. Privilege of Members of State Legislatures, 737.
    - d. Determination of Privilege, 737.
  - 2. From Suit, 737.
- C. Privilege of Members of Constitutional Conventions, 738.

### III. Exemption of Freeholders under Pennsylvania Statute, 738.

### IV. Pleading and Practice, 738.

- A. Claiming the Privilege, 738.
  - 1. Necessity for Claiming the Privilege, 738.
  - 2. Methods of Asserting Privilege, 738.
  - 3. How Privilege Shown, 738.
- B. Waiver of Privilege, 738.
- C. Discharge of Privileged Person, 739.
- D. Jurisdiction, 739.

### CROSS REFERENCES.

As to privilege of foreign ministers from arrest, see the title **AMBASSADORS AND CONSULS**, vol. 1, p. 276. As to exemptions and privileges of state or sovereign, see the title **STATES**. As to effect of appearance as waiving privilege, see the title **APPEARANCE**, vol. 2, p. 448. As to direct appeal from district court in case involving privilege of senator from arrest under constitution, see the title **APPEAL AND ERROR**, vol. 1, p. 431. As to privilege of jail limits, see the title **PRISONS AND PRISONERS**, ante, p. 729. As to constitutional privileges, see the title **CONSTITUTIONAL LAW**, vol. 4, p. 467. As to privileges of persons accused of crime, see the title **CONSTITUTIONAL LAW**, vol. 4, p. 491. As to privilege of witness to refuse to testify, see the title **WITNESSES**. As to privileged communications, see the titles **LIBEL AND SLANDER**, vol. 7, p. 861; **PRIVILEGED COMMUNICATIONS**. As to privilege tax, see the title **LICENSES**, vol. 7, p. 869, and references given. As to special or exclusive privileges, see the titles **CORPORATIONS**, vol. 4, p. 677; **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, pp. 797, 817; **MONOPOLIES AND CORPORATE TRUSTS**, vol. 8, p. 431, and references given.

### I. Privilege of Suitors and Witnesses.

**A. Suitors.**—A nonresident attending court as a suitor, and subpoenaed as a witness in another case, is privileged from arrest in execution, issuing from a state court, while at his lodgings.<sup>1</sup>

- 1. **Nonresident suitor.**—Hurst's Cases, 4 Dall. 387, 1 L. Ed. 878.

**B. Privilege of Witnesses.**—A witness is, undoubtedly, privileged from arrest for a reasonable time, to prepare for his departure, and return to his home, as well as during his actual attendance upon the court.<sup>2</sup> But the privilege does not extend throughout the term at which the cause is marked for trial.<sup>3</sup> Nor will it protect him, while the witness is engaged in transacting his general private business, after he is discharged from the obligation of the subpoena.<sup>4</sup>

**C. Distinction between Arrest on Mesne and Final Process.**—But the early cases drew a distinction between an arrest on mesne and on judicial process. Accordingly it was held that although the court would certainly protect suitors, witnesses and jurors from an arrest on mesne process, during their attendance upon the court, and for a reasonable time in coming and going, yet they would not discharge a man taken in execution which was regularly issued, upon a judgment regularly obtained, on the ground of such a protection.<sup>5</sup>

## II. Privilege of Persons in Public Service.

**A. In General.**—All persons in the public service are exempt, as a matter of public policy, from arrest upon civil process while thus engaged.<sup>6</sup> But the rule is different when the process is issued upon a charge of felony. No officer or employee of the United States is placed by his position, or the services he is called to perform, above responsibility to the legal tribunals of the country, and to the ordinary process for his arrest and detention, when accused of felony, in the forms prescribed by the constitution and laws.<sup>7</sup> Process of that kind can, therefore, furnish no justification for the arrest of a carrier of the mail.<sup>8</sup> An officer will never be privileged from arrest on any trip made for his own private gain, or which the law does not require him to make.<sup>9</sup>

**B. Privilege of Members of Legislative Bodies**—1. FROM ARREST AND SERVICE OF PROCESS—*a. Origin and History of Privilege in England.*—As this is a parliamentary trust, we must necessarily consider the law of parliament, in

**2. Privilege of witness from arrest.**—*Smythe v. Banks*, 4 Dall. 329, 1 L. Ed. 854.

**3. Extent of privilege of witness.**—*Smythe v. Banks*, 4 Dall. 329, 1 L. Ed. 854.

**4.** *Smythe v. Banks*, 4 Dall. 329, 1 L. Ed. 854.

**5. No exemption from arrest on final process.**—*Starret's Case*, 1 Dall. 356, 1 L. Ed. 174, citing Wood's Inst. 303, 600.

The same point was determined in *Hannum v. Askew*, 1 Yeates 25, by Judges Shippen and Yates, after argument. Judge Yeates said: "I was of counsel in *Starret's case*, and it was then pressed that the authorities cited by Wood did not warrant his doctrine. This gave rise to the chief justice's remark respecting the author. Upon my return from the circuit, I examined the point very fully, and found that 2 Trials per Pais, 382; 3 Salk 46; *Crompton's Just.* 162, 181, fully established the distinction, which is here contended against." Notwithstanding which, it is said, in a note to 4 Dall. 388: "It was admitted by the counsel, Mr. Ingersoll and Mr. Rawle, on both sides, that the authority of *Starret's case* had been often doubted, both on the bench and at the bar, though never expressly overruled." And in *Ex parte Hurst*, 1 W. C. C. 186; S. C., 4 Dall. 387, 1 L. Ed. 878, the circuit court of the United States expressly de-

cided, that a suitor in that court was privileged from arrest on a ca. sa.; and Hurst was discharged although the writ issued from the supreme court of the state. *Starret's Case*, 1 Dall. 356, 1 L. Ed. 174.

**6. Persons in public service exempt from arrest.**—*United States v. Kirby*, 7 Wall. 482, 486, 19 L. Ed. 278.

**7.** *United States v. Kirby*, 7 Wall. 482, 486, 19 L. Ed. 278.

**8. Arrest of mail carrier.**—*United States v. Kirby*, 7 Wall. 482, 486, 19 L. Ed. 278. See the title POSTAL LAWS, ante, p. 550.

**9. Trips by officers for own private gain.**—*Morgan v. Eckart*, 1 Dall. 295, 1 L. Ed. 144.

In *Morgan v. Eckart*, 1 Dall. 295, 1 L. Ed. 144, it was held that neither the lieutenant of a county coming to Philadelphia in order to obtain from the executive council the commissions of some officers of the militia within his department, nor the sheriff-elect of the same county, coming for the purpose of soliciting his commission, and giving the usual security, were protected from arrest, where it appeared that they had not been required by the executive council to attend them, but evidently came to Philadelphia on their own private business; the court adding that it was their duty to be careful not to extend the doctrine of privilege to the injury of honest creditors.



that country from whence we have drawn our other laws.<sup>10</sup> The origin of these privileges is said by Selden to be as ancient as Edward the Confessor. For a long time, however, after the conquest, we find very little, either in the books of law, or history, upon this subject. If there were then any regular parliaments, their members held their privileges by a very precarious tenure.<sup>11</sup> There appears, indeed, in the reigns of Henry IV and Henry VI to have been some provisions made by acts of parliament, to protect the members from illegal and violent attacks upon their persons.<sup>12</sup> In the reign of Edward IV, there has been a case cited to show that the judges determined that a menial servant of a member of parliament, though privileged from actual arrest, might yet be impleaded. Although it were fairly to be inferred from the case that the privilege of the servant was equal to the privilege of the member himself, yet a case determined at so early a period, when the rights and privileges of parliament were so little ascertained and defined, cannot have the same weight as more modern authorities.<sup>13</sup> From the whole frame of the statute of 12 & 13 Wm. III, c. 3, it appears clearly to be the sense of the legislature, that, before that time, members of parliament were privileged from arrest, and from being served with any process out of the courts of law, not only during the sitting of parliament, but during the recess within the time of privilege; which was a reasonable time *eundo et redeundo*. The design of this act was not to meddle with the privileges which the members enjoyed during the sitting of parliament (those seem to have been held sacred), but it enacts, that after the dissolution or prorogation of parliament, or after adjournment of both houses, for above the space of fourteen days, any person might commence and prosecute any action against a member of parliament, provided the person of the member be not arrested during the time of privilege.<sup>14</sup> That part of the law of parliament, which respects the privileges of its members, was principally established to protect them from being molested by their fellow subjects, or oppressed by the power of the crown, and to prevent their being diverted from the public business.<sup>15</sup>

b. *Privilege of Members of National Congress*.—While the framers of the national constitution did not adopt the laws and the constitution of the British Parliament as a whole, they did incorporate such parts of it, and with it such privileges of parliament as they thought proper to be applied to the two houses of congress. Among these is the right of each house to make its own rules of procedure, to determine the selection and qualification of its own members, preserve order, etc., and the right of members to freedom from arrest, and freedom from being called in question from their utterances and actions upon the floor of either house.<sup>16</sup> Section 6 of article 1 of the constitution of the United States provides that senators and representatives shall, in all cases except treason, felony and breach of the peace, be privileged from arrest during their attendance at the sessions of their respective houses and in going to and returning from the same.<sup>17</sup> But the court in one case at least has refused to sign a letter purporting to be addressed by them to several members of congress, congress

10. This privilege is a parliamentary trust.—*Bolton v. Martin*, 1 Dall. 296, 303, 1 L. Ed. 144.

11. Origin of privilege in England.—*Bolton v. Martin*, 1 Dall. 296, 303, 1 L. Ed. 144.

12. *Bolton v. Martin*, 1 Dall. 296, 303, 1 L. Ed. 144.

13. Status of privilege in reign of Edward IV.—*Bolton v. Martin*, 1 Dall. 296, 303, 1 L. Ed. 144.

14. Status of privilege after dissolution of parliament.—*Bolton v. Martin*, 1 Dall. 296, 303, 1 L. Ed. 144.

"Neither, says Judge Blackstone, can

any member of either house be arrested, or taken into custody, nor served with any process of the courts of law, nor his servants arrested, etc., without a breach of the privilege of parliament." *Bolton v. Martin*, 1 Dall. 296, 1 L. Ed. 144.

15. Purpose of act of parliament.—*Bolton v. Martin*, 1 Dall. 296, 303, 1 L. Ed. 144.

16. Privilege of members of national congress.—*Kilbourn v. Thompson*, 103 U. S. 168, 201, 26 L. Ed. 377.

17. *Burton v. United States*, 196 U. S. 283, 295, 49 L. Ed. 482. See *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. Ed. 377.

being in session, requesting their attendance as witnesses in a criminal case.<sup>18</sup>

c. *Privilege of Members of State Legislatures.*—A member of the general assembly is, undoubtedly, privileged from arrest, summons, citation or other civil process, during his attendance on the public business confided to him.<sup>19</sup> And this privilege from arrest has extended itself, in process of time, to every case where the attendance is a duty, in conducting any proceedings of a judicial nature;<sup>20</sup> so as to protect all persons engaged in public business of a legislative character.<sup>21</sup>

d. *Determination of Privilege.*—The parliament, in general, is the sole and exclusive judge and expositor of its own privileges: but, in certain cases, it will happen that they come necessarily and incidentally before the courts of law, and then they must likewise judge upon them.<sup>22</sup>

2. FROM SUIT.—The constitutional provision exempting members of the congress from being called in question elsewhere for their utterances and actions upon the floor of either house, is not limited to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers. In short, to things generally done in a session of the house by one of its members in relation to the business before it.<sup>23</sup> And upon principle, members of the general assembly are privileged from having their suits forced to a trial and decision, while the session of the legislature continues.<sup>24</sup> But exemption from suit does not necessarily imply ex-

**18. The court will not request members by letter to attend.**—United States v. Cooper, 4 Dall. 341, 1 L. Ed. 859. Justice Peters, however, expressed a willingness to sign such a letter, saying that while he was speaker of the house of representatives, he had received such letter from the supreme court of Pennsylvania.

"The constitution gives to every man charged with an offense, the benefit of compulsory process, to secure the attendance of his witnesses. I do not know of any privilege to exempt members of congress from the service or the obligations of a subpoena, in such cases. I will not sign any letter of the kind proposed. If, upon service of a subpoena the members of congress do not attend, a different question may arise; and it will then be time enough to decide, whether an attachment ought, or ought not, to issue. It is not a necessary consequence of nonattendance, after the service of a subpoena, that an attachment shall issue. A satisfactory reason may appear to the court, to justify or excuse it." United States v. Cooper, 4 Dall. 341, 1 L. Ed. 859.

**19. Privilege of members of state legislatures.**—Geyer v. Irwin, 4 Dall. 107, 1 L. Ed. 762.

The assembly of Pennsylvania being the legislative branch of our government, its members are legally and inherently possessed of all such privileges as are necessary to enable them, with freedom and safety, to execute the great trust reposed in them by the body of the people who elected them. Bolton v. Martin, 1 Dall. 296, 303, 1 L. Ed. 144.

**20. Extent of privilege.**—In the case of

United States v. Edme, 10 S. & R. 147, Judge Duncan said that the privilege extends to every case where the attendance and conducting any judicial proceedings is a duty. Bolton v. Martin, 1 Dall. 296, 1 L. Ed. 144.

**21.** Bolton v. Martin, 1 Dall. 296, 1 L. Ed. 144.

In Geyer v. Irwin, 4 Dall. 107, 1 L. Ed. 762, the court recognized the principle that a member of assembly is privileged from arrest, during his attendance on the public business. Bolton v. Martin, 1 Dall. 296, 1 L. Ed. 144.

**22. Who judges of existence of privilege.**—Bolton v. Martin, 1 Dall. 296, 303, 1 L. Ed. 144.

**23. Exemption of members of congress from suit.**—Kilbourn v. Thompson, 103 U. S. 168, 204, 26 L. Ed. 377.

The privileges of the members of the house of representatives to freedom of speech and debate extends to the protection of the members for having voted in favor of a resolution to imprison a citizen for an alleged contempt as a witness in an investigation which the house had no jurisdiction to order. Kilbourn v. Thompson, 103 U. S. 168, 26 L. Ed. 377.

Such privilege does not extend to the protection of the person executing the order of imprisonment under the authority of such unwarranted resolution. Kilbourn v. Thompson, 103 U. S. 168, 196, 26 L. Ed. 377, disapproving Anderson v. Dunn, 6 Wheat. 204, 5 L. Ed. 242.

**24. Exemption of state legislators from suit.**—Geyer v. Irwin, 4 Dall. 107, 1 L. Ed. 762.



emption from liability.<sup>25</sup>

**C. Privilege of Members of Constitutional Conventions.**—The members of convention, elected by the people, and assembled for a great national purpose, ought to be considered, in reason, and from the nature as well as dignity of their office, as invested with the same or equal immunities with the members of general assembly, met in their ordinary legislative capacity.<sup>26</sup>

### III. Exemption of Freeholders under Pennsylvania Statute.

An early Pennsylvania statute exempted freeholders from arrest under a *capias*.<sup>27</sup>

### IV. Pleading and Practice.

**A. Claiming the Privilege**—1. **NECESSITY FOR CLAIMING THE PRIVILEGE.**—But every privileged person must, at a proper time, and in a proper manner, claim the benefit of his privilege.<sup>28</sup> The judges are not bound, judicially, to notice a right of privilege, nor to grant it, without a claim.<sup>29</sup>

2. **METHODS OF ASSERTING PRIVILEGE.**—A rule to show cause was used in some of the earlier cases to obtain the discharge of a privileged person from arrest under a *capias*,<sup>30</sup> though the better remedy would seem to be by motion to quash the writ.<sup>31</sup>

3. **HOW PRIVILEGE SHOWN.**—And in order to obtain this discharge the privilege need not be made to appear to the justice who granted the writ; but it is sufficient if the plaintiff can make it appear from the records or otherwise.<sup>32</sup>

**B. Waiver of Privilege.**—If neither the defendant nor his attorney suggests the privilege as an objection to the trial of the cause, this amounts to a waiver by which the party is forever concluded.<sup>33</sup>

**The exemption from arrest in a district in which the defendant is not an inhabitant,** or in which he is not found, at the time of serving the process, is the privilege of the defendant, which he may waive by a voluntary appearance.<sup>34</sup>

**25. Exemption from suit not exemption from liability.**—*Bridge Co. v. United States*, 105 U. S. 470, 483, 26 L. Ed. 1143.

**26. Members of constitutional conventions.**—*Bolton v. Martin*, 1 Dall. 296, 303, 1 L. Ed. 144.

**27. And this privilege has been extended to actions of trespass vi et armis.** The court said: "The practice has been long settled under this act. Unless it is a suit on a recognizance, or for a fine actually due to the state, we cannot take up a mere fiction, to defeat a positive privilege." *Hudson v. Howell*, 1 Dall. 310, 1 L. Ed. 151.

**Effect of temporary nonresidence.**—Under an early Pennsylvania statute exempting freeholders from arrest under a *capias*, it was held that the legislature did not mean to subject a citizen of large estate to the process of a *capias* on account of a short absence from the state. But there is a controlling power in the court to inquire into the circumstances of the case, and to relieve a defendant from an arrest, if they think he was "intended to be exempted," although the words "that he has not been resident in the state for two years before the date of the writ," may be inserted in the plaintiff's affidavit. *Penman v. Wayne*, 1 Dall. 241, 1 L. Ed. 118; *Morgan v. Eckart*, 1 Dall. 295, 1 L. Ed. 144.

**Nature of service to be made on free-**

**holder.**—Although the act of the assembly of Pennsylvania directed that the process to be issued against a freeholder shall be a summons, yet it would seem that if the defendant submits to a *capias*, he has forfeited his privilege to be sued by a summons. *Barnard v. Field*, 1 Dall. 348, 1 L. Ed. 170.

**The privilege of a freeholder may be defeated by producing the records of judgments obtained against him before a justice of the peace.** *Quesnel v. Mussi*, 1 Dall. 436, 1 L. Ed. 212.

**28. Privilege must be claimed seasonably.**—*Geyer v. Irwin*, 4 Dall. 107, 1 L. Ed. 762.

**29. Privilege will not be judicially noticed.**—*Geyer v. Irwin*, 4 Dall. 107, 1 L. Ed. 762. See, generally, the title **JUDICIAL NOTICE**, vol. 7, p. 672.

**30. Privilege may be claimed by means of rule to show cause.**—*Penman v. Wayne*, 1 Dall. 241, 1 L. Ed. 118.

**31. Motion to quash writ.**—*Hudson v. Howell*, 1 Dall. 310, 1 L. Ed. 151.

**32. How privilege shown.**—*Penman v. Wayne*, 1 Dall. 241, 1 L. Ed. 118.

**33. Waiver of privilege.**—*Geyer v. Irwin*, 4 Dall. 107, 1 L. Ed. 762.

**34. Exemption from arrest out of defendant's district.**—*Gracie v. Palmer*, 8 Wheat. 699, 700, 5 L. Ed. 719.



**C. Discharge of Privileged Person.**—In an early Pennsylvania case it was held that the discharge of the privileged person from arrest would not be made absolute, but he would be required to file common bail.<sup>35</sup>

**D. Jurisdiction.**—It is admitted that a federal court has no jurisdiction over the proceedings in a state court. The statute regulates this.<sup>36</sup> But this statute did not prevent the United States circuit court from releasing a defendant from process out of the supreme court of Pennsylvania, violating its protection.<sup>37</sup>

**35. Discharge of privileged person.**—*Coxe v. McClenachan*, 3 Wall. 478, 1 L. Ed. 687. See opinion of court in *Bolton v. Martin*, 1 Dall. 296, 304, 1 L. Ed. 144.

**Compromise recognized by court.**—In the case of *Coxe v. McClenachan*, 3 Dall. 478, 1 L. Ed. 687, a judgment having been obtained against McClenachan, a ca. sa. issued, which was returned non est inventus. Thereupon a scire facias was issued against his special bail, who, within the first four days of the term, surrendered McClenachan in discharge of his bail and filed a motion for an exoneretur. The defendant, McClenachan, being a member of congress which was in session at the time of his surrender, presented a memorial to the court, demanding as his privilege to be discharged from the cus-

tody of the sheriff. Both motions being heard together, a compromise was agreed upon whereby the bail consented to remain responsible for surrendering the defendant within four days after the sessions of congress, in consideration of being allowed that time to make the surrender. The court declared their approbation of this compromise as affording a good precedent for future cases of a similar kind.

**36. Federal courts may discharge from process issued by state court.**—16 Encyc. Pl. & Pr., p. 975, title Privilege, citing Rev. Stat. U. S., § 720; *Watson v. Jones*, 13 Wall. 679, 20 L. Ed. 666.

**37.** 16 Encyc. Pl. & Pr., p. 975, title Privilege, citing *Hurst's Case*, 4 Dall. 387, 1 L. Ed. 878.

## PRIVILEGED COMMUNICATIONS.

BY A. P. WALKER.

### I. Confidential Communications, 740.

- A. Communications to Attorney by Client, 740.
- B. Communications to Physicians and Surgeons by Patients, 742.
- C. Communications between Husband and Wife, 742.
- D. Confidential Statements to Commercial Agency, 742.
- E. Communications between Principal and Agent, 742.

### II. Defamatory Communications, 742.

### III. Communications between Government Officers, 742.

#### CROSS REFERENCES.

See the titles COURTS, vol. 4, p. 861; LIBEL AND SLANDER, vol. 7, p. 857; PRINCIPAL AND AGENT, ante, p. 640; WITNESSES.

#### I. Confidential Communications.

**A. Communications to Attorney by Client.—General Rule.**—Within the scope of the professional employment of an attorney, the communications made to him by his client are privileged and are inadmissible in evidence without the consent of the latter.<sup>1</sup>

**1. General rule.**—Connecticut Mut. Life Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. Ed. 251; Hunt v. Blackburn, 128 U. S. 464, 32 L. Ed. 488; Blackburn v. Crawford, 3 Wall. 175, 18 L. Ed. 186; Glover v. Patten, 165 U. S. 394, 41 L. Ed. 760; Alexander v. United States, 138 U. S. 353, 34 L. Ed. 954; Chirac v. Reinicker, 11 Wheat. 280, 6 L. Ed. 474. And see Reagan v. Aiken, 138 U. S. 109, 34 L. Ed. 892. "In the language of Mr. Justice Story, speaking for this court in Chirac v. Reinicker, 11 Wheat. 280, 294, 6 L. Ed. 474: 'Whatever facts, therefore, are communicated by a client to a counsel solely on account of that relation, such counsel are not at liberty, even if they wish, to disclose; and the law holds their testimony incompetent.'" Alexander v. United States, 138 U. S. 353, 34 L. Ed. 954.

If he consulted him in the capacity of an attorney, and the communication was in the course of his employment, it may be supposed to have been drawn out in consequence of the relations of the parties to each other. Neither the payment of a fee nor the pendency of litigation was necessary to entitle him to the privilege. Alexander v. United States, 138 U. S. 353, 34 L. Ed. 954.

**Statements as to crime.**—Statements by a client to his attorney as to a crime already committed by such client are within the rule as to privileged communications. Alexander v. United States, 138 U. S. 353, 34 L. Ed. 954.

On a trial for murder, statements of the

prisoner made after the commission of the crime, to an attorney, when consulting him in that capacity, are privileged and inadmissible in evidence. Alexander v. United States, 138 U. S. 353, 34 L. Ed. 954.

A statement of a person accused of murdering his partner, made to an attorney to the effect that his partner was missing, that he had taken off money belonging to the partnership and that he had not heard from him, is privileged. Alexander v. United States, 138 U. S. 353, 34 L. Ed. 954.

**Communications in furtherance of a criminal or fraudulent purpose** have been held not to be privileged. Alexander v. United States, 138 U. S. 353, 34 L. Ed. 954.

The rule that a communication made to counsel in furtherance of a scheme to commit a crime, or for a fraudulent purpose, is not privileged, does not apply where the communication was made after the commission of the crime, and was offered in evidence as an admission tending to show that defendant was concerned in the crime, or rather as a statement contradictory to one he had made upon the stand. Alexander v. United States, 138 U. S. 353, 34 L. Ed. 954.

**Examination of attorney as to existence of relation.**—A counsel or attorney is not a competent witness to testify as to facts communicated to him by his client, in the course of the relation subsisting between them, but may be examined as to the

**Reason for Rule.**—The rule as to privileged communications is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences of the apprehension of disclosure.<sup>2</sup>

mere fact of the existence of that relation. *Chirac v. Reinicker*, 11 Wheat. 280, 6 L. Ed. 474.

A person who was both a creditor and an attorney for other creditors, and who was present at an interview between a mortgagor and his creditors, held with a view of obtaining from the mortgagor the security which was in fact given, is competent to testify that he was present at the time of the execution of the mortgage, and to state what transpired at that time. It was objected that communications to an attorney were confidential and that he could neither be compelled nor permitted to disclose them as a witness; that the creditors whose counsel he was did not object to this testimony, and, as stated, he was present both as party and counsel. Under these circumstances there was no error in the admission of his testimony. *Reagan v. Aiken*, 138 U. S. 109, 34 L. Ed. 892.

**Statements by testator to counsel respecting execution of will.**—An attorney by whom a will is drawn may be allowed to testify to what was said by the testator contemporaneously upon the subject. *Blackburn v. Crawford*, 3 Wall. 175, 193, 18 L. Ed. 186; *Glover v. Patten*, 165 U. S. 394, 406, 41 L. Ed. 760.

"In a suit between devisees under a will, statements made by the deceased to counsel respecting the execution of the will, or other similar document, are not privileged. While such communications might be privileged, if offered by third persons to establish claims against an estate, they are not within the reason of the rule requiring their exclusion, when the contest is between the heirs or next of kin." *Glover v. Patten*, 165 U. S. 394, 406, 41 L. Ed. 760.

The disclosure in such cases can affect no right or interest in the client; and the apprehension of it can present no impediment to a full statement to the attorney, unless the client was contemplating an illegal disposition; and a disclosure when made would expose the court to no greater difficulty than it has in all cases when the views and intentions of the parties, or the objects for which the disposition is made, are unknown. In the case, then, of a testamentary disposition, the very foundations on which the rule proceeds seem to be wanting; and in the absence of any illegal purpose entertained by the testator, there does not seem to be any ground for applying the rule in such case. The communication is not protected because it may lead to the disclosure of an illegal purpose, and evidence

otherwise admissible cannot be rejected upon such grounds. Another view of the case is, that the protection which the rule gives, is the protection of the client; and it cannot be said to be for the protection of the client that evidence should be rejected, the effect of which would be to prove a trust created by him, and to destroy a claim to take beneficially by the parties accepting the trust. It cannot be said to be for the client's interest to exclude any testimony in support of what he solemnly proclaimed and put on record by his will. This cannot be said in regard to property to which he never had or assumed to have any title and in regard to a claim by others to that property, which he did all in his power, by his will to foreclose. *Blackburn v. Crawford*, 3 Wall. 175, 193, 18 L. Ed. 186; *Glover v. Patten*, 165 U. S. 394, 407, 41 L. Ed. 760.

On a question of marriage and legitimacy, an attorney, who drew a will for the alleged husband now deceased, in which the children of the connection set up as wedlock are described as the "natural children" of the testator, may, without violating professional confidence, testify what was said by the testator about the character of the children and his relations to their mother, in interviews between the testator and himself preceding and connected with the preparation of the will. *Blackburn v. Crawford*, 3 Wall. 175, 176, 18 L. Ed. 186; *Glover v. Patten*, 165 U. S. 394, 407, 41 L. Ed. 760.

**Ohio.**—An examination of the Ohio statutes renders it doubtful whether this is the law of that state. *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457, 458, 24 L. Ed. 251.

**Federal courts.**—Without the consent of his client an attorney should neither be required nor permitted by the courts of the United States to testify concerning the communications made to him by such client. *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. Ed. 251.

As to state law and decision being binding upon federal courts, see the title **COURTS**, vol. 4, p. 1083.

**2. Reason for rule.**—*Hunt v. Blackburn*, 128 U. S. 464, 32 L. Ed. 488; *Glover v. Patten*, 165 U. S. 394, 41 L. Ed. 760.

"The protection of confidential communications made to professional advisers is dictated by a wise and liberal policy. If a person cannot consult his legal adviser without being liable to have the interview made public the next day by an examination enforced by the courts, the law would be little short of despotic. It would be a prohibition upon professional advice



**Waiver of Privilege.**—The rule as to privileged communications being personal and for the protection of the client,<sup>3</sup> may be waived by him,<sup>4</sup> either expressly, or by implication;<sup>5</sup> and if the client has voluntarily waived the privilege, it cannot be insisted upon to close the mouth of the attorney.<sup>6</sup>

**B. Communications to Physicians and Surgeons by Patients.**—A person duly authorized to practise physic or surgery, shall not be allowed to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity.<sup>7</sup>

**C. Communications between Husband and Wife.**—See the title WITNESSES.

**D. Confidential Statements to Commercial Agency.**—A confidential business statement made by a merchant to a commercial agency which concealed an alleged then-existing liability of such merchant to his brother is admissible in evidence as having a bearing upon the inquiry whether he was in fact indebted to his brother to the full extent claimed by the latter.<sup>8</sup>

**E. Communications between Principal and Agent.**—See the titles PRINCIPAL AND AGENT, ante, p. 640; WITNESSES.

## II. Defamatory Communications.

See the title LIBEL AND SLANDER, vol. 7, p. 861.

## III. Communications between Government Officers.

Communications between government officers, of a confidential nature, need not be disclosed.<sup>9</sup>

and assistance." *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. Ed. 251.

"The principle of privileged communications was ably considered by Lord Brougham in *Greenough v. Gaskel*. He said: 'The foundation of the rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection, though certainly it may not be very easy to discover why a like privilege has been refused to others, and especially to medical advisers. But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence—in the practice of courts—and in those matters affecting the rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skillful person, or would only dare to tell his counsel half his case.'" *Blackburn v. Crawford*, 3 Wall. 175, 18 L. Ed. 186; *Glover v. Patten*, 165 U. S. 394, 41 L. Ed. 760.

**3. Personal privilege.**—*Hunt v. Blackburn*, 128 U. S. 464, 32 L. Ed. 488; *Chirac v. Reinicker*, 11 Wheat. 280, 6 L. Ed. 474.

**4. Privilege may be waived.**—*Blackburn*

*v. Crawford*, 3 Wall. 175, 18 L. Ed. 186; *Glover v. Patten*, 165 U. S. 394, 41 L. Ed. 760; *Hunt v. Blackburn*, 128 U. S. 464, 32 L. Ed. 488.

**5. Waiver may be express or implied.**—*Blackburn v. Crawford*, 3 Wall. 175, 18 L. Ed. 186; *Glover v. Patten*, 165 U. S. 394, 41 L. Ed. 760; *Hunt v. Blackburn*, 128 U. S. 464, 32 L. Ed. 488.

When a defendant enters upon a line of defense which involved what transpired between himself and an attorney, and respecting which he testified, he thereby waives his right to object to the attorney's giving his own account of the matter. As, for instance, when a client says that the original deed was drawn by an attorney, and that he has not got it, and that he thinks he gave it to him, his letter calling for that deed, and the attorney's reply inclosing it, are admissible evidence. *Hunt v. Blackburn*, 128 U. S. 464, 470, 32 L. Ed. 488.

**6.** *Hunt v. Blackburn*, 128 U. S. 464, 32 L. Ed. 488.

**7. Communications to physicians and surgeons by patients.**—*Connecticut Mut. Life Ins. Co. v. Union Trust Co.*, 112 U. S. 250, 28 L. Ed. 708. See, also, the title COURTS, vol. 4, p. 1083.

**8. Confidential statements to commercial agency.**—*Shauer v. Alterton*, 151 U. S. 607, 617, 38 L. Ed. 286. See, also, the title FRAUDULENT AND VOLUNTARY CONVEYANCES, vol. 6, p. 524.

**9. Communications between government officers.**—*Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60.

**PRIVILEGES AND IMMUNITIES.**—See note 1.

1. **Privileges and immunities.**—As to the **privileges and immunities** secured by article 4, § 2, of the federal constitution, see the title **CONSTITUTIONAL LAW**, vol. 4, pp. 467, 471. As to the **privileges and immunities** protected by the 14th amendment of the federal constitution, see the title **CONSTITUTIONAL LAW**, vol. 4, pp. 479, 483. And see, generally, the titles **CITIZENSHIP**, vol. 3, p. 805;

**CIVIL RIGHTS**, vol. 3, p. 816.

As to whether an immunity from taxation enjoyed by a corporation passes to the transferee of the rights and privileges of the corporation, see the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, p. 841.

**Privilege tax.**—See the title **LICENSES**, vol. 7, p. 869.

## PRIZE.

BY WALTER CARRINGTON.

- I. Definition, 747.
- II. Right to Visit and Search, 748.
- III. Right to Detain, 748.
- IV. Capture and Condemnation or Restoration, 748.
  - A. What Constitutes a Capture, 748.
  - B. Character of the Right of Capture, 749.
  - C. By Whom Capture May Be Made, 749.
    - 1. In General, 749.
    - 2. Privateers, 749.
    - 3. Ships of War of Rebellious Colonies, 750.
    - 4. Enforcement of Rights against Armed Insurrection, 750.
    - 5. Capture of Property Belonging to Subjects of a Friendly Power, 750.
  - D. When Capture May Be Made, 750.
  - E. Where Capture May Be Made, 750.
    - 1. In General, 750.
    - 2. Captures in Neutral Waters, 751.
  - F. Vessels and Property Subject to Capture and Condemnation, 751.
    - 1. In General, 751.
    - 2. Enemies' Vessels and Property, 751.
      - a. Statement of General Rule, 751.
      - b. What Property Considered Enemies' Property, 751.
        - (1) General Rule, 751.
        - (2) Property of Persons Domiciled or Residing in Enemy's Country, 752.
        - (3) Property within Enemy's Territory, 752.
        - (4) Property of Partnership Established in Enemy's Country, 753.
        - (5) Property Engaged in Illegal Intercourse with the Enemy, 753.
        - (6) Ships Sailing under the License of the Enemy, 754.
      - c. Consignments of Goods, 755.
        - (1) Consignments by Enemies, 755.
        - (2) Consignments to Enemies, 756.
      - d. Armed Neutral Merchant Vessel Captured by Enemy, 757.
      - e. Enemy's Vessels Transferred to Neutrals, 757.
        - (1) Vessels Owned by Individuals, 757.
        - (2) War Vessels, 757.
      - f. Effect of Possession of Neutral Papers, 757.
      - g. Evidence of Enemy Ownership, 757.
        - (1) Presumptions and Burden of Proof, 757.
        - (2) Weight and Sufficiency, 757.
      - h. Exemptions from Capture and Condemnation, 757.
        - (1) In General, 757.
        - (2) Coast Fishing Vessels, 758.
        - (3) Articles of Capitulation, 758.
        - (4) Proclamation of President of United States or of Commanding Officer, 758.



- (5) Treaties with Neutral Nations, 759.
- (6) Facts Not Exempting, 759.
- (7) United States Consul Has No Authority to Exempt, 760.
- 3. Neutral Vessels and Property, 760.
  - a. In General, 760.
  - b. Trade of Neutrals with Belligerents, 760.
    - (1) In Articles Not Contraband, 760.
    - (2) In Contraband Articles, 760.
  - c. Trade of Neutrals with Neutrals, 761.
  - d. Who Are Neutrals, 761.
  - e. What Articles Are Contraband, 761.
  - f. Neutral Goods on Enemy's Vessel, 761.
  - g. Property of Neutral Leaving Belligerent Country at Commencement of War, 762.
  - h. Neutral Property Captured and Retained by the Enemy, 762.
  - i. Neutral Vessels Having Enemy's Property on Board, 762.
  - j. Effect of Carrying Arms on Neutral Vessel, 762.
  - k. Immunity from Capture by Treaty, 762.
  - l. Effect of Delay in Claiming Neutral Property, 762.
- 4. Vessels and Property Belonging to Citizens of the Capturing Nation, 762.
  - a. Persons Entitled to Rights of Citizens under Prize Law, 762.
  - b. Goods Destined for Use of Enemy or Rebel Military Forces, 763.
  - c. Goods Consigned by Enemies to Citizens of Capturing Nation, 763.
  - d. Vessel Guilty of Conduct Subjecting Her to Confiscation at a Time Anterior to Capture, 763.
- G. Effect of Concealment or Spoliation of Papers, 763.
- H. Effect of Assertion of a False Claim, 763.
  - I. Collusive Captures, 763.
  - J. Effect of Disavowal of Capture by Government, 763.
- K. Effect of Preliminary Articles of Peace, 764.
- L. Effect of Loss, Destruction and Wreckage of Property, 764.
- M. Probable Cause as Justification of Capture, 764.
- N. Rights of Belligerent Captors in Relation to Neutral Nations, 764.
- O. Duties of Captors as to Vessels and Property Captured, 765.
- P. Sale without Condemnation, 765.
- Q. Rights in Property Captured and Interests in and Distribution of Prize Money and Bounty, 765.
  - 1. In General, 765.
  - 2. When the Capture Is Illegal, 766.
  - 3. When Title to Property Changes, 766.
  - 4. Liens, 766.
  - 5. Damages for Tort Committed by Prize Ship after Capture, 767.
- 6. Rights of Captors to Prize Money or Bounty, 767.
  - a. In General, 767.
  - b. Captures by Noncommissioned Vessels, 767.
  - c. Captures by Privateers, 768.
  - d. Period in Relation to Which Distribution Is Made, 768.
  - e. Evidence to Establish Right to Share in Prize Money, 768.
  - f. Forfeiture of Rights of Prize, 768.
  - g. Prize Money and Bounty Abolished in United States—Interpretation of Former Laws, 768.
- 7. Compensation of Agent Appointed to Represent Captors' Interest in Prize Money, 769.

8. Appropriation of Captured Vessels and Property to Use of Government, 769.
  9. Captured Vessel Abandoned and Taken Possession of by Neutral, 769.
  10. Captured Property Given to Neutral and Carried to His Country for Adjudication, 769.
  11. What Person Setting up Title under a Condemnation Must Show, 769.
- R. Deposit of Prize Money, 770.
- S. Restoration, 770.
1. By the Government, 770.
  2. By the Courts, 770.
    - a. When Restoration Will Be Decreed, 770.
      - (1) In General, 770.
      - (2) By United States Courts for Violation of Our Neutrality, 770.
      - (3) Under Treaty between a Neutral and a Belligerent, 771.
  3. Liability of Prize Agents Who Have Paid Proceeds of Prize to Captors, without Order, 772.
  4. To Whom Restoration Is Decreed, 772.
  5. Rights of Bona Fide Purchaser from Captor Who Pays Freight, 772.
- T. Liability for Unlawful Capture or for Destruction of or Injury to Property Captured, 772.
1. Statement of Rule of Liability, 772.
  2. In Whom Right of Indemnity Vests, 773.
  3. Measure of Damages, 773.
- U. Jurisdiction and Procedure, 774.
1. Jurisdiction, 774.
    - a. Jurisdiction of Prize Courts, 774.
      - (1) In General, 774.
        - (a) Courts of the Nation to Which the Captor Belongs, 774.
          - aa. In General, 774.
          - bb. Liability of Captors for Damages, 774.
        - (b) Courts of Neutral Nations, 774.
      - (2) Of District Courts of the United States, 775.
        - (a) In General, 775.
        - (b) What Determines Jurisdiction, 775.
        - (c) Extent of Jurisdiction, 775.
          - aa. In Relation to Place of Capture and Ownership of Property, 775.
          - bb. What Claims Are within Jurisdiction, 775.
          - cc. Power to Carry into Effect Sentences of Continental Courts, 776.
      - (3) In What Foreign Courts United States Courts Will Recognize Jurisdiction, 776.
    - b. Jurisdiction of Courts of Common Law, 776.
  2. Procedure in General, 776.
  3. Order to Institute Proceedings, 776.
  4. Excuse for Delay in Instituting Proceedings, 777.
  5. In Whose Name Proceedings Should Be Instituted or Carried on, 777.
  6. The Libel, 777.
  7. The Monition, 777.
  8. The Claim, 777.

9. Bond for Release of Property, 778.
10. Examination in Preparatorio and First Hearing, 778.
11. Further Proof, 778.
  - a. When Allowed, 778.
  - b. Foundation for Introduction, 779.
  - c. Character of Proof Admitted and Competency of Witnesses, 780.
  - d. Motion for Order, 780.
  - e. Effect of Failure to Comply with Order, 780.
  - f. Effect of Failure to Put in Affidavits of Title or Neutral Ownership, 780.
  - g. Depositions Taken in One Prize Cause Cannot Be Used in Another, 780.
12. Burden of Proving Neutral Ownership, 780.
13. Interlocutory Application by Government Where Capture Is Made by a Noncommissioned Vessel, 780.
14. Decree, 781.
  - a. Who Are Concluded or Bound by Decree, 780.
  - b. What Is Concluded by Decree, 780.
    - (1) Decree of Condemnation and Sale, 780.
    - (2) Decree of Acquittal and Restitution, 781.
  - c. To What Property Decree of Condemnation Applies, 781.
  - d. When Final Decree Is Entered, 782.
  - e. Effect of Death of Claimant Pending Proceedings, 782.
15. Report of Commissioners Appointed to Assess Damages, 782.
16. Necessity for Order of Distribution, 782.
17. Costs and Expenses, 782.
- V. Appeal, 783.

## V. Recapture, 783.

- A. In General, 783.
- B. Before Condemnation, 783.
- C. After Condemnation, 783.
- D. Rule of Reciprocity, 784.
- E. In Whom Prize Vests Where Enemy's Vessel Is Captured, Recaptured, and Again Recaptured, 784.
- F. The Libel, 784.
- G. Claimant's Test Affidavit, 784.

## CROSS REFERENCES.

See the titles ADMIRALTY, vol. 1, p. 119; APPEAL AND ERROR, vol. 1, p. 333; ARBITRATION AND AWARD, vol. 2, p. 464; CITIZENSHIP, vol. 3, p. 788; COURTS, vol. 4, p. 861; DOMICILE, vol. 5, p. 473; INTERNATIONAL LAW, vol. 7, p. 239; JUDICIAL NOTICE, vol. 7, p. 672; JUDICIAL SALES, vol. 7, p. 704; JURISDICTION, vol. 7, p. 738; MARINE INSURANCE, vol. 8, p. 149; NEUTRALITY, vol. 8, p. 894; PENALTIES AND FORFEITURES, vol. 9, p. 357; REVENUE LAWS; SALVAGE; SHIPS AND SHIPPING; SLAVERY AND INVOLUNTARY SERVITUDE; STATUTES; TREASON; TREATIES; UNITED STATES; WAR.

As to capture and condemnation for breach of blockade, see the title BLOCKADE, vol. 3, p. 364. As to captures on land, see the titles ABANDONED AND CAPTURED PROPERTY, vol. 1, p. 1; WAR. As to seizures for breach of embargo and nonintercourse laws, see the title EMBARGO AND NONINTERCOURSE LAWS, vol. 5, p. 732. As to captures of pirates, see the title PIRACY, ante, p. 411. As to seizures for breach of the revenue laws, see the title REVENUE LAWS.

## I. Definition.

Prize is generally used as a technical term, to express a legal capture.<sup>1</sup>

1. **Prize defined.**—The Resolution, 2 Dall. 1, 4, 1 L. Ed. 263.



## II. Right to Visit and Search.

Under international law, a war vessel of a belligerent power, has a right to visit and search other vessels met at sea, and this though such vessels are sailing under the flag and license of a neutral nation.<sup>2</sup> The right must be conducted with as much regard to the safety of the vessel detained, as is consistent with a thorough examination of her character and voyage.<sup>3</sup> Without an express order of the government, a merchant vessel is not privileged from search by the fact that it has a government mail on board.<sup>4</sup> The right of visitation and search does not exist in time of peace.<sup>5</sup>

## III. Right to Detain.

To detain for examination is a right which a belligerent may exercise over every vessel, except a national vessel, which he meets with on the ocean.<sup>6</sup> This right necessarily carries with it all the means essential to its exercise.<sup>7</sup> The modern usages of war authorize the bringing of one of the principal officers of the vessel detained, on board the belligerent vessel, with the papers, for examination.<sup>8</sup>

## IV. Capture and Condemnation or Restoration.

**A. What Constitutes a Capture.**—In order to constitute a capture, some act should be done, indicative of an intention to seize and to retain as prize.<sup>9</sup> It is sufficient if such intention is fairly to be inferred from the conduct of the captor.<sup>10</sup> It is not essential that any considerable detachment of the crew

**2. Right of visitation and search.**—The *Nereide*, 9 Cranch 388, 427, 3 L. Ed. 769; The *Eliza*, 4 Dall. 37, 1 L. Ed. 731; The *Anna Maria*, 2 Wheat. 327, 4 L. Ed. 252; The *Panama*, 176 U. S. 535, 543, 44 L. Ed. 577; The *Peterhoff*, 5 Wall. 28, 61, 18 L. Ed. 564.

The right of search is essential to the exercise of the right of capture, and is a right growing out of and ancillary to that right. Where the greater right may be legally exercised without search, the right of search can never arise or come into question. The *Nereide*, 9 Cranch 388, 427, 3 L. Ed. 769.

**3.** The *Anna Maria*, 2 Wheat. 327, 4 L. Ed. 252.

**4.** The *Panama*, 176 U. S. 535, 543, 44 L. Ed. 577; The *Peterhoff*, 5 Wall. 28, 61, 18 L. Ed. 564.

The captain of a neutral merchant steamer is not privileged from search by the fact that he has a government mail on board; on the contrary he is bound by that circumstance to strict performance of neutral duties and to special respect for belligerent rights. The *Peterhoff*, 5 Wall. 28, 61, 18 L. Ed. 564.

**5. Right does not exist in time of peace.**—The *Marianna Flora*, 11 Wheat. 1, 6 L. Ed. 405; The *Antelope*, 10 Wheat. 66, 6 L. Ed. 268. See the title **SLAVERY AND INVOLUNTARY SERVITUDE.**

**Right of approach in time of peace.**—Ships of war sailing under the authority of their government, in time of peace, have a right to approach other vessels at sea, for the purpose of ascertaining their real characters, so far as the same can be done, without the exercise of the right of visitation and search. The *Marianna Flora*, 11 Wheat. 1, 6 L. Ed. 405.

No vessel is bound to await the approach of armed ships, under such circumstances. But such vessel cannot lawfully prevent their approach, by the use of force, upon the mere suspicion of danger. The *Marianna Flora*, 11 Wheat. 1, 6 L. Ed. 405.

Where an aggression was committed by a foreign armed merchant vessel, on a public armed ship of the United States, under these circumstances, and a combat ensued, upon mutual misapprehension and mistake, the commander of the public ship was held exempt from costs and damages, for subduing, seizing and bringing into a port of this country for adjudication, the offending vessel. The *Marianna Flora*, 11 Wheat. 1, 6 L. Ed. 405.

**6. Right of detention.**—The *Eleanor*, 2 Wheat. 345, 4 L. Ed. 257.

**7. What right carries with it.**—The *Eleanor*, 2 Wheat. 345, 358, 4 L. Ed. 257.

**8. Right to have papers brought on board belligerent.**—The *Eleanor*, 2 Wheat. 345, 4 L. Ed. 257.

The captain of a neutral merchant steamer, when brought to by a vessel of war, is not privileged by the fact of having mail on board, from sending, if required, his papers on board the boarding vessel for examination. The *Peterhoff*, 5 Wall. 28, 29, 18 L. Ed. 564.

**9. What constitutes a capture.**—The *Grotius*, 9 Cranch 368, 3 L. Ed. 762.

**10.** The *Grotius*, 9 Cranch 368, 3 L. Ed. 762.

A vessel having been brought to by a shot across her bow and notice that she would be fired into if she did not stop, was boarded by an ensign from the ship thus bringing her to. It was held that at the moment of the boarding the capture

of the capturing should be put on board the captured vessel. The prize master alone is sufficient.<sup>11</sup>

**B. Character of the Right of Capture.**—The right of capture is entirely derived from the law. It is not an absolute, vested right which cannot be taken away or modified by law. It is a limited right which is subject to all the restraints which the legislature has imposed, and is to be exercised in the manner which its wisdom has prescribed.<sup>12</sup>

**C. By Whom Capture May Be Made**—1. IN GENERAL.—Capture is universally deemed lawful when made by a declared enemy, lawfully commissioned,<sup>13</sup> and according to the laws of war.<sup>14</sup> But any citizen may seize any property, forfeited to the use of the government as prize of war, in order to enforce the forfeiture,<sup>15</sup> and it depends upon the government, whether it will act upon the seizure. If it proceeds to enforce the forfeiture by legal process, this is a sufficient confirmation of the seizure.<sup>16</sup> The right of capture does not reside in a neutral.<sup>17</sup>

2. PRIVATEERS.—The commission of a privateer is to be taken in its general terms, with reference to the laws under which it emanates, and as containing within itself all the qualifications and restrictions which the acts giving it existence have prescribed.<sup>18</sup> A capture by a privateer is not invalidated by the fact that its commander is an alien enemy.<sup>19</sup> By § 3 of the act of June 26, 1812, c. 430, a bond was required to be given, in the case of a privateer, to

was complete. The Mangrove Prize Money, 188 U. S. 720, 721, 47 L. Ed. 664.

Facts held to constitute a capture.—The *Grotius*, 9 Cranch 368, 3 L. Ed. 762.

11. Only prize master need be put on board captured vessel.—The *Alexander*, 8 Cranch 169, 179, 3 L. Ed. 524.

12. Character of the right of capture.—The *Thomas Gibbons*, 8 Cranch 421, 428, 3 L. Ed. 610.

13. Commission proof of national character.—“In general, the commission of a public ship, signed by the proper authorities of the nation to which she belongs, is complete proof of her national character; a bill of sale is not necessary to be produced. Nor will the courts of a foreign country inquire into the means by which the title to the property has been acquired.” The *Santissima Trinidad*, 7 Wheat. 283, 335, 5 L. Ed. 454.

Commission not authorizing captures.—A commission issued by Aury, as “Brigadier of the Mexican republic” (a republic whose existence is unknown and unacknowledged), or as “Generalissimo of the Floridas” (a province in the possession of Spain), will not authorize armed vessels to make captures at sea. *United States v. Klintonck*, 5 Wheat. 144, 5 L. Ed. 55.

The seal to the commission of a new government, not acknowledged by the government of the United States, cannot be permitted to prove itself. But the fact that the vessel cruising under such commission is employed by such government, may be established by other evidence, without proving the seal. The *Estrella*, 4 Wheat. 298, 4 L. Ed. 574.

Where a privateer, cruising under such a commission, was lost, subsequent to the capture in question, the previous existence

of the commission on board was allowed to be proved by parol evidence. The *Estrella*, 4 Wheat. 298, 4 L. Ed. 574.

14. When capture is lawful.—*Mauran v. Insurance Co.*, 6 Wall. 1, 10, 18 L. Ed. 836.

15. Seizure by citizen to enforce forfeiture.—The *Caledonian*, 4 Wheat. 100, 4 L. Ed. 523; The *Langdon Cheves*, 4 Wheat. 103, 104, 4 L. Ed. 525.

“A noncommissioned cruiser may seize for the benefit of the government.” *Carrington v. Merchants’ Ins. Co.*, 8 Pet. 495, 522, 8 L. Ed. 1021; The *Dos Hermanos*, 10 Wheat. 306, 6 L. Ed. 328; The *Dos Hermanos*, 2 Wheat. 76, 99, 4 L. Ed. 189; The *Amiable Isabella*, 6 Wheat. 1, 5 L. Ed. 191.

16. Confirmation of seizure by government.—The *Caledonian*, 4 Wheat. 100, 4 L. Ed. 523; The *Langdon Cheves*, 4 Wheat. 103, 104, 4 L. Ed. 525.

17. Neutral not entitled to make capture.—*Talbot v. Jansen*, 3 Dall. 133, 1 L. Ed. 540.

A capture made by a neutral in co-operation with a belligerent privateer is illegal.—*Talbot v. Jansen*, 3 Dall. 133, 1 L. Ed. 540.

18. Terms of commission construed with reference to laws under which it emanates.—The *Thomas Gibbons*, 8 Cranch 421, 428, 3 L. Ed. 610.

In this view, the commission of a privateer was qualified and restrained by the power of the president to issue instructions under the prize act of June 26, 1812. The *Thomas Gibbons*, 8 Cranch 421, 428, 3 L. Ed. 610.

19. That commander is an alien enemy does not invalidate capture.—The *Mary and Susan*, 1 Wheat. 46, 56, 4 L. Ed. 32.

observe the treaties and laws of the United States.<sup>20</sup>

3. SHIPS OF WAR OF REBELLIOUS COLONIES.—Where the government of the United States has recognized the existence of a civil war between a foreign nation and her colonies, and has avowed a determination to remain neutral between them, and to allow each the same rights of asylum, hospitality and intercourse, each party is to be deemed a belligerent nation; and a ship of war of the colonies, as regards captures made by her, is entitled to all the rights and immunities of a public ship of such a nation.<sup>21</sup>

4. ENFORCEMENT OF RIGHTS AGAINST ARMED INSURRECTION.—The United States, in the enforcement of their constitutional rights against armed insurrection, have all the powers of the most favored belligerent and as such they may by capture enforce their authority.<sup>22</sup>

5. CAPTURE OF PROPERTY BELONGING TO SUBJECTS OF A FRIENDLY POWER.—A capture made by citizens of the United States, of property belonging to subjects of a country in amity with the United States, is unlawful, wheresoever the capturing vessel may have been equipped, or by whomsoever commissioned; and the property thus captured if brought within the neutral limits of this country, will be restored to the original owners.<sup>23</sup>

D. When Capture May Be Made.—In Port after Termination of Voyage.—A vessel and cargo, which is liable to capture as enemy's property, or for sailing under the pass or license of the enemy, or for trading with the enemy, may be seized, after her arrival in a port of the United States, and condemned as prize. The delictum is not purged by the termination of the voyage.<sup>24</sup>

E. Where Capture May Be Made—1. IN GENERAL.—A capture as prize of war may lawfully be made within the territorial limits of the United States, at any place below lowwater mark.<sup>25</sup> Mere contact with land does not ipso facto exclude jurisdiction in prize.<sup>26</sup> But under the seventh section of the act of July 2d, 1864, no property seized or taken upon any of the inland waters of the United States, by the naval forces thereof, could be regarded as maritime prize.<sup>27</sup>

20. Breach of condition of privateer's bond.—An American privateer making collusive captures of enemy's property, during the war of 1812 and under color of such captures, introducing goods and merchandise into the United States, contrary to the provisions of the act of March 1st, 1809, c. 195, revived and continued in force by the act of March 2d, 1811, c. 306, thereby broke the condition of a bond given pursuant to the above act. *Greeley v. United States*, 8 Wheat. 257, 260, 5 L. Ed. 611.

21. Ships of war of rebellious colonies.—The *Santissima Trinidad*, 7 Wheat. 283, 337, 5 L. Ed. 454.

So held in regard to the colonies, during the existence of the civil war between Spain and her colonies, and previous to the acknowledgment of the independence of the latter by the United States. The *Santissima Trinidad*, 7 Wheat. 283, 337, 5 L. Ed. 454.

22. Enforcement of rights against armed insurrection.—*Lamar v. Browne*, 92 U. S. 187, 23 L. Ed. 650.

23. Capture of property belonging to subjects of a friendly power.—The *Bello Corrunes*, 6 Wheat. 152, 5 L. Ed. 229; *Talbot v. Jansen*, 3 Dall. 133, 1 L. Ed. 540.

A commission to cruise as a privateer, granted to an American citizen by a for-

eign officer within the jurisdiction of the United States, is invalid. *Talbot v. Jansen*, 3 Dall. 133, 1 L. Ed. 540.

24. Capture may be made in port after termination of voyage.—The *Caledonian*, 4 Wheat. 100, 4 L. Ed. 523; The *Langdon Cheves*, 4 Wheat. 103, 104, 4 L. Ed. 525.

25. Where capture may be made.—The *Joseph*, 8 Cranch 451, 3 L. Ed. 621.

26. The *Manila Prize Cases*, 188 U. S. 254, 47 L. Ed. 463.

Under the federal statutes public property designed for hostile uses, and stored on the seashore in an establishment for facilitating naval warfare, may be made prize and condemned as such, when captured by naval forces operating directly from the sea. The *Manila Prize Cases*, 188 U. S. 254, 277, 47 L. Ed. 463.

27. *Porter v. United States*, 106 U. S. 607, 612, 27 L. Ed. 286; The *Cotton Plant*, 10 Wall. 577, 580, 19 L. Ed. 983.

The term "inland" as here used was intended to apply to all waters of the United States upon which a naval force could go, other than bays and harbors on the seacoast. *Porter v. United States*, 106 U. S. 607, 612, 27 L. Ed. 286.

A capture made within the state of North Carolina on the Roanoke River, 130 miles from its mouth, by a naval force detached from two steamers that had pro-



2. CAPTURES IN NEUTRAL WATERS.—A capture in neutral waters is valid as between belligerents.<sup>28</sup> Neither a belligerent owner, nor an individual enemy owner,<sup>29</sup> nor a neutral acting the part of an enemy,<sup>30</sup> can be heard to complain. But the neutral sovereign whose territory has been violated may interpose and demand reparation, and is entitled to have the captured property restored.<sup>31</sup> But if the captured vessel commence hostilities upon the captor, she forfeits the neutral protection, and the capture is not an injury for which redress can be sought by the neutral sovereign.<sup>32</sup>

**F. Vessels and Property Subject to Capture and Condemnation—1. IN GENERAL.—National Character of Owner at Time of Capture Determines His Rights.**—The rights of the owner of property captured as maritime prize of war must be determined by his national character at the time of capture.<sup>33</sup>

The character of property, during war, cannot be changed in transitu, by any act of the owner, subsequent to its capture.<sup>34</sup>

No provision for the immunity of mail ships from capture has been adopted by such a general consent of civilized nations as to constitute a rule of international law.<sup>35</sup>

**What Determines Character of Ship.**—Ships in time of war are bound by the character impressed upon them by the government from which their documents issue, and under whose flag and pass they sail;<sup>36</sup> and in a prize cause, the ship's papers are prima facie, but not conclusive, evidence of the national character of the property.<sup>37</sup>

**Liability of Ship Creates Presumption That Cargo Is Liable.**—When a vessel is liable to confiscation, the first presumption is that the cargo is so as well.<sup>38</sup>

2. ENEMIES' VESSELS AND PROPERTY—*a. Statement of General Rule.*—As a general rule, property of the enemy, if at sea, and not expressly made immune,<sup>39</sup> is subject to capture and condemnation as prize of war;<sup>40</sup> and this though it is found in the vessel of a neutral.<sup>41</sup>

*b. What Property Considered Enemies' Property*—(1) *General Rule.*—"Enemy property" is a technical phrase peculiar to prize courts, and depends upon principles of public police as distinguished from the common law. The general rule is that in war the citizens or subjects of the belligerents are enemies to each

ceeded up the river, one about 80 miles and the other about 100, where they stopped in consequence of the crookedness of the stream and apprehensions of low water, held to be a capture upon "inland waters" of the United States, as that phrase is used in the act of 1864, and therefore not to be regarded as maritime prize. *The Cotton Plant*, 10 Wall. 577, 19 L. Ed. 983.

28. **Captures in neutral waters.**—*The Florida*, 101 U. S. 37, 42, 25 L. Ed. 898; *The Anne*, 3 Wheat. 435, 4 L. Ed. 428; *The Sir William Peel*, 5 Wall. 517, 18 L. Ed. 696.

29. *The Florida*, 101 U. S. 37, 42, 25 L. Ed. 898; *The Adela*, 6 Wall. 266, 18 L. Ed. 821; *The Sir William Peel*, 5 Wall. 517, 18 L. Ed. 696.

30. *The Adela*, 6 Wall. 266, 18 L. Ed. 821; *The Sir William Peel*, 5 Wall. 517, 18 L. Ed. 696.

31. *The Florida*, 101 U. S. 37, 42, 25 L. Ed. 898; *The Anne*, 3 Wheat. 435, 4 L. Ed. 428. See, also, *The Sir William Peel*, 5 Wall. 517, 18 L. Ed. 696.

32. *The Anne*, 3 Wheat. 435, 4 L. Ed. 428.

33. **National character of owner at time**

**of capture determines his rights.**—*The Venus*, 8 Cranch 253, 285, 3 L. Ed. 353.

34. **Character of property cannot be changed by act of owner subsequent to capture.**—*The Venus*, 8 Cranch 253, 284, 3 L. Ed. 353.

35. **Mail ships not immune from capture.**—*The Panama*, 176 U. S. 535, 542, 44 L. Ed. 577.

36. **How character of ship determined.**—*The William Bagaley*, 5 Wall. 377, 18 L. Ed. 583.

37. *The Resolution*, 2 Dall. 1, 19, 1 L. Ed. 263.

38. **Liability of ship creates presumption that cargo is liable.**—*The Sally Maggee*, 3 Wall. 451, 18 L. Ed. 197.

39. See post, "Exemptions from Capture and Condemnation," IV, F, 2, h.

40. **Enemies' property generally subject to capture and condemnation.**—*The William Bagaley*, 5 Wall. 377, 405, 18 L. Ed. 583; *The Nereide*, 9 Cranch 388, 427, 3 L. Ed. 769; *The George*, 1 Wheat. 408, 409, 4 L. Ed. 128; *The Amiable Isabella*, 6 Wheat. 1, 66, 5 L. Ed. 191.

41. *The Nereide*, 9 Cranch 388, 418, 3 L. Ed. 769.

other without regard to individual sentiments or dispositions, and that political status determines the question of enemy ownership.<sup>42</sup>

(2) *Property of Persons Domiciled or Residing in Enemy's Country.*—Property of persons domiciled or residing within the enemy's lines is enemy property, and liable to capture as prize of war,<sup>43</sup> whether such persons be citizens or subjects of the capturing nation,<sup>44</sup> or neutrals.<sup>45</sup> A mere declaration made by a citizen of one belligerent domiciled in the country of the other belligerent, of an intention to remove to the country to which he owes allegiance, will not protect his property from capture and condemnation.<sup>46</sup>

(3) *Property within Enemy's Territory.*—All property within enemy territory is, for the purposes of capture, enemy property,<sup>47</sup> without regard to the status of the owner.<sup>48</sup>

**42. "Enemy property" defined.**—The *Benito Estenger*, 176 U. S. 568, 571, 44 L. Ed. 592; *Prize Cases*, 2 Black 635, 674, 17 L. Ed. 459; *Jecker v. Montgomery*, 18 How. 110, 15 L. Ed. 311.

The subjects of a country at war with the United States, are, while the war lasts, enemies of the United States, although they are not directly connected with military operations. Therefore a seizure for the purposes of war of a vessel belonging to such subjects, is a seizure of enemy's property; and if made while the war is flagrant, is an act of war within the limits of military operations. *Hijo v. United States*, 194 U. S. 315, 322, 48 L. Ed. 994.

**43. "Shipments made by merchants, actually domiciled in the enemy's country, at the breaking out of a war, partake of the nature of enemy trade, and, as such, are subject to belligerent capture."** The *Mary and Susan*, 1 Wheat. 46, 54, 4 L. Ed. 32.

The property of persons domiciled or residing within the Confederate States during the Civil War was a proper subject of capture on the sea as enemies' property, whether the owner was in arms against the United States government or not. *Prize Cases*, 2 Black 635, 671, 17 L. Ed. 459. See, also, *The Peterhoff*, 5 Wall. 28, 60, 18 L. Ed. 564.

**44. Property of subjects of one belligerent domiciled in country of other belligerent.**—*United States v. Farragut*, 22 Wall. 406, 407, 22 L. Ed. 879; *The Mary and Susan*, 1 Wheat. 46, 54, 4 L. Ed. 32; *The Venus*, 8 Cranch 253, 279, 3 L. Ed. 353.

The property of a citizen or subject of one belligerent domiciled or residing in the country of the other belligerent, is enemy property, and liable to capture as prize of war, without regard to his sentiments of loyalty or disloyalty to his own country. *United States v. Farragut*, 22 Wall. 406, 407, 22 L. Ed. 879.

**Facts constituting acquisition of domicile in enemy's country.**—A naturalized citizen, who, in time of peace, returns to his native country, for the purpose of trade, but with the intention of returning again to his adopted country, continuing in the former a year after the knowledge of the existence of war between the two

countries, for the purpose of winding up a complicated business, and engaging in no new commercial transactions whatever with the enemy, and actually returning to his adopted country in a little more than a year after his first knowledge of the war, is to be considered as having gained a domicile in his native country, and his goods, captured after the declaration of war, are liable to condemnation. *The Frances*, 8 Cranch 335, 3 L. Ed. 581.

**45. Property of neutrals domiciled in enemies' country.**—*The Venus*, 8 Cranch 253, 279, 3 L. Ed. 353; *The Venice*, 2 Wall. 258, 275, 17 L. Ed. 866.

Citizens of a neutral country who reside and are engaged in business in the enemies' country, are, according to settled principles of prize law, enemies, and their property subject to condemnation as enemies' property. *The Flying Scud*, 6 Wall. 263, 266, 18 L. Ed. 755.

**The share of a partner in a neutral house whose domicile is in the hostile country, is subject to condemnation as prize.** *The Antonia Johanna*, 1 Wheat. 159, 168, 4 L. Ed. 60.

**46. Declaration of intention to return to country to which allegiance is owed.**—*The Venus*, 8 Cranch 253, 281, 3 L. Ed. 353.

**47. Property within enemy territory is enemy property.**—*Young v. United States*, 97 U. S. 39, 60, 24 L. Ed. 992; *Lamar v. Browne*, 92 U. S. 187, 194, 23 L. Ed. 650.

**48. Status of owner immaterial.**—*Lamar v. Browne*, 92 U. S. 187, 194, 23 L. Ed. 650.

**Products of enemy country.**—The liability of capture of property, the product of an enemy country, and coming from it during war, is irrespective of the status domicilli guilt or innocence of the owner. If it come from enemy territory, it bears the impress of enemy property. *The Gray Jacket*, 5 Wall. 342, 18 L. Ed. 646.

"The produce of the soil of the hostile territory, as well as other property engaged in the commerce of the hostile power, as the source of its wealth and strength, are always regarded as legitimate prize, without regard to the domicile of the owner, and much more so if he reside and trade within their terri-



**Thus personal property left in a hostile country by an owner who abandons such country** in order to go to the other belligerent, and so to return to his proper allegiance and soil, becomes, unless an effort is made with promptitude to remove it from such country, impressed with its character, and as such is liable to the consequences attaching to enemy's property.<sup>49</sup>

(4) *Property of Partnership Established in Enemy's Country.*—The property of a commercial house, established in the enemy's country, is enemy property, and is subject to seizure and condemnation as prize without regard to the citizenship or domicile of the partners.<sup>50</sup>

(5) *Property Engaged in Illegal Intercourse with the Enemy.*—Property engaged in any illegal intercourse with the enemy is deemed enemy property, whether belonging to an ally or a citizen and is liable to confiscation as prize

tory." Prize Cases, 2 Black 635, 674, 17 L. Ed. 459.

**The produce of an enemy's colony** is to be considered as hostile property, so long as it belongs to the owner of the soil, whatever may be his national character in other respects, or whatever may be his place of residence. Thirty Hogsheads of Sugar *v.* Boyle, 9 Cranch 191, 3 L. Ed. 701.

An island in the temporary occupation of the enemy, is to be considered as an enemy's colony. Thirty Hogsheads of Sugar *v.* Boyle, 9 Cranch 191, 3 L. Ed. 701.

**49. Personal property of citizen of one belligerent left in country of other belligerent.**—The William Bagaley, 5 Wall. 377, 18 L. Ed. 583.

The presumption of the law of nations is against an owner who suffers such property to continue in the hostile country for much length of time. The William Bagaley, 5 Wall. 377, 18 L. Ed. 583.

Property, the product of an enemy country, coming from it during war, and belonging to a loyal citizen of the country of the captors, is as much liable to condemnation as if owned by a citizen or subject of the hostile country or by the hostile government itself. The Gray Jacket, 5 Wall. 342, 369, 18 L. Ed. 646.

The only qualification of this rule is that where, upon the breaking out of hostilities or as soon after as possible, the owner escapes with such property as he can take with him, or in good faith thus early removes his property, with the view of putting it beyond the dominion of the hostile power, the property in such cases is exempt from the liability which would otherwise attend it. The Gray Jacket, 5 Wall. 342, 18 L. Ed. 646.

Where a war broke out in April, 1861, a removal on the 30th of December, 1863, was held to be too late. The Gray Jacket, 5 Wall. 342, 18 L. Ed. 646.

**The share of a citizen in a ship and cargo sailing under an enemy's flag and papers,** and who has had ample time and every facility to withdraw his effects from the enemy country, or dispose of such interests as could not be removed, but who has not attempted so to withdraw or dispose of them, is subject to capture and

condemnation equally with the shares of enemies in the same ship and cargo. The William Bagaley, 5 Wall. 377, 18 L. Ed. 583.

**Property shipped before knowledge of war.**—If a citizen of the United States establishes his domicile in a foreign country, between which and the United States hostilities afterwards break out, any property shipped by such citizen, before knowledge of the war, and captured by an American cruiser, after the declaration of war, must be condemned as lawful prize. The Venus, 8 Cranch 253, 3 L. Ed. 353; The Frances, 8 Cranch 363, 371, 3 L. Ed. 590.

**50. Property of partnership established in enemy's country.**—The Cheshire, 3 Wall. 231, 233, 18 L. Ed. 175; The Friendschaft, 4 Wheat. 105, 107, 4 L. Ed. 525; The Antonia Johanna, 1 Wheat. 159, 4 L. Ed. 60; The William Bagaley, 5 Wall. 377, 18 L. Ed. 583; Prize Cases, 2 Black 635, 681, 17 L. Ed. 459.

"The trade of a house of this kind is essentially a hostile trade, and the property employed in its prosecution is therefore treated as enemy's property, though some of the partners may have a neutral domicile." The Cheshire, 3 Wall. 231, 233, 18 L. Ed. 175; The Friendschaft, 4 Wheat. 105, 107, 4 L. Ed. 525; The Antonia Johanna, 1 Wheat. 159, 4 L. Ed. 60.

The effect of war is to dissolve a partnership subsisting between citizens of nations at war; and if a person abandoning the enemy country, has had his property in partnership with citizens of such country, it is his duty to dispose of, and withdraw his interest in the firm. If he does not, such interest is subject to the same rule that governs in the case of individual property. The William Bagaley, 5 Wall. 377, 18 L. Ed. 583.

During the Civil War, a loyal citizen domiciled at the time it broke out in one of the Confederate States, and trading there as a member of a commercial firm, abandoned it and removed to a loyal state. He never in any way aided or abetted the rebellion, but there was no evidence that he ever attempted or desired to withdraw his property from the rebellious region. In a year, more or less, after the war broke out, the Confederate authori-



of war.<sup>51</sup> But the property is not divested ipso facto by the mere act of illicit intercourse with the enemy. It is only liable to be condemned as enemy property, or as adhering to the enemy, if rightfully captured during the voyage.<sup>52</sup> A vessel is not exempted from liability to condemnation by the fact that the owner was ignorant that its destination was an enemy's port. The fate of the vessel must be decided by the act of those persons who had her in charge.<sup>53</sup> The interposition of a neutral port through which the property is to pass, will not prevent it from being confiscated.<sup>54</sup>

(6) *Ships Sailing under the License of the Enemy*.—A ship, sailing under the pass or license of the enemy, is deemed to be an enemy's ship, and is liable to condemnation as prize,<sup>55</sup> without regard to the object of the voyage or the port of destination.<sup>56</sup> It is not necessary, in order to subject the property to condemnation, that the person granting the license should be duly authorized to

ties professed by one of their decrees to confiscate his interest in the firm; and the partners resident in the Confederate States—he having no connection with or knowledge of their action—loaded a ship which he alleged belonged to his firm when he left it, and which, in attempting, under papers, flag, officers and crew of the Confederate States, to run the blockade established by the United States, two years before, off the Southern coast, was captured by a federal cruiser. It was held that so much time having elapsed after the proclamation and before the confiscation and the capture, without effort on the part of the loyal owner to get it away from the rebellious region, his share in vessel and cargo was rightly condemned with the shares of the partners in rebellion; that the alleged confiscation was no excuse for his not having previously made an effort to withdraw or dispose of his interest in the firm and that neither his loyal domicile during the rebellion, nor under the circumstances, the confiscation, nor his want of connection with or knowledge of the enterprise, nor all combined, defeated the right of the captors. *The William Bagaley*, 5 Wall. 377, 18 L. Ed. 583.

**51. Property engaged in illegal intercourse with enemy liable to confiscation.**—*The Benito Estenger*, 176 U. S. 568, 571, 44 L. Ed. 592; *Prize Cases*, 2 Black 635, 674, 17 L. Ed. 459; *Jecker v. Montgomery*, 18 How. 110, 15 L. Ed. 311; *The Sally*, 8 Cranch 382, 384, 3 L. Ed. 597; *The Caledonian*, 4 Wheat. 100, 102, 4 L. Ed. 523; *The Langdon Cheves*, 4 Wheat. 103, 104, 4 L. Ed. 525; *The Venus*, 8 Cranch 253, 280, 3 L. Ed. 353. See post, "Goods Destined for Use of Enemy or Rebel Military Forces," IV, F, 4, b.

A vessel sailing to an enemy's country, after knowledge of the war, and taken, bringing from that country a cargo, consisting chiefly of enemy goods, is guilty of trading with the enemy and is liable to confiscation. *The St. Lawrence*, 8 Cranch 434, 3 L. Ed. 615.

That a vessel sailed from an American port with the design of trading with the enemy, and did, in fact, hold illegal inter-

course with them, are grounds sufficient to subject both the vessel and cargo to condemnation. *Jecker v. Montgomery*, 13 How. 498, 14 L. Ed. 240; *Jecker v. Montgomery*, 18 How. 110, 112, 15 L. Ed. 311.

**Facts held to constitute trading with the enemy.**—A vessel owned by citizens of the United States, sailed from Naples, in the year 1812, for the United States, with a cargo and a British license to carry the same to England. On her passage, hearing that war had broken out between Great Britain and the United States, she altered her course for England, was captured by the British, carried into Ireland, libelled and acquitted upon her license. She sold her cargo, and after a detention of seven months in Ireland, purchased a return cargo in Liverpool, sailed for the United States, and was captured by a United States privateer. It was held that this constituted trading with the enemy, and the vessel and cargo were condemned as prize to the captors. *The Alexander*, 8 Cranch 169, 3 L. Ed. 524.

**Sending vessel to bring property from enemy's country.**—After a declaration of war, an American citizen cannot lawfully send a vessel to the enemy's country, to bring away his property, as this constitutes trading with the enemy within the meaning of prize law. *The Rapid*, 8 Cranch 155, 3 L. Ed. 520.

**52. Capture during voyage essential to liability to confiscation.**—*The Thomas Gibbons*, 8 Cranch 421, 3 L. Ed. 610.

**53. Ignorance of owner will not exempt vessel.**—*Jecker v. Montgomery*, 18 How. 110, 15 L. Ed. 311.

**54. Interposition of neutral port will not exempt property.**—*Jecker v. Montgomery*, 18 How. 110, 15 L. Ed. 311.

**55. Ship sailing under license of enemy liable to confiscation.**—*The Caledonian*, 4 Wheat. 100, 102, 4 L. Ed. 523; *The Langdon Cheves*, 4 Wheat. 103, 104, 4 L. Ed. 525; *The Hiram*, 1 Wheat. 440, 4 L. Ed. 131; *The Ariadne*, 2 Wheat. 143, 4 L. Ed. 205.

**56. The Ariadne**, 2 Wheat. 143, 4 L. Ed. 205.

**A vessel captured during the Spanish-American War** was owned by a corporation incorporated under the laws of Spain, had

grant it, provided the person receiving it takes it with the expectation that it will protect his property from the enemy.<sup>57</sup> The knowledge of an agent that the vessel captured was sailing under a license from the enemy, will affect the principal, although he may, in reality be ignorant of the fact.<sup>58</sup> The circumstances of a vessel having been sent into an enemy's port, for adjudication, and afterwards permitted to resume her voyage, raises a violent presumption that she had a license from the enemy.<sup>59</sup>

c. *Consignments of Goods*—(1) *Consignments by Enemies*.—An intention clearly proved, of a consignor of goods, to vest the right of property in the consignee, is not sufficient to affect a change of property, until the goods are received by the consignee, or some evidence is given of his agreement to take them on his own account. Until that time, the goods are at the risk of the shippers; and if they are enemies, the goods, if captured, are good prize.<sup>60</sup>

a Spanish registry, was sailing under a Spanish flag and a Spanish license, and was offered and manned by Spaniards. It was held that she was a Spanish ship, although the stock of the corporation which owned her belonged to British subjects, and she was insured against risks of war by British underwriters. *The Pedro*, 175 U. S. 354, 367, 44 L. Ed. 195. See, also, *The Guido*, 175 U. S. 382, 383, 44 L. Ed. 206.

**Sailing in furtherance of views or interests of enemy.**—Sailing on a voyage, under the license and passport of protection of the enemy, in furtherance of his views or interests, constitutes such an act of illegality as subjects the ship and cargo to condemnation. *The Hiram*, 8 Cranch 444, 3 L. Ed. 619; *The Aurora*, 8 Cranch 203, 3 L. Ed. 536; *The Julia*, 8 Cranch 181, 3 L. Ed. 528.

Sailing with a cargo of provisions to the port of a neutral, who is the ally of our enemy, in his war with another power, is such a furtherance of the views of our enemy. *The Hiram*, 8 Cranch 444, 3 L. Ed. 619.

Sailing, with an intention to further the views of the enemy, is sufficient to condemn the property although that intention be frustrated by capture. *The Aurora*, 8 Cranch 203, 3 L. Ed. 536.

**57. That license was granted by person unauthorized, immaterial.**—*The Aurora*, 8 Cranch 203, 3 L. Ed. 536.

**58. Knowledge of agent will effect principal.**—*The Hiram*, 1 Wheat. 440, 4 L. Ed. 131.

**59. Facts raising presumption that vessel had enemy's license.**—*The Langdon Cheves*, 4 Wheat. 103, 4 L. Ed. 525.

**60. What essential to effect change of property.**—*The Frances*, 8 Cranch 359, 3 L. Ed. 589; *The Frances*, 8 Cranch 358, 3 L. Ed. 589.

**Change of property not effected.**—In *The St. Joze Indiano*, 1 Wheat. 208, 4 L. Ed. 73, goods were shipped by D., B. and Co. of Liverpool on board a neutral ship bound to Rio de Janeiro, which was captured and brought into the United States for adjudication. The invoice was headed:

"Consigned to Messrs. D., B. and F. by order and for account of J. L." In a letter accompanying the bill of lading and invoice, D., B. and Co. wrote D. B. and F.: "For Mr. L. we open an account in our books here, and debit him, etc. We cannot yet ascertain the proceeds of his hides, etc., but find his order for goods will far exceed the amount of these shipments, therefore we consign the whole to you, that you may come to a proper understanding with him." The two houses consisted of the same persons. It was held that the goods were, during their transit, the property and at the risk of the enemy shippers, and therefore subject to condemnation.

Where goods on board a captured vessel were shipped by a subject of the enemy to citizens of the capturing nation, who had an option to accept or reject the whole invoice, in a limited time, it was held that the goods remained the property of the shippers until the exercise of such option, and were liable to condemnation as enemy property. *The Frances*, 8 Cranch 354, 357, 3 L. Ed. 587.

A British merchant purchased with his own funds, two cargoes of goods, in consequence of, but not in exact conformity with, the orders of an American house, and shipped them to America, giving the American house an option, within twenty-four hours after receipt of his letter, to take or reject both cargoes. The consignees gave notice, within the time, that they would take one cargo, but would consider as to the other. It was held that the right of property in the cargo, not accepted, did not, in transitu, vest in the American house, but remained in the British subject, and was, therefore, upon capture during war between the United States and Great Britain, liable to condemnation as enemy property. *The Frances*, 9 Cranch 183, 3 L. Ed. 698.

Goods were purchased by British merchants, before the war of 1812, between the United States and Great Britain, in pursuance of orders from American citizens, and shipped to the agent of the British merchants in the United States,

(2) *Consignments to Enemies*.—Bills of lading consigning a cargo to enemies make out a *prima facie* case for the condemnation of the cargo as enemies' property.<sup>61</sup> But in such case, if the purchase of the goods by the consignor was in contravention of the consignee's orders, the property in the goods does not vest in the consignee until he ratifies the purchase, and if he rejects it the goods cannot be condemned as enemies' property.<sup>62</sup> But such purchase in contravention of orders and rejection must be affirmatively and sufficiently proved.<sup>63</sup>

also an American citizen, "on account and risk of an American citizen," and the accompanying invoices, bills of lading and letters were addressed to the American citizens for whom the purchase was made, and all concurred to show the property to be in them. These documents, however, were inclosed in a letter from the consignors to their agent directing him not to deliver the goods, in case of the existence of certain circumstances, nor until he should have received payment from the consignees in cash. It was held that the property in the goods continued in the British consignors at the time of the capture, and that they were liable therefore to condemnation as enemy's property. *The Merrimack*, 8 Cranch 317, 3 L. Ed. 575.

**Change of property effected.**—Goods purchased by British merchants, before the war of 1812 between the United States and Great Britain, in pursuance of orders from American citizens, shipped to the agent of the British merchants in the United States, also an American citizen, "on account and risk of an American citizen," and no circumstances of fraud or unfairness appearing in the transaction—were vested in the American citizens at the time of the shipment, and are not liable to condemnation, although the vessel sailed from England, after the declaration of war was known there. *The Merrimack*, 8 Cranch 317, 3 L. Ed. 575.

Goods by the same ship, purchased as above and consigned to the agent of the consignors, being an American citizen, in whose name also the bill of lading was made out, but the bill of parcels and invoice in the name of the American merchants for whom the purchase was made; the shipment also being expressed to be on their account, though the goods are spoken of in the letter of the consignors as British property—vested in the American merchants at the time of shipment. The circumstance that the goods continue, during the whole voyage, at the risk of the shippers is immaterial. *The Merrimack*, 8 Cranch 317, 3 L. Ed. 575.

**Property vested in consignees and not divested by intermediate assignment.**—In *The Mary and Susan*, 1 Wheat. 25, 4 L. Ed. 27, an American merchantman bound from Liverpool to New York was captured by a privateer of the United States during the war of 1812. In her cargo were certain goods which had been shipped by British subjects to citizens of the United

States, in pursuance of orders received before the declaration of war. Previous to the execution of the orders the shippers became embarrassed, and assigned the goods to certain bankers to secure advances made by them, with a request to the consignees to remit the amount to the bankers, who also repeated the same request, the invoices being for gain and risk of the consignees, and stating the goods to be then the property of the bankers. It was held that the goods having been purchased and shipped in pursuance of orders from the consignees, the property was originally vested in them, and was not divested by the intermediate assignment, which was merely intended to transfer the right to the debt due from the consignees.

**61. Bills of lading make out prima facie case for condemnation.**—*The Sally Magee*, 3 Wall. 451, 457, 18 L. Ed. 197.

**Cargo held to be property of consignees.**—A cargo shipped on an enemy vessel to an enemy port by neutral merchants before declaration of war held upon the evidence in the case, to be, during the voyage, the property of the consignees, subjects of the enemy, and, as such, subject to capture and condemnation. *The Carlos F. Roses*, 177 U. S. 655, 44 L. Ed. 929.

**62. Purchase by consignor in contravention of consignee's orders.**—*The Sally Magee*, 3 Wall. 451, 457, 18 L. Ed. 197; *The Frances*, 8 Cranch 354, 3 L. Ed. 587; *The Merrimack*, 8 Cranch 317, 3 L. Ed. 575.

**63. The Sally Magee**, 3 Wall. 451, 458, 18 L. Ed. 197.

Ownership thus presumptively in an enemy is not disproved by a test affidavit in prize, stating generally that the goods consigned had been purchased for their consignee contrary to his instructions, and that he had rejected them; and that this appeared "from the correspondence of the parties," which the affiant (an asserted agent of the alleged true owner) swore that he "believed to be true," but which neither he nor any one produced, or accounted for the absence of; and where, though two years had passed between the date of the claim and that of the decree, the consignors and asserted owners, who lived at Rio Janeiro, had not manifested any interest in the result of the prize proceedings, which were at New York, nor, so far as appeared, had been even applied to in the matter. *The Sally Magee*, 3 Wall. 451, 18 L. Ed. 197.



d. *Armed Neutral Merchant Vessel Captured by Enemy*.—If a neutral merchant vessel with an armament originally taken on board for defense only is captured by the enemy, she becomes an armed vessel of the enemy, and is liable to capture as such,<sup>64</sup> provided her armament is of sufficient strength to interfere with commerce.<sup>65</sup>

e. *Enemy's Vessels Transferred to Neutrals*.—(1) *Vessels Owned by Individuals*.—The fact that an enemy's vessel has been transferred to a neutral will not protect it from condemnation if there has not been an absolute sale, or if the transfer was merely colorable.<sup>66</sup> The burden of proof is upon the claimant to show that there has been a valid transfer.<sup>67</sup>

(2) *War Vessels*.—A bona fide purchase for a commercial purpose by a neutral, in his own home port, of a ship of war of a belligerent that had fled to such port in order to escape from enemy vessels in pursuit, but which was bona fide dismantled prior to the sale and afterwards fitted up for the merchant service, does not pass a title above the right of capture by the other belligerent.<sup>68</sup>

f. *Effect of Possession of Neutral Papers*.—The possession of neutral papers, however formal and regular, if colorable only, cannot affect belligerent rights.<sup>69</sup>

g. *Evidence of Enemy Ownership*.—(1) *Presumptions and Burden of Proof*.—Everything that issues from a hostile country is prima facie the property of the enemy; and it is incumbent upon the claimant to support the negative of the proposition.<sup>70</sup> And where a vessel captured is an enemy vessel the presumption is that the cargo is enemy's property, and this can only be overcome by clear and positive evidence to the contrary.<sup>71</sup>

(2) *Weight and Sufficiency*.—In several cases the supreme court has passed upon the sufficiency of the evidence to prove enemy ownership.<sup>72</sup>

h. *Exemptions from Capture and Condemnation*.—(1) *In General*.—To the general rule of international law that all property belonging to the enemy is li-

**64. Armed neutral merchant vessel captured by enemy.**—The *Panama*, 176 U. S. 535, 547, 44 L. Ed. 577; The *Charming Betsy*, 2 Cranch 64, 121, 2 L. Ed. 208; The *Amelia*, 1 Cranch 1, 32, 2 L. Ed. 15.

While such a defensive armament would not preclude the vessel, while in the possession of her neutral owners, from claiming the protection of neutrality, the fact that its original purpose was purely defensive is immaterial where the vessel has been captured by the enemy. The *Panama*, 176 U. S. 535, 547, 44 L. Ed. 577.

**65.** The *Charming Betsy*, 2 Cranch 64, 121, 2 L. Ed. 208.

Where a neutral vessel which had been captured by the enemy had on board but one musket, a few ounces of powder and a few balls, it was held that her capacity for offense was not sufficient to warrant her capture as an armed vessel of the enemy. The *Charming Betsy*, 2 Cranch 64, 121, 2 L. Ed. 208.

**66. To protect from condemnation sale must be absolute.**—The *Benito Estenger*, 176 U. S. 568, 44 L. Ed. 592. See, also, The *Andromeda*, 2 Wall. 481, 17 L. Ed. 849.

Where a vessel owned by one domiciled in the enemies' country, and in possession of the country's papers, is sold to subjects of a neutral country, for the purpose of protecting, under the name of a friend, property which ought to be considered as that of the enemy, no immunity from capture and condemnation is thereby ob-

tained. The *Experiment*, 2 Dall. 41, 42, 1 L. Ed. 280.

In the United States the right of a neutral to purchase an enemy's vessel is in principle admitted, but the circumstances attending a sale are severely scrutinized, and the transfer is not held to be good if it is subjected to any condition or even tacit understanding by which the vendor keeps an interest in the vessel or its profits, a control over it, a power of revocation, or a right to its restoration at the conclusion of the war. The *Benito Estenger*, 176 U. S. 568, 578, 44 L. Ed. 592.

Transfer during the war with Spain of a Spanish vessel to a British subject held to be merely colorable and not to protect it from condemnation. The *Benito Estenger*, 176 U. S. 568, 576, 44 L. Ed. 592.

**67. Burden upon claimant to show valid transfer.**—The *Benito Estenger*, 176 U. S. 568, 44 L. Ed. 592.

**68. Sale of ship of war not exempting from capture.**—The *Georgia*, 7 Wall. 32, 19 L. Ed. 122.

**69. Effect of possession of neutral papers.**—The *Rugen*, 1 Wheat. 62, 4 L. Ed. 37.

**70. Presumptions and burden of proof.**—The *Rapid*, 8 Cranch 155, 162, 3 L. Ed. 520.

**71.** The *Carlos F. Roses*, 177 U. S. 335, 661, 44 L. Ed. 929; The *London Packet*, 5 Wheat. 132, 5 L. Ed. 52.

**72. Sufficiency of evidence to prove enemy ownership.**—Evidence held not suffi-

able to capture and condemnation, there are certain modifications and relaxations, founded upon public policy and the convenience and general welfare of nations.<sup>73</sup>

(2) *Coast Fishing Vessels*.—Independently of any express treaty or other public act, it is an established rule of international law that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed, and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war.<sup>74</sup> The rule is one which prize courts, administering the law of nations, are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter.<sup>75</sup>

(3) *Articles of Capitulation*.—On surrender of enemies' territory, the property of the inhabitants may, by the articles of capitulation, be protected against capture at sea.<sup>76</sup>

(4) *Proclamation of President of United States or of Commanding Officer*.—By a proclamation or instructions of the president of the United States, made in pursuance of an act of congress, enemy merchant vessels or vessels sailing under a license from the enemy may, under certain prescribed conditions, be exempted from capture.<sup>77</sup> So enemies' property in a certain locality may be ex-

cient to prove that vessel captured was enemy's property. *The Wren*, 6 Wall. 582, 587, 18 L. Ed. 876.

Evidence held to show that property captured was not enemy property. *The Watchful*, 6 Wall. 91, 93, 18 L. Ed. 763.

Cargoes captured held not to be enemy property. *United States v. Weed*, 5 Wall. 62, 66, 18 L. Ed. 531.

Evidence held to be conclusive that certain goods part of the cargo of a belligerent vessel was the property of a subject of the belligerent nation. *The Venus*, 8 Cranch 253, 274, 3 L. Ed. 353.

**73. Exemptions from capture and condemnation.**—*The Paquete Habana*, 175 U. S. 677, 44 L. Ed. 320.

**Barges for discharging cargoes and wrecking boats exempt.**—Large barges, called cascos, propelled by sweeps and by poling, of from thirty to sixty tons capacity, used in the Philippine Islands in discharging cargoes, and floating derricks or wrecking boats, having no means of propulsion, and which are not, in any sense, sea going boats and can only be used in comparatively smooth water, are not subject to condemnation. *The Manila Prize Cases*, 188 U. S. 254, 278, 47 L. Ed. 463.

**74. Coast fishing vessels exempt.**—*The Paquete Habana*, 175 U. S. 677, 708, 44 L. Ed. 320. See, also, *The Paquete Habana*, 189 U. S. 453, 464, 47 L. Ed. 901.

A vessel of 35 tons burden, containing a crew of six men, who were engaged in coast fishing for eight days, catching ten thousand pounds of fish, one-third of which was to go to the owner of the vessel for the use of same, was held to be engaged in coast fishing and not in a commercial adventure, within the rule of international law. *The Paquete Habana*, 175 U. S. 677, 714, 44 L. Ed. 320.

This rule is founded on considerations of humanity to a poor and industrious or-

der of men, and of the mutual convenience of belligerent states. *The Paquete Habana*, 175 U. S. 677, 708, 44 L. Ed. 320.

**Cases to which the exemption does not apply.**—"The exemption, of course, does not apply to coast fishermen or their vessels, if employed for a warlike purpose, or in such a way as to give aid or information to the enemy; nor when military or naval operations create a necessity to which all private interests must give way. Nor has the exemption been extended to ships or vessels employed on the high sea in taking whales or seals, or cod or other fish which are not brought fresh to market, but are salted or otherwise cured and made a regular article of commerce." *The Paquete Habana*, 175 U. S. 677, 708, 44 L. Ed. 320.

**75. Prize courts bound to take judicial notice of exemption.**—*The Paquete Habana*, 175 U. S. 677, 708, 44 L. Ed. 320.

**76. Articles of capitulation held to have this effect.** *The Resolution*, 2 Dall. 1, 6, 1 L. Ed. 263.

**77. Under the fourth clause of president's proclamation of April 26, 1898, declaring certain rules under which the war with Spain would be conducted, Spanish merchant vessels leaving ports of the United States on or before May 21, 1898, were exempted from condemnation while on their voyage, provided they did not have on board any officer in the military or naval service of the enemy or certain prohibited articles.** *The Panama*, 176 U. S. 535, 540, 44 L. Ed. 577; *The Pedro*, 175 U. S. 354, 44 L. Ed. 195.

Vessels held to be exempted from capture and condemnation under this clause. *The Buena Ventura*, 175 U. S. 384, 44 L. Ed. 206.

Vessels held not to be so exempted. *The Panama*, 176 U. S. 535, 543, 44 L. Ed. 577; *The Pedro*, 175 U. S. 354, 364, 44 L. Ed. 195.

Under the 5th clause of the same

empted from capture, by a proclamation of the general commanding the troops in that locality, made under legislative and executive sanction.<sup>78</sup>

(5) *Treaties with Neutral Nations*.—Under a stipulation in a treaty with a neutral nation that "free ships shall make free goods," property of an enemy on board a ship of such neutral nation is just as much protected from capture as if it were neutral.<sup>79</sup>

(6) *Facts Not Exempting*.—**Intention to Restore Vessels to Neutral Registry**.—Where an enemy's vessel had originally, and prior to the war, a neutral registry, the mere intention to restore her to such registry, when war rendered the change desirable, will not exempt her from capture and condemnation as prize.<sup>80</sup>

**Clearance Granted and Mails Put on Board**.—An enemy's vessel on a voyage from a port in the United States is not exempted from capture by the facts that before the war a collector of customs had granted a clearance, and a postmaster had put mails on board, for a port which was not then, but has since

proclamation any Spanish merchant vessel, which prior to April 21, 1898, sailed from any foreign port bound for any port in the United States, was permitted to enter such port and discharge her cargo, and afterwards depart without molestation, and was not liable to capture on her voyage, provided it was to a port not blockaded. *The Pedro*, 175 U. S. 354, 44 L. Ed. 195.

Vessels held not to be exempted from capture and condemnation under this clause. *The Pedro*, 175 U. S. 354, 44 L. Ed. 195; *The Guido*, 175 U. S. 382, 383, 44 L. Ed. 206.

The sixth clause of the same proclamation applied only to neutral vessels, and did not exempt from capture a Spanish mail ship carrying mails between the United States and Cuba. *The Panama*, 176 U. S. 535, 542, 44 L. Ed. 577.

The president's instructions of August 26, 1812, made in pursuance of act of congress, prohibiting the interruption of vessels belonging to citizens of the United States, coming from Great Britain, laden with British merchandise, in consequence of the supposed repeal of the British orders in council, must have been actually known to the commander of a capturing vessel at or before the time of the seizure, in order to invalidate a capture made contrary to the letter and spirit of the instructions. *The Mary and Susan*, 1 Wheat. 46, 4 L. Ed. 32.

Under the 8th section of the prize act of June 26th, 1812, the president had full authority to issue these instructions. *The Thomas Gibbons*, 8 Cranch 421, 3 L. Ed. 610.

A shipment made, even after a knowledge of the war, is to be considered as having been made in consequence of the repeal of the orders in council, if made within so early a period thereafter, as would leave a reasonable presumption that the knowledge of that repeal would induce a suspension of hostilities on the part of the United States. *The Thomas Gibbons*, 8 Cranch 421, 3 L. Ed. 610.

Vessel held to have been protected by the instructions, the continuity of her voyage not having been broken by her being compelled to put into Ireland on account of the dangers of the sea. *The Mary*, 9 Cranch 126, 3 L. Ed. 678.

**78. General Butler's proclamation of May 1, 1862**.—Vessels and their cargoes belonging to citizens of New Orleans or neutrals residing there and not affected by any attempts to run the blockade, or by any act of hostility against the United States, were protected after the publication of General Butler's proclamation, dated May 1st, 1862, and published on the 6th; though such persons, by being identified by long voluntary residence and by relations of active business with the enemy, may have themselves been "enemies" within the meaning of the expression as used in public law. *The Venice*, 2 Wall. 258, 17 L. Ed. 866. See, also, *United States v. Padelford*, 9 Wall. 531, 541, 19 L. Ed. 788.

**79. Under our treaty with Spain** (treaty of 1795, art. 15), declaring that free ships should make free goods, the property of an enemy on board of a Spanish ship was just as much protected from capture as if it were neutral. But the property of citizens of the United States engaged in trade with the enemy was not protected. *The Pizarro*, 2 Wheat. 227, 242, 4 L. Ed. 226.

The want of such a sea-letter or passport, or such certificates as were described in the 17th article of this treaty was not a substantive ground of condemnation; it only authorized capture and sending in for adjudication, and the proprietary interest in the ship might be proved by other equivalent testimony. *The Pizarro*, 2 Wheat. 227, 4 L. Ed. 226.

A ship held to be a Spanish ship within the meaning of this treaty. *The Pizarro*, 2 Wheat. 227, 4 L. Ed. 226.

**80. Intention to restore vessel to neutral registry not ground for exemption**.—*The Pedro*, 175 U. S. 354, 368, 44 L. Ed. 195.



become, enemy's country.<sup>81</sup>

**A vessel is not exempted from condemnation for engaging in illegal trading with the enemy** by the necessity of obtaining funds to pay the expenses of the ship, nor by the opinion of an American minister, expressed to the master, that by undertaking the voyage, he would violate no law of the United States.<sup>82</sup>

(7) *United States Consul Has No Authority to Exempt.*—A United States consul has no authority by virtue of his official station to exempt a vessel of an enemy from capture and confiscation.<sup>83</sup>

3. **NEUTRAL VESSELS AND PROPERTY**—a. *In General.*—As a general rule neutral vessels and property are exempt from capture and condemnation; and where it can be clearly shown, that property is really neutral, its being covered under hostile habiliments, for the purpose of evasion, will not necessarily subject it to condemnation.<sup>84</sup> But a neutral vessel is subject to capture and condemnation as enemy's property, if she acts in such a manner as to forfeit the protection to which she is entitled by her neutral character.<sup>85</sup>

b. *Trade of Neutrals with Belligerents*—(1) *In Articles Not Contraband.*—The trade of neutrals with belligerents in articles not contraband is absolutely free unless interrupted by blockade.<sup>86</sup>

(2) *In Contraband Articles.*—The conveyance by neutrals to belligerents of contraband articles is always unlawful, and such articles are liable to capture and condemnation as prize.<sup>87</sup> Contraband articles contaminate the parts not contraband of a cargo, if belonging to the same owner; and the noncontraband must share the fate of the contraband.<sup>88</sup> Formerly, conveyance of contraband subjected the ship to forfeiture.<sup>89</sup> But in more modern times, that consequence, in ordinary cases, attaches only to the freight of the contraband merchandise.<sup>90</sup>

81. **Clearance granted and mails put on board.**—The *Panama*, 176 U. S. 535, 542, 44 L. Ed. 577.

82. **Facts not exempting from condemnation for illegal trading with enemy.**—The *Joseph*, 8 Cranch 451, 3 L. Ed. 621.

83. **Consul has no authority to exempt.**—The *Benito Estenger*, 176 U. S. 568, 575, 44 L. Ed. 592.

84. **Effect of covering neutral property under hostile habiliments.**—The *Frances*, 9 Cranch 183, 189, 3 L. Ed. 698.

85. **Conduct forfeiting neutral protection.**—*Maley v. Shattuck*, 3 Cranch 458, 488, 2 L. Ed. 498.

**Taking decided part with enemy.**—If the owners of a neutral vessel violate their neutrality by taking a decided part with the enemy, their ship is in the predicament of enemy's property, and subject to seizure and confiscation, as lawful prize. The *Erstern*, 2 Dall. 34, 1 L. Ed. 277.

86. **Trade free unless interrupted by blockade.**—The *Peterhoff*, 5 Wall. 28, 18 L. Ed. 564. See the title **BLOCKADE**, vol. 3, p. 364.

87. **Contraband articles liable to capture and condemnation.**—The *Peterhoff*, 5 Wall. 28, 18 L. Ed. 564; The *Nereide*, 9 Cranch 388, 427, 3 L. Ed. 769; *Carrington v. Merchants' Ins. Co.*, 8 Pet. 495, 8 L. Ed. 1021.

**Armed vessels, or munitions of war,** sent from a neutral country to a belligerent port, for sale, as articles of

commerce, are subject to capture and confiscation by the other belligerent. The *Santissima Trinidad*, 7 Wheat. 283, 338, 5 L. Ed. 454.

88. **Contraband articles contaminate parts of cargo not contraband.**—The *Peterhoff*, 5 Wall. 28, 29, 18 L. Ed. 564.

89. **Effect upon ship of carriage of contraband.**—The *Peterhoff*, 5 Wall. 28, 61, 18 L. Ed. 564.

90. **The *Peterhoff*, 5 Wall. 28, 61, 18 L. Ed. 564.**

The vessel and such of the cargo as is not contraband, if they do not belong to the owner of the contraband goods, are not subject to confiscation. That penalty is applied only when there has been some actual co-operation in a meditated fraud upon the belligerents by covering up the voyage under false papers and with a false destination. This is the general doctrine, when the capture is made in transitu, while the contraband goods are yet on board. *Carrington v. Merchants' Ins. Co.*, 8 Pet. 495, 8 L. Ed. 1021.

But when the contraband goods have been deposited at the port of destination, and the subsequent voyage has thus been disconnected with the noxious articles, it has not been usual to apply the penalty to the ship or cargo upon the return voyage, although the latter may be the proceeds of the contraband; and the same rule would seem, by analogy, to apply to cases where the contraband articles have been deposited at an intermediate port,

c. *Trade of Neutrals with Neutrals*.—The carriage of contraband articles owned by neutrals in a neutral vessel to a neutral port, does not render either the vessel or cargo liable to capture and condemnation, where the evidence does not show an intent to violate neutral obligations.<sup>91</sup>

d. *Who Are Neutrals*.—The subject of a belligerent state, domiciled in a neutral country, is deemed a neutral by both belligerents, with reference to the trade which he carries on with the adverse belligerent, and with all the rest of the world.<sup>92</sup>

e. *What Articles Are Contraband*.—Generally speaking, arms and ammunition are contraband of war.<sup>93</sup> But not when taken and kept on board a merchant vessel as part of her equipment, and solely for her defense.<sup>94</sup>

**Articles Manufactured and Primarily and Ordinarily Used for Military Purposes**.—Parts of a cargo described in a ship's invoices as cases or "artillery harness," as "men's army Bluchers," as "artillery boots," and as "government regulation gray blankets," are articles manufactured and primarily and ordinarily used for military purposes in time of war, and as such are contraband.<sup>95</sup>

**Provisions**, neutral property, but the growth of the enemy's country, and destined for the supply of the enemy's military or naval forces, are contraband.<sup>96</sup> But provisions, neutral property, and the growth of a neutral country, destined for the general supply of human life in the enemy's country, are not contraband.<sup>97</sup>

f. *Neutral Goods on Enemy's Vessel*.—A neutral cargo, found on board an

on the outward voyage, and before it had terminated. *Carrington v. Merchants' Ins. Co.*, 8 Pet. 495, 496, 8 L. Ed. 1021.

But the distinction between the outward and homeward voyage exists only in favor of neutrals who conduct themselves with fairness and good faith in the arrangement of the voyage. If, with a view to practice a fraud upon the belligerent, and to escape from his acknowledged right of capture and detention, the voyage is disguised, and the vessel sails under false papers, and with a false destination, the mere deposit of the contraband, in the course of the voyage, is not allowed to purge away the guilt of the fraudulent conduct of the neutral. *Carrington v. Merchants' Ins. Co.*, 8 Pet. 495, 496, 8 L. Ed. 1021.

91. **Carriage of contraband**.—The *Commercen*, 1 Wheat. 382, 388, 4 L. Ed. 116; *The Peterhoff*, 5 Wall. 28, 59, 18 L. Ed. 564; *The Springbok*, 5 Wall. 1, 22, 18 L. Ed. 480.

**Facts not warranting condemnation of vessel or cargo**.—In regard to a vessel captured during the Civil War by a United States war vessel, the evidence was clear that she and her outward cargo were neutral property, destined to neutral consignees at a neutral port, and that the cargo had been actually delivered as consigned. Some of the proof tended to show that a portion of the cargo consisted of Confederate uniform cloth; but there was none showing destination to enemy territory or immediate enemy use. It was held that there was nothing in the character of the vessel or of the cargo which warranted condemnation. *The Science*, 5 Wall. 178, 179, 18 L. Ed. 625.

**Facts not showing intent on part of owners of vessel to violate neutral obligations**.—The facts that the master of a neutral vessel with papers showing a voyage between neutral ports, declared himself ignorant as to what a part of his cargo, of which invoices were not on board (having been sent by mail to the port of destination), consisted, such part having been contraband; and also declared himself ignorant of the cause of capture, when his mate, boatswain and steward all testified that they understood it to be the vessel's having contraband on board, were held not sufficient, of themselves, to show a guilty intent on the part of the owners of the vessel, in no way compromised with the cargo, to violate neutral obligations. *The Springbok*, 5 Wall. 1, 18 L. Ed. 480.

92. **Subject of belligerent state domiciled in neutral country**.—*The Venus*, 8 Cranch 253, 280, 3 L. Ed. 353.

93. **Arms and ammunition**.—*The Panama*, 176 U. S. 535, 545, 44 L. Ed. 577.

94. *The Panama*, 176 U. S. 535, 545, 44 L. Ed. 577.

95. **Articles manufactured and primarily and ordinarily used for military purposes**.—*The Peterhoff*, 5 Wall. 28, 29, 18 L. Ed. 564.

96. **Provisions**.—*The Commercen*, 1 Wheat. 382, 4 L. Ed. 116.

97. *The Commercen*, 1 Wheat. 382, 4 L. Ed. 116.

As to the definition and classification of contraband goods, see CONTRABAND, vol. 4, p. 548. And see post, "Goods Destined for Use of Enemy or Rebel Military Forces," IV, F, 4, b.



armed enemy's vessel, is not liable to condemnation.<sup>98</sup> The stipulation in a treaty, "that free ships shall make free goods," does not imply the converse proposition, that "enemy ships shall make enemy goods."<sup>99</sup>

g. *Property of Neutral Leaving Belligerent Country at Commencement of War.*—A neutral leaving a belligerent country, in which he was domiciled at the commencement of the war, is entitled to the rights of a neutral as to his property which he takes with him as soon as he sails from the hostile port. Such property is not liable to condemnation for a breach of blockade by the vessel in which he embarks, unless he knew of the intention of the vessel to break it.<sup>1</sup>

h. *Neutral Property Captured and Retained by the Enemy.*—The capture of neutral property, by one of the belligerent parties, and its retention for twenty-four hours, does not vest the property in the captors, so as to render it lawful prize to the other power.<sup>2</sup>

i. *Neutral Vessels Having Enemy's Property on Board.*—The capture of a neutral ship, having enemy's property on board, is a strictly justifiable exercise of the rights of war.<sup>3</sup> The captors are not therefore, answerable in pænam to the neutral, for the losses which he may sustain by such capture.<sup>4</sup>

j. *Effect of Carrying Arms on Neutral Vessel.*—It would seem that a neutral merchant vessel does not lose the protection of neutrality by carrying arms on board solely for her own defense.<sup>5</sup> But if she is subsequently captured by the enemy, with her armament still on board, she becomes liable to capture and condemnation as an armed vessel of the enemy.<sup>6</sup>

k. *Immunity from Capture by Treaty.*—By treaty with a neutral nation its ships and cargoes may, under certain conditions, be given immunity from capture.<sup>7</sup>

l. *Effect of Delay in Claiming Neutral Property.*—If neutral property is not claimed within a year and a day after the institution of prize proceedings, it may be treated as good prize and condemned to the captors.<sup>8</sup>

4. **VESSELS AND PROPERTY BELONGING TO CITIZENS OF THE CAPTURING NATION**—a. *Persons Entitled to Rights of Citizens under Prize Law.*—Persons

98. Neutral cargo on armed enemy's vessel not liable to condemnation.—*The Atalanta*, 3 Wheat. 409, 4 L. Ed. 422.

A neutral may lawfully employ an armed belligerent vessel to transport his goods; and such goods do not lose their neutral character, by the armament, nor by the resistance made by such vessel, provided the neutral do not aid in such armament or resistance although he charter the whole vessel, and be on board at the time of the resistance. *The Nereide*, 9 Cranch 388, 3 L. Ed. 769.

The president's proclamation of April 26, 1898, declared the policy of the government in the conduct of the war with Spain would be to adhere to the rules of the Declaration of Paris therein set forth, one of them being thus expressed: "Neutral goods, not contraband of war, are not liable to confiscation under the enemy's flag." *The Carlos F. Roses*, 177 U. S. 655, 661, 44 L. Ed. 929.

99. *Stipulation in treaty.*—*The Nereide*, 9 Cranch 388, 3 L. Ed. 769.

1. *Property of neutral leaving belligerent country at commencement of war.*—*United States v. Guillem*, 11 How. 47, 13 L. Ed. 599. See the title **BLOCKADE**, vol. 3, p. 375.

2. *Neutral property captured and retained by the enemy.*—*The Resolution*, 2 Dall. 1, 1 L. Ed. 263.

3. *Capture of neutral ship having enemy's property on board, justifiable.*—*The Antonia Johanna*, 1 Wheat. 159, 169, 4 L. Ed. 60.

4. *Captors not answerable in pænam to neutral.*—*The Antonia Johanna*, 1 Wheat. 159, 169, 4 L. Ed. 60.

As to the liability of the captors for freight in such cases, see the title **SHIPS AND SHIPPING**.

5. *Effect of carrying arms on neutral vessel.*—*The Panama*, 176 U. S. 535, 546, 44 L. Ed. 577.

But the fact that arms carried by such a vessel were originally taken on board for her own defense is not conclusive as to her character. *The Panama*, 176 U. S. 535, 546, 44 L. Ed. 577.

6. See ante, "Armed Neutral Merchant Vessel Captured by Enemy," IV, F, 2, d.

7. *The 17th article of the Spanish treaty of 1795*, so far as it purported to give any effect to passports, was imperfect and inoperative, in consequence of the omission to annex the form of passport to the treaty, and the immunity, whatever it was, intended by the article never took effect. *The Amiable Isabella*, 6 Wheat. 1, 5 L. Ed. 191. See the title **TREATIES**.

8. *Effect of delay in claiming neutral property.*—*The Harrison*, 1 Wheat. 298, 299, 4 L. Ed. 95; *The Carlos F. Roses*, 177 U. S. 655, 663, 44 L. Ed. 929.



faithful to the Union, who escaped from the Confederate States, during the Civil War, and subsequently resided in the loyal states, or in neutral countries, were entitled to all the rights of citizens of the United States in relation to the seizure and condemnation of their property as prize.<sup>9</sup>

b. *Goods Destined for Use of Enemy or Rebel Military Forces.*—Goods belonging to a citizen of the United States destined to a belligerent country, or to a state in rebellion for the use of the belligerent or rebel military forces, are liable to condemnation as prize.<sup>10</sup>

c. *Goods Consigned by Enemies to Citizens of Capturing Nation.*—See ante, "Consignments by Enemies," IV, F, 2, c, (1).

d. *Vessel Guilty of Conduct Subjecting Her to Confiscation at a Time Anterior to Capture.*—If an American vessel be captured on a circuitous voyage to the United States, in a former part of which voyage she had been guilty of conduct subjecting her to confiscation, though at the time of capture, she is committing no illegal act, she must be condemned.<sup>11</sup>

G. *Effect of Concealment or Spoliation of Papers.*—Concealment or spoliation of papers is not, per se, a sufficient ground for condemnation in a prize court. It is calculated to excite the vigilance, and justify the suspicions of the court, but is open to explanation, and if the party, in the first instance, fairly, frankly and satisfactorily explains it, he is deprived of no right to which he is otherwise entitled.<sup>12</sup> But if the spoliation be unexplained or the explanation is unsatisfactory; if the cause labor under heavy suspicions, or there be a vehement presumption of bad faith or gross prevarication, condemnation will be decreed.<sup>13</sup>

H. *Effect of Assertion of a False Claim.*—If a party attempts to impose upon a prize court, by knowingly or fraudulently claiming as his own, property belonging in part to others, he will not be entitled to restitution of that portion which he may ultimately establish as his own.<sup>14</sup> So the assertion of a false claim, in whole or in part, by an agent of, or in connivance with, the real owners, is a substantive cause of forfeiture, leading to condemnation of the property.<sup>15</sup>

I. *Collusive Captures.*—A collusive capture conveys no title to the captors.<sup>16</sup> In case of such a capture, papers found on board one captured vessel may be invoked into the case of another, captured on the same cruise.<sup>17</sup>

J. *Effect of Disavowal of Capture by Government.*—Where a capture

9. *Persons faithful to Union who escaped from Confederate States.*—The *Peterhoff*, 5 Wall. 28, 60, 18 L. Ed. 564.

10. *Goods destined for use of enemy or rebel military forces.*—The *Peterhoff*, 5 Wall. 28, 60, 18 L. Ed. 564. See ante, "Property Engaged in Illegal Intercourse with the Enemy," IV, F, 2, b, (5).

Such goods are contraband. The *Peterhoff*, 5 Wall. 28, 60, 18 L. Ed. 564. See CONTRABAND, vol. 4, p. 548. And see ante, "What Articles Are Contraband," IV, F, 3, e.

11. *Vessel guilty of conduct subjecting her to confiscation at a time anterior to capture.*—The *Joseph*, 8 Cranch 451, 3 L. Ed. 621.

12. *Concealment or spoliation of papers.*—The *Pizarro*, 2 Wheat. 227, 4 L. Ed. 226.

13. The *Pizarro*, 2 Wheat. 227, 241, 4 L. Ed. 226.

A vessel and cargo condemned as enemy property, under circumstances of suspicion, spoliation of papers in the moment of capture being one of them as regarded

the cargo. The *Andromeda*, 2 Wall. 481, 17 L. Ed. 849.

14. *Assertion of a false claim.*—The *Dos Hermanos*, 2 Wheat. 76, 77, 4 L. Ed. 189.

If a neutral covers up enemy's property under false papers, which also cover his own property, prize courts will not disentangle the one from the other, but condemn the whole as good prize. *Carrington v. Merchants' Ins. Co.*, 8 Pet. 495, 496, 522, 8 L. Ed. 1021; The *St. Nicholas*, 1 Wheat. 417, 431, 4 L. Ed. 125.

15. The *Amiable Isabella*, 6 Wheat. 1, 78, 5 L. Ed. 191.

16. *Collusive capture conveys no title to captors.*—The *Experiment*, 8 Wheat. 261, 265, 5 L. Ed. 612; The *George*, 2 Wheat. 278, 4 L. Ed. 239.

Evidence held to prove that a capture was collusive.—The *Experiment*, 8 Wheat. 261, 266, 5 L. Ed. 612; The *George*, 2 Wheat. 278, 4 L. Ed. 239.

17. *Papers on board one captured vessel may be invoked into case of another.*—

is disavowed by the United States, the captor is not entitled to a decree in his favor.<sup>18</sup>

**K. Effect of Preliminary Articles of Peace.**—A vessel captured after the signing of preliminary articles of peace, cannot be condemned as prize.<sup>19</sup>

**L. Effect of Loss, Destruction and Wreckage of Property.**—Under § 4625 of the Revised Statutes proceedings for condemnation, may be had where property which might have been brought in has been entirely lost or destroyed.<sup>20</sup> But the federal statutes make no provision for adjudicating wrecks as prize.<sup>21</sup>

**M. Probable Cause as Justification of Capture.**—Probable cause for making it will not merely excuse, but even, in some cases, justify a capture.<sup>22</sup> Probable cause exists where there are circumstances sufficient to warrant suspicion, though it may turn out that the facts are not sufficient to warrant condemnation.<sup>23</sup>

**N. Rights of Belligerent Captors in Relation to Neutral Nations.**—Captors acting under the commission of a belligerent nation acquired a right which no nation neutral to them has authority to impugn,<sup>24</sup> unless for the pur-

The Experiment, 8 Wheat. 261, 5 L. Ed. 612.

18. Disavowal of capture by government.—The Florida, 101 U. S. 37, 42, 25 L. Ed. 898.

19. Preliminary articles of peace.—The Speedwell, 2 Dall. 40, 1 L. Ed. 280.

20. Condemnation may be had where property entirely lost or destroyed.—The Manila Prize Cases, 188 U. S. 254, 260, 47 L. Ed. 463.

21. No provision in federal statutes for adjudicating wrecks as prize.—The Infanta Maria Teresa, 188 U. S. 283, 288, 47 L. Ed. 477.

22. Probable cause as justifying capture.—The Olinde Rodrigues, 174 U. S. 510, 536, 43 L. Ed. 1065; The Apollon, 9 Wheat. 362, 363, 372, 6 L. Ed. 111.

It is a universal principle, which applies to those engaged in a partial, as well as those engaged in a general war, that where there is probable cause to believe a vessel met with at sea is in the condition of one liable to capture, it is lawful to take her, and subject her to the examination and adjudication of the courts. The Amelia, 1 Cranch 1, 31, 2 L. Ed. 15.

Effect of probable cause for capture upon owner's right to damages.—See post, "Statement of Rule of Liability," IV, T, 1.

23. When probable cause exists.—The Olinde Rodrigues, 174 U. S. 510, 535, 43 L. Ed. 1065; The Thompson, 3 Wall. 155, 18 L. Ed. 55. See, also, Locke v. United States, 7 Cranch 339, 348, 3 L. Ed. 364.

Neutral property may be seized under such circumstances of suspicion as will justify the capture, though in the prize proceedings facts warranting condemnation are not shown. The Dashing Wave, 5 Wall. 170, 177, 18 L. Ed. 622.

A party, whose national character, did not appear, gave his own money to a neutral house, to be shipped with money of that house and in their name, to a neutral port in immediate proximity to a blockaded region, and an attorney in fact, on capture of the money and libel

of it as prize, stated that such neutral house were the owners thereof, and that no other persons were interested therein. It was held that the capture and sending in were justified; though in the absence of proof of an enemy's character in the party shipping his money with the neutral's, a condemnation was not warranted. The Dashing Wave, 5 Wall. 170, 18 L. Ed. 622.

If a neutral vessel obtain a register from a belligerent power, sail under the belligerent flag, and have on board accounts describing her as belligerent property, there is probable cause for seizing her as lawful prize, and bringing her in for examination. The Grand Sachem, 3 Dall. 333, 1 L. Ed. 624.

24. Right of belligerent captors in relation to neutral nations.—La Nereyda, 8 Wheat. 108, 169, 5 L. Ed. 574.

War having been recognized to exist between two belligerents, by the government of the United States, it is the duty of the courts of the United States, where a capture is made by either of the belligerent parties, without any violation of our neutrality, and the captured prize is brought innocently within our jurisdiction, to leave things in the same state they find them, or to restore the property to the state from which they have been forcibly removed by the act of our own citizens. The Neustra Senora De La Caridad, 4 Wheat. 497, 4 L. Ed. 624.

A cruiser, equipped at the port of Carthage, in South America, and commissioned under the authority of the province of Carthage, one of the United Provinces of New Grenada, at war with Spain, sailed from the said port, and captured on the high seas, as prize, a vessel and cargo, belonging to the subjects of the king of Spain, and put a prize crew on board; and ordered her to proceed to the said port of Carthage. The captured vessel was afterwards fallen in with, by a private armed vessel of the United States, and the cargo taken out



pose of vindicating its own violated neutrality.<sup>25</sup>

**O. Duties of Captors as to Vessels and Property Captured.**—The public interest requires captors to preserve the property captured if possible.<sup>26</sup> Therefore, when a vessel is captured, she must be committed to the care of a competent prize master and crew.<sup>27</sup> It is generally the duty of the captor with all convenient dispatch, to send his prize home for adjudication,<sup>28</sup> and to institute judicial proceedings for condemnation without unnecessary delay.<sup>29</sup>

**P. Sale without Condemnation.**—If a vessel and cargo are liable to condemnation, and it is impossible, consistently with the public interest, to bring them into a port of the United States for trial, the captors may sell them<sup>30</sup> and will not be liable in damages for doing so.<sup>31</sup> A sale, by the authority of the captors, before sentence of condemnation, is affirmed by such sentence, and is good ab initio.<sup>32</sup>

**Q. Rights in Property Captured and Interests in and Distribution of Prize Money and Bounty**—1. **IN GENERAL.**—Captures in war enure to the government,<sup>33</sup> and can become private property only by its grant.<sup>34</sup>

and brought into the United States for adjudication, as the property of their enemy. The original Spanish owner and the prize master from the Carthaginian cruiser, both claimed the goods. The possession was decreed to be restored to the Carthaginian prize master. *The Neustra Senora De La Caridad*, 4 Wheat. 497, 4 L. Ed. 624.

The Spanish treaty held not to apply to the above case, as the court could not consider the Carthaginian captors as pirates, and the capture was not made within the jurisdictional limits of the United States—the only two cases in which the treaty enjoins restitution. *The Neustra Senora De La Caridad*, 4 Wheat. 497, 4 L. Ed. 624.

25. *La Nereyda*, 8 Wheat. 108, 169, 5 L. Ed. 574.

As to restoration of property by a neutral for violation of its neutrality, see post, "Restoration," IV, S.

26. **Captors required to preserve property.**—*The Manila Prize Cases*, 188 U. S. 254, 265, 47 L. Ed. 463.

27. **Prize master and crew must be put on board.**—*The Eleanor*, 2 Wheat. 345, 4 L. Ed. 257.

**But this rule does not extend to the case of a mere detention for examination,** which the commander of the detaining vessel may enforce by orders from his own quarter deck. Such commander may send an officer on board the vessel detained, in order more conveniently to enforce his order, without taking the vessel out of the possession of her own officers and crew. *The Eleanor*, 2 Wheat. 345, 4 L. Ed. 257.

28. **Captor generally required to send prize home for adjudication.**—*The Nuestra Senora De Regla*, 108 U. S. 92, 102, 27 L. Ed. 662; *The Manila Prize Cases*, 188 U. S. 254, 260, 47 L. Ed. 463; *The Nassau*, 4 Wall. 634, 641, 18 L. Ed. 413; *Lamar v. Browne*, 92 U. S. 187, 195, 23 L. Ed. 650; *Jecker v. Montgomery*, 18 How. 110, 15 L. Ed. 311.

**But circumstances may render it improper** to send the prize home, and of these the captor must be the judge. *Jecker v. Montgomery*, 18 How. 110, 15 L. Ed. 311. See post, "Sale without Condemnation," IV, P.

In making up his decision, good faith and reasonable discretion are required. *Jecker v. Montgomery*, 18 How. 110, 15 L. Ed. 311.

Captor held excusable for not sending home vessel. *Jecker v. Montgomery*, 18 How. 110, 15 L. Ed. 311.

29. **Duty of captor to institute proceedings for condemnation.**—*The Nuestra Senora De Regla*, 108 U. S. 92, 103, 27 L. Ed. 662.

30. **When sale may be had without condemnation.**—*Jecker v. Montgomery*, 18 How. 110, 112, 15 L. Ed. 311; *Jecker v. Montgomery*, 13 How. 498, 14 L. Ed. 240.

**Under § 4615 of the Revised Statutes,** if the captured vessel, or any part of the captured property, is not in condition to be sent in for adjudication, a survey and appraisalment may be had, the property sold, and the proceeds deposited subject to the order of the court. *The Manila Prize Cases*, 188 U. S. 254, 260, 47 L. Ed. 463.

31. **Captors not liable in damages for sale without condemnation.**—*Jecker v. Montgomery*, 18 How. 110, 112, 15 L. Ed. 311; *Jecker v. Montgomery*, 13 How. 498, 14 L. Ed. 240.

32. **Sale before sentence of condemnation affirmed by such sentence.**—*The Fortitude*, 7 Cranch 423, 3 L. Ed. 393.

33. **Captures enure to government.**—*The Manila Prize Cases*, 188 U. S. 254, 258, 47 L. Ed. 463.

"The title to captured property always vests primarily in the government of the captors." *The Florida*, 101 U. S. 37, 42, 25 L. Ed. 898.

34. **Captures can become private property only by government grant.**—*The Manila Prize Cases*, 188 U. S. 254, 258,



2. **WHEN THE CAPTURE IS ILLEGAL.**—In the case of an illegal capture, the property is not changed.<sup>35</sup> The legality of a capture is open for question and examination until a competent jurisdiction has decided the question, and a decree passes for condemnation as prize. But the possession and occupation of the property, in such case, is evidence of title, which is conclusive upon all mankind, except the rightful owner.<sup>36</sup>

3. **WHEN TITLE TO PROPERTY CHANGES.**—The property of the owner of a ship or cargo is not divested by capture, but by condemnation in a prize court.<sup>37</sup> But such condemnation will relate back to the date of the capture.<sup>38</sup> Until there is a sentence of condemnation or restitution, the capture is held by the government in trust for those who, by the decree of the court, may have the ultimate right to it.<sup>39</sup>

4. **LIENS.**—It is a general rule that capture as prize of war, *jure belli*, overrides previous liens.<sup>40</sup> Hence, the prize courts have refused to recognize the lien of bottomry bonds,<sup>41</sup> of mortgages,<sup>42</sup> for supplies,<sup>43</sup> for materials fur-

47 L. Ed. 463; *The Siren*, 13 Wall. 389, 20 L. Ed. 505.

"The rights of individuals, where such rights exist, are the results of local law or regulations." *The Florida*, 101 U. S. 37, 42, 25 L. Ed. 898. See, also, *The Manila Prize Cases*, 188 U. S. 254, 258, 47 L. Ed. 463.

35. **Property not changed by illegal capture.**—*Mauran v. Insurance Co.*, 6 Wall. 1, 11, 18 L. Ed. 836.

36. **Effect of possession and occupation of property captured.**—*The Resolution*, 2 Dall. 1, 1 L. Ed. 263.

37. **Condemnation, not capture, divests property of owner.**—*Jecker v. Montgomery*, 13 How. 498, 14 L. Ed. 240; *Jecker v. Montgomery*, 18 How. 110, 112, 15 L. Ed. 311; *The Nassau*, 4 Wall. 634, 641, 18 L. Ed. 413; *Oakes v. United States*, 174 U. S. 778, 786, 43 L. Ed. 1169; *Lamar v. Browne*, 92 U. S. 187, 195, 23 L. Ed. 650. But see *The Adventure*, 8 Cranch 221, 226, 3 L. Ed. 542.

"Until condemnation, captors acquire no absolute right of property in a prize." *The Manila Prize Cases*, 188 U. S. 254, 278, 47 L. Ed. 463. See, also, *Oakes v. United States*, 174 U. S. 778, 786, 43 L. Ed. 1169.

By the seizure of a vessel as prize the title to her does not change nor the title to the proceeds of her sale, *pendente lite*. That awaits adjudication. *Coudert v. United States*, 175 U. S. 178, 183, 44 L. Ed. 122.

"Property captured at sea can never be converted by the captor until it has been brought to legal adjudication." *Lamar v. Browne*, 92 U. S. 187, 195, 23 L. Ed. 650.

38. **Condemnation relates back to capture.**—*Jecker v. Montgomery*, 18 How. 110, 112, 15 L. Ed. 311; *Jecker v. Montgomery*, 13 How. 498, 14 L. Ed. 240; *The Manila Prize Cases*, 188 U. S. 254, 263, 47 L. Ed. 463.

Therefore, where vessels which were sunk are afterwards raised and saved, the fact that hostilities had ceased before they were raised is immaterial. The

*Manila Prize Cases*, 188 U. S. 254, 263, 47 L. Ed. 463.

**Anything done by the owner of property captured, after the commencement of the voyage upon which the capture was made, designed to incur the property or to change its ownership, is a nullity.** *The Sally Magee*, 3 Wall. 451, 452, 18 L. Ed. 197. See post, "Liens," IV, Q, 4.

39. **Until sentence government holds property in trust.**—*The Nassau*, 4 Wall. 634, 641, 18 L. Ed. 413.

40. **Capture overrides previous liens.**—*The Carlos F. Roses*, 177 U. S. 655, 669, 44 L. Ed. 929; *The Battle*, 6 Wall. 498, 18 L. Ed. 933. See, also, *The Siren*, 7 Wall. 152, 162, 19 L. Ed. 129.

The right of capture acts on the proprietary interest of the thing captured at the time of the capture and is not affected by the secret liens or private engagements of the parties. *The Carlos F. Roses*, 177 U. S. 655, 666, 44 L. Ed. 929; *The Frances*, 8 Cranch 418, 419, 3 L. Ed. 609; *The Mary and Susan*, 1 Wheat. 25, 4 L. Ed. 27.

**Neither the act of July 13, 1861, nor that of March 3, 1863, had reference to cases of condemnation as prize *jure belli*, and, therefore, in such condemnation proceedings they did not protect a lien or mortgage on enemy's property held by a loyal citizen.** *The Hampton*, 5 Wall. 372, 375, 18 L. Ed. 659.

41. **Bottomry bonds.**—*The Carlos F. Roses*, 177 U. S. 655, 666, 44 L. Ed. 929; *The Mary*, 9 Cranch 126, 3 L. Ed. 678.

42. **Mortgages.**—*The Carlos F. Roses*, 177 U. S. 655, 666, 44 L. Ed. 929; *The Hampton*, 5 Wall. 372, 18 L. Ed. 659.

In proceedings in prize, and under principles of international law, mortgages on vessels captured *jure belli*, are to be treated only as liens, subject to being overridden by the capture, not as *jura in re*, capable of an enforcement superior to the claims of the captors. *The Hampton*, 5 Wall. 372, 18 L. Ed. 659.

43. **Lien for supplies.**—*The Carlos F. Roses*, 177 U. S. 655, 666, 44 L. Ed. 929;

nished,<sup>44</sup> for work and labor,<sup>45</sup> of bills of lading,<sup>46</sup> of factors<sup>47</sup> and of consignees for advances made by them to the consignors.<sup>48</sup> But in peculiar cases, where the lien is imposed by a general law of the mercantile world, independent of any contract between the parties it will receive recognition in a prize court.<sup>49</sup>

5. DAMAGES FOR TORT COMMITTED BY PRIZE SHIP AFTER CAPTURE.—Where a prize ship, after capture, and while in charge of a prize master and crew, commits a maritime tort, the persons injured upon intervening in the prize proceedings instituted by the government are entitled to have their damages assessed and paid out of the proceeds of the ship before distribution to the captors.<sup>50</sup>

6. RIGHTS OF CAPTORS TO PRIZE MONEY OR BOUNTY—*a. In General.*—As has previously been stated, rights of individuals in the property captured can result only from a grant by the government.<sup>51</sup> In this country the right of a citizen, or of an officer in the navy, to demand condemnation of a vessel or property as prize for his benefit must be derived from acts of congress,<sup>52</sup> and the capture must meet the conditions imposed by such acts.<sup>53</sup> The scope of the statutes is not to be enlarged in a captor's favor by construction.<sup>54</sup> But in matters of detail, where there is no controversy in respect of the existence of the grant, a more liberal construction may be applied in carrying the intention of congress into effect.<sup>55</sup>

*b. Captures by Noncommissioned Vessels.*—If a seizure by a noncommissioned cruiser for the benefit of the government<sup>56</sup> is adopted by the government, the property, when condemned, becomes a droit of the government,<sup>57</sup> and the

The Battle, 6 Wall. 498, 18 L. Ed. 933.

44. Lien for materials.—The Battle, 6 Wall. 498, 18 L. Ed. 933.

45. Lien for work and labor.—The Battle, 6 Wall. 498, 18 L. Ed. 933.

46. Lien of bills of lading.—The Carlos F. Roses, 177 U. S. 655, 666, 44 L. Ed. 929.

47. Factors' liens.—The Carlos F. Roses, 177 U. S. 655, 666, 44 L. Ed. 929; The Frances, 8 Cranch 418, 419, 3 L. Ed. 609.

48. Lien of consignees for advances.—The Carlos F. Roses, 177 U. S. 655, 666, 44 L. Ed. 929; The Frances, 8 Cranch 418, 419, 3 L. Ed. 609.

49. Liens imposed by general law of mercantile world recognized.—The Carlos F. Roses, 177 U. S. 655, 666, 44 L. Ed. 929; The Frances, 8 Cranch 418, 419, 3 L. Ed. 609.

"Such is the case of freight upon enemies' goods seized in the vessel of a friend, which is always decreed to the owner of the vessel." The Carlos F. Roses, 177 U. S. 655, 666, 44 L. Ed. 929; The Frances, 8 Cranch 418, 419, 3 L. Ed. 609. See the title SHIPS AND SHIPPING.

50. Damages for tort committed by prize ship after capture.—The Siren, 7 Wall. 152, 19 L. Ed. 129.

A prize ship, in charge of a prize master and crew, on her way from the place of capture to the port of adjudication, committed a maritime tort by running into and sinking another vessel. Upon the libel of the government, the ship was condemned as lawful prize, and sold, and the proceeds paid into the registry. The owners of the sunken vessel, and the owners of her cargo, thereupon intervened by petition, asserting a claim upon the proceeds for the damages sustained by

the collision. It was held that they were entitled to have their damages assessed and paid out of the proceeds before distribution to the captors. The Siren, 7 Wall. 152, 19 L. Ed. 129.

51. See ante, "In General," IV, Q, 1.

52. Right to demand condemnation as prize derived from acts of congress.—The Manila Prize Cases, 188 U. S. 254, 258, 47 L. Ed. 463; The Dos Hermanos, 10 Wheat. 306, 6 L. Ed. 328.

"Captures are made as prize for the benefit of captors when they come within the scope of our prize statutes, and not otherwise." The Manila Prize Cases, 188 U. S. 254, 273, 47 L. Ed. 463.

The right of vessels of the navy of the United States to prize money comes only in virtue of grant or permission from the United States, and if no act of congress sanctions a claim to it, it does not exist. The Siren, 13 Wall. 389, 20 L. Ed. 505.

53. Capture must meet conditions imposed by statute.—The Manila Prize Cases, 188 U. S. 254, 259, 47 L. Ed. 463.

54. Construction of prize laws.—The Manila Prize Cases, 188 U. S. 254, 258, 47 L. Ed. 463.

55. The Manila Prize Cases, 188 U. S. 254, 258, 47 L. Ed. 463.

56. Captures by noncommissioned captors made for government.—It is the settled law of the United States, that all captures made by noncommissioned captors, are made for the government. The Dos Hermanos, 10 Wheat. 306, 310, 6 L. Ed. 328.

57. Property in vessels captured by noncommissioned cruisers.—Carrington v. Merchants' Ins. Co., 8 Pet. 495, 522, 8 L. Ed. 1021; The Amiable Isabella, 6 Wheat. 1, 66, 5 L. Ed. 191; The Dos



only claim which the captors can sustain is one in the nature of salvage for bringing in and preserving the property.<sup>58</sup>

c. *Captures by Privateers*.—Articles of agreement generally direct the distribution of prize money in the case of a capture by a privateer.<sup>59</sup> But if no articles are executed, the admiralty court will make distribution in proportion to the number, interest and merits of the captors.<sup>60</sup> A commission obtained by fraudulent misrepresentations will not vest the interests of prize.<sup>61</sup>

**Vessel Taken by Force by One Privateer from Another.**—Where an enemy's vessel is captured by a privateer which is subsequently dispossessed by the force or terror of another privateer, the prize will be adjudged to the first captor, with costs and damages.<sup>62</sup>

d. *Period in Relation to Which Distribution Is Made*.—In the absence of a provision to the contrary prize money is to be awarded and distributed according to the laws in force and the facts existing at the time of the capture.<sup>63</sup>

e. *Evidence to Establish Right to Share in Prize Money*.—The keeping of books and entries therein by the proper officers of the names of the persons serving on board, is not a condition to the right of any vessel to share in prize money. The doing duty on board is sufficient prima facie evidence, at least, that the person performing it belonged to the ship and is entitled to share in the prize money.<sup>64</sup>

f. *Forfeiture of Rights of Prize*.—If captors are guilty of gross misconduct, or laches, in violation of their duty, courts of prize will visit upon them the penalty of a forfeiture of the rights of prize, especially where the government chooses to interpose a claim to assert such forfeiture.<sup>65</sup> But irregularities, which arise from mere mistake or negligence, if they work no irreparable mischief, and are consistent with good faith, do not ordinarily work such penal consequences.<sup>66</sup> To prevent captors recovering prize money on the ground that the capture was collusive, it must affirmatively appear that there was collusion.<sup>67</sup>

g. *Prize Money and Bounty Abolished in United States—Interpretation of Former Laws*.—By the act of March 3, 1899, ch. 413, all provisions of law authorizing the distribution among captors of the whole or any portion of the proceeds of vessels, or any property thereafter captured, condemned as prize, or providing for the payment of bounty for the sinking or destruction of vessels of the enemy thereafter occurring in time of war, were repealed. Many of the

Hermanos, 2 Wheat. 76, 99, 4 L. Ed. 189.

The provisions in the prize acts, as to the distribution of prize proceeds, are confined to public and private armed vessels, cruising under a regular commission. The *Dos Hermanos*, 10 Wheat. 306, 310, 6 L. Ed. 328. See the title SALVAGE.

58. **Only claim of captors one in nature of salvage.**—The *Dos Hermanos*, 10 Wheat. 306, 310, 6 L. Ed. 328. See the title SALVAGE.

59. **Distribution generally directed by articles of agreement.**—The *Gloucester*, 2 Dall. 36, 37, 1 L. Ed. 278.

60. **Distribution where no articles of agreement executed.**—The *Gloucester*, 2 Dall. 36, 1 L. Ed. 278.

**Members of crew discharged and put on shore.**—Persons who signed the articles with a privateer and were subsequently without fault on their part, discharged, and put on shore by the captain, were held entitled to participate as captors in the prizes taken, although fresh articles were signed by the captain and the re-

mainder of the crew, after their discharge. The *Gloucester*, 2 Dall. 36, 1 L. Ed. 278.

61. **Commission obtained by fraudulent misrepresentations will not vest interests of prize.**—The *Experiment*, 8 Wheat. 261, 5 L. Ed. 612.

**A collusive capture, made under a commission, is not, per se, evidence that the commission was fraudulently obtained.** The *Experiment*, 8 Wheat. 261, 5 L. Ed. 612.

62. **Vessel taken by force by one privateer from another.**—The *Mary*, 2 Wheat. 123, 4 L. Ed. 200.

63. **Period in relation to which distribution is made.**—*United States v. Steever*, 113 U. S. 747, 753, 28 L. Ed. 1133.

64. **Evidence sufficient to establish right to share in prize money.**—*United States v. Steever*, 113 U. S. 747, 753, 28 L. Ed. 1133.

65. **Forfeiture of rights of prize.**—The *Anne*, 3 Wheat. 435, 448, 4 L. Ed. 428.

66. The *Anne*, 3 Wheat. 435, 448, 4 L. Ed. 428.

67. The *Bothnea*, 2 Wheat. 169, 176, 4 L. Ed. 211.



provisions of the laws thus repealed have been interpreted by the supreme court.<sup>68</sup>

7. COMPENSATION OF AGENT APPOINTED TO REPRESENT CAPTORS' INTEREST IN PRIZE MONEY.—The prize court has no power to award payment from prize money of the compensation which the captors have agreed to pay an agent appointed by them to represent their interest in prize money. The agent should apply to the proper officers of the government intrusted with the distribution of the money.<sup>69</sup>

8. APPROPRIATION OF CAPTURED VESSELS AND PROPERTY TO USE OF GOVERNMENT.—By §§ 4624 and 4625 of the Revised Statutes captured vessels and property may be appropriated to the use of the United States, and the money value stand in place of the prize.<sup>70</sup>

9. CAPTURED VESSEL ABANDONED AND TAKEN POSSESSION OF BY NEUTRAL.—The rights vested in a belligerent, by capture, cannot be destroyed, by a neutral taking possession of the captured vessel, after being abandoned at sea by the captors.<sup>71</sup>

10. CAPTURED PROPERTY GIVEN TO NEUTRAL AND CARRIED TO HIS COUNTRY FOR ADJUDICATION.—Where a vessel and cargo belonging to a subject of one belligerent is captured by the other belligerent and given to a neutral who carries it to his own country for adjudication, the right of the original owner revives, subject to salvage; and if before final adjudication war breaks out between the country of such original owner and that of the neutral, the property will be held subject to the owner's claim at the termination of the war, if not previously confiscated.<sup>72</sup>

11. WHAT PERSON SETTING UP TITLE UNDER A CONDEMNATION MUST SHOW.—Whoever sets up a title under a condemnation, is bound to show that the court had jurisdiction of the cause, and that the sentence has been rightly pronounced, upon the application of parties competent to ask it. For this purpose, it is necessary to show who are the captors, and how the court acquired authority to decide the cause.<sup>73</sup> And in all cases, the courts require the production of the libel, or other equivalent document, to verify the nature of the case, and ascertain the foundation of the claim of forfeiture as prize, or require its non-production to be accounted for.<sup>74</sup> Whoever claims, as a purchaser, under a condemnation, must show that he is a bona fide purchaser, for a valuable con-

68. Interpretation of former laws relating to prize money and bounty.—The *Mangrove Prize Money*, 188 U. S. 720, 47 L. Ed. 664; *The Infanta Maria Teresa*, 188 U. S. 283, 47 L. Ed. 477; *The Manila Prize Cases*, 188 U. S. 254, 47 L. Ed. 463; *Dewey v. United States*, 178 U. S. 510, 521, 44 L. Ed. 1170; *United States v. Steever*, 113 U. S. 747, 28 L. Ed. 1133; *Porter v. United States*, 106 U. S. 607, 611, 27 L. Ed. 286; *The Siren*, 13 Wall. 389, 20 L. Ed. 505; *The Iron-Clad Atlanta*, 3 Wall. 425, 431, 18 L. Ed. 253; *The Sally*, 8 Cranch 382, 3 L. Ed. 597; *The Nuestra Senora De Regla*, 108 U. S. 92, 101, 27 L. Ed. 662.

Act of August 8, 1882, c. 480, referring the claims of the captors of the *Albemarle* to the court of claims construed. *United States v. Steever*, 113 U. S. 747, 755, 28 L. Ed. 1133.

69. Compensation of agent appointed to represent captors' interest in prize money.—*The Iron-Clad Atlanta*, 3 Wall. 425, 434, 18 L. Ed. 253.

70. Appropriation of captured vessels

and property to use of government.—*The Manila Prize Cases*, 188 U. S. 254, 260, 47 L. Ed. 463.

71. Captor's right not destroyed by neutral taking possession after abandonment.—*The Mary Ford*, 3 Dall. 188, 1 L. Ed. 163.

72. Captured property given to neutral and carried to his country for adjudication.—*The Adventure*, 8 Cranch 221, 3 L. Ed. 542. See the titles SALVAGE; WAR.

73. What person setting up title under a condemnation must show.—*La Nereyda*, 8 Wheat. 108, 168, 5 L. Ed. 574.

Where the capture is made by captors acting under the commission of a foreign country, and the property condemned by a court of that country, it is peculiarly proper to show the jurisdiction of the court, by an exemplification of the proceedings anterior to the sentence of condemnation. *La Nereyda*, 8 Wheat. 108, 169, 5 L. Ed. 574.

74. *La Nereyda*, 8 Wheat. 108, 169, 5 L. Ed. 574.

sideration.<sup>75</sup>

**R. Deposit of Prize Money.**—The place of deposit of prize money prior to distribution is regulated by statute.<sup>76</sup>

**S. Restoration**—1. BY THE GOVERNMENT.—When in the judgment of the government the public interest demands it, prizes may be restored, and the courts cannot proceed to condemnation.<sup>77</sup> In respect to what is so restored, the government is absolved from liability to the captors.<sup>78</sup>

2. BY THE COURTS—*a. When Restoration Will Be Decreed*—(1) *In General.*—Where a capture was unlawful, or where the circumstances do not warrant condemnation, the vessel or property captured,<sup>79</sup> or their proceeds in case they have been sold,<sup>80</sup> will be restored to the owners; to a libel for restitution, probable cause for seizure is no defense.<sup>81</sup>

(2) *By United States Courts for Violation of Our Neutrality.*—Where in a war in which the United States occupies the position of a neutral, a vessel of one of the belligerents which has violated our neutrality captures and brings into our ports vessels or cargoes of the other belligerent, our courts will decree their restoration to their original owners. Such restoration may be decreed either under international law,<sup>82</sup> or under the acts of congress relating to the subject.<sup>83</sup> The violations of neutrality for which restoration is most frequently decreed are an augmentation of force or an illegal outfit or equipment in this country, es-

75. *La Nereyda*, 8 Wheat. 108, 5 L. Ed. 574.

Evidence held insufficient to prove a bona fide sale after condemnation by a prize court of a foreign nation. *La Nereyda*, 8 Wheat. 108, 173, 5 L. Ed. 574.

76. Under the act of March 3, 1849, all prize money arising from captures by vessels of the navy of the United States, whether received by marshals for the sale of prizes, or in the hands of prize agents, should be deposited in the treasury of the United States. *Jecker v. Montgomery*, 18 How. 110, 125, 15 L. Ed. 311.

77. Restoration by the government.—*The Manila Prize Cases*, 188 U. S. 254, 278, 47 L. Ed. 463.

Section 8 of the act of July 13, 1861, authorizing the secretary of the treasury in certain cases to remit the forfeiture of vessels and cargoes, had no reference to cases of maritime prize, and therefore a remission by the secretary did not entitle the claimant in such a case to restoration of the vessel and cargo. *The Gray Jacket*, 5 Wall. 342, 368, 18 L. Ed. 646.

78. Government absolved from liability to captors.—*The Manila Prize Cases*, 188 U. S. 254, 278, 47 L. Ed. 463.

79. Restoration of vessel or property captured.—*The Volant*, 5 Wall. 179, 180, 18 L. Ed. 626; *The Dashing Wave*, 5 Wall. 170, 18 L. Ed. 622; *The Science*, 5 Wall. 178, 179, 18 L. Ed. 625; *Talbot v. Jansen*, 3 Dall. 133, 1 L. Ed. 540; *The Thompson*, 3 Wall. 155, 162, 18 L. Ed. 55; *The Venus*, 5 Wheat. 127, 131, 5 L. Ed. 50.

Restitution directed.—Several witnesses stated facts which tended to prove that a vessel was in the employment of an enemy government, and that part, at least, of her cargo was in fact enemy property, while the statements of others made it probable that the vessel was in truth

what she professed to be, a merchant steamer, belonging to neutrals, and nothing more; that her outward cargo was consigned in good faith by neutral owners for lawful sale; and that the return cargo was purchased by neutrals, and on neutral account, with the proceeds of the cargo or other money. The court directed restitution. *The Sir William Peel*, 5 Wall. 517, 18 L. Ed. 696.

80. Restoration of proceeds after sale.—*The Paquete Habana*, 175 U. S. 677, 44 L. Ed. 320.

81. Probable cause for seizure no defense to libel for restitution.—*Jecker v. Montgomery*, 18 How. 110, 112, 15 L. Ed. 311; *Jecker v. Montgomery*, 13 How. 498, 14 L. Ed. 240.

82. Restoration under international law, for violation of neutrality.—In the absence of any act of congress on the subject, the courts of the United States, would have authority, under the general law of nations, to decree restitution of property captured in violation of their neutrality under a commission issued within the United States, or under an armament, or augmentation of the armament or crew, of the capturing vessel, within the same. *The Estrella*, 4 Wheat. 298, 4 L. Ed. 574.

83. Restoration under acts of congress relating to violation of neutrality.—Though a vessel be commissioned by a foreign belligerent, if it violates the acts of congress enacted for the preservation of our neutrality, vessels and cargoes captured by it, and belonging to subjects of the other belligerent nation, will, if brought within the territory of the United States, be restored to their original owners. *The Monte Allegre*, 7 Wheat. 520, 5 L. Ed. 513; *La Amistad de Rues*, 5 Wheat. 385, 5 L. Ed. 115.

Vessels restored on this ground.—The

pecially where the vessel is owned in, or commanded by a citizen, of this country.<sup>84</sup> Where to legalize a capture made by a vessel owned, armed and equipped in the United States, a transfer in a port of a belligerent state, under whose flag and commission she made the capture, is set up, the bona fides of the sale must be proved by the usual documentary evidence in a satisfactory manner.<sup>85</sup> An augmentation of force, or illegal outfit, does not affect any capture made after the original cruise, for which such augmentation or outfit was made, is terminated.<sup>86</sup> But as to captures made during the same cruise, the uniform doctrine of the supreme court has been, that they are infected with the character of torts, and that the original owner is entitled to restitution, when the property is brought into our jurisdiction.<sup>87</sup> The exemption of foreign public ships, coming into our waters, under an express or implied license from the local jurisdiction, does not extend to their prize ships or goods, captured in violation of our neutrality.<sup>88</sup> Our counts will restore to the former owners property captured in violation of our neutrality where it is claimed by the original wrongdoer, though it may have come back to his possession, after a regular condemnation as prize.<sup>89</sup>

**Burden of Proof.**—Where the original owner seeks for restitution in our courts, upon the ground of a violation of our neutrality by the captors, the onus probandi rests upon him, and if there be reasonable doubt respecting the facts, the court will decline to exercise its jurisdiction.<sup>90</sup>

(3) *Under Treaty between a Neutral and a Belligerent.*—Restoration is sometimes decreed in the courts of a neutral nation under a treaty made by such neutral with one of the belligerents.<sup>91</sup>

Monte Allegre, 7 Wheat. 520, 5 L. Ed. 513; The Arrogante Barcelones, 7 Wheat. 496, 518, 5 L. Ed. 507; The Santa Maria, 7 Wheat. 490, 494, 5 L. Ed. 505; The Gran Para, 7 Wheat. 471, 486, 5 L. Ed. 501.

**84. Augmentation of force or illegal outfit or equipment in United States.**—Talbot v. Jansen, 3 Dall. 133, 1 L. Ed. 540; The Fanny, 9 Wheat. 658, 669, 6 L. Ed. 484; La Concepcion, 6 Wheat. 235, 5 L. Ed. 249.

**Facts not constituting breach of neutrality.**—The mere replacement of her guns in a neutral port is not an augmentation of the force of a privateer, constituting a breach of neutrality. The Phoebe Anne, 3 Dall. 319, 1 L. Ed. 618; Den Onzekerem, 3 Dall. 285, 296, 1 L. Ed. 605.

The sale of a vessel fitted for a privateer, to the subject of one of two belligerent powers, which the purchaser subsequently equips and furnishes in a port of his own country, is not a breach of our neutrality. The Alfred, 3 Dall. 307, 1 L. Ed. 614.

**Under our treaty with France in force in 1796,** a federal privateer had a right to make repairs in our ports, and her doing so did not invalidate a capture of a British vessel subsequently made by her. The Phoebe Anne, 3 Dall. 319, 1 L. Ed. 618.

**85. Transfer of vessel in port of belligerent state.**—La Concepcion, 6 Wheat. 235, 5 L. Ed. 249.

**86. Capture made after original cruise is terminated.**—The Santissima Trinidad, 7 Wheat. 283, 5 L. Ed. 454.

The supreme court has never decided that the offense adheres to the vessel, whatever changes may have taken place,

and cannot be deposited, at the termination of the cruise, in preparing for which it was committed; but if this termination be merely colorable, and the vessel was originally equipped with the intention of being employed on the cruise, during which the capture was made, the delictum is not purged. The Gran Para, 7 Wheat. 471, 5 L. Ed. 501.

**87. Captures made on cruise in preparation for which breach of neutrality occurred.**—The Santissima Trinidad, 7 Wheat. 283, 5 L. Ed. 454; The Estrella, 4 Wheat. 298, 4 L. Ed. 574.

**88. Effect of exemption of foreign public ships coming into our waters under license.**—The Santissima Trinidad, 7 Wheat. 283, 5 L. Ed. 454.

**89. Property coming back into possession of original wrongdoer after condemnation.**—The Arrogante Barcelones, 7 Wheat. 496, 5 L. Ed. 507.

**90. Burden of proof.**—La Amistad de Rues, 5 Wheat. 385, 5 L. Ed. 115.

Where restitution of captured property is claimed, upon the ground that the force of the cruiser making the capture has been augmented within the United States, by enlisting men, the burden of proving such enlistment is thrown upon the claimant. The Estrella, 4 Wheat. 298, 4 L. Ed. 574.

But that fact being proved by him, the burden shifts to the captors to show that the persons enlisted were subjects of the belligerent state or belonged to its service, and were then transiently within the United States. The Santissima Trinidad, 7 Wheat. 283, 5 L. Ed. 454; The Estrella, 4 Wheat. 298, 4 L. Ed. 574.

**91. The 6th article of the Spanish treaty of 1795,** applied exclusively to the protec-



3. **LIABILITY OF PRIZE AGENTS WHO HAVE PAID PROCEEDS OF PRIZE TO CAPTORS, WITHOUT ORDER.**—Prize agents who receive the proceeds of sales of prize, and pay them over to the captors, without an order of court, are responsible to the owners, in case restitution be decreed, to the extent of the sums actually received by them.<sup>92</sup>

4. **TO WHOM RESTORATION IS DECREED.**—"When no other person interposes a claim, restitution of ship or goods is ordinarily decreed to the master as representing the interests of all concerned, or to the person who by the ship's papers or by the master's oath appears to be the owner."<sup>93</sup>

5. **RIGHTS OF BONA FIDE PURCHASER FROM CAPTOR WHO PAYS FREIGHT.**—Where freight upon goods illegally captured was paid by one who purchased them, bona fide, without notice, from the captor, such purchaser is entitled to be reimbursed therefor out of the goods captured.<sup>94</sup>

**T. Liability for Unlawful Capture or for Destruction of or Injury to Property Captured**—1. **STATEMENT OF RULE OF LIABILITY.**—Where a capture is made without probable cause therefor,<sup>95</sup> or property captured is injured or destroyed,<sup>96</sup> and upon adjudication in a prize court the capture is adjudged unlawful and the property ordered to be restored to the owners, the captors,<sup>97</sup>

tion and defense of Spanish ships, within our territorial jurisdiction, and provided only for their restitution, when captured within the same. *The Santissima Trinidad*, 7 Wheat. 283, 5 L. Ed. 454.

The provisions of the fourteenth article of the same treaty, which prohibited the citizens or subjects of the respective contracting parties from taking commissions, etc., to cruise against the other, under the penalty of being considered as pirates, were confined to private armed vessels, and did not extend to public ships. *The Santissima Trinidad*, 7 Wheat. 283, 5 L. Ed. 454.

92. **Liability of prize agents who have paid proceeds of prize to captors, without order.**—*Hills v. Ross*, 3 Dall. 331, 1 L. Ed. 623.

93. **To whom restoration is decreed.**—*Cushing v. Laird*, 107 U. S. 69, 81, 27 L. Ed. 391.

94. **Bona fide purchaser who pays freight entitled to reimbursement.**—*The Fanny*, 9 Wheat. 658, 671, 6 L. Ed. 184.

95. **Probable cause for capture exempts from damages.**—The captors are exempted from damages if there was probable cause for the capture. *The Olinde Rodrigues*, 174 U. S. 510, 536, 43 L. Ed. 1065; *The Goodwin*, 9 Wheat. 362, 372, 6 L. Ed. 111; *The Palmyra*, 12 Wheat. 1, 17, 6 L. Ed. 531; *The Buena Ventura*, 175 U. S. 384, 395, 44 L. Ed. 206; *Jecker v. Montgomery*, 18 How. 110, 112, 15 L. Ed. 311; *Jecker v. Montgomery*, 13 How. 498, 14 L. Ed. 240; *The Thompson*, 3 Wall. 155, 18 L. Ed. 55.

**When probable cause exists.**—See ante, "Probable Cause as Justification of Capture," IV. M.

Probable cause for capture held to have existed and therefore that the prize court committed no error in refusing to give the claimants damages. *The Thompson*, 3 Wall. 155, 18 L. Ed. 55.

96. **The existence of probable cause for seizing a neutral vessel as prize, and send-**

ing her in for examination, does not exonerate the captors from liability for any injury to or spoliation of, the property captured, if not condemned as lawful prize. *The Grand Sachem*, 3 Dall. 333, 1 L. Ed. 624.

97. **The commander of a single ship is responsible for the acts of those under his command.** *The Eleanor*, 2 Wheat. 345, 4 L. Ed. 257.

**The owners of privateers are responsible for the conduct of the commanders appointed by them.** *The Eleanor*, 2 Wheat. 345, 4 L. Ed. 257.

The owners of a privateer are responsible for the conduct of their agents, the officers and crew, for injury to, or spoliation of, property captured, and which is found upon adjudication not subject to condemnation. *The Grand Sachem*, 3 Dall. 333, 334, 1 L. Ed. 624.

**Liability where vessel taken by force from original captor.**—The commander of a United States ship of war, if he seize a vessel on the high seas without probable cause, is liable to make restitution in value, with damages and costs, even although the vessel be taken out of his possession by a superior force; and the owner is not bound to resort to the recaptor, but may abandon and hold the original captor liable for the whole loss. *Maley v. Shattuck*, 3 Cranch 458, 2 L. Ed. 498.

**Where libel filed by United States, captors, if not intervening, not liable.**—Where libels are filed by the United States on its own behalf, praying a forfeiture to the United States of a vessel captured by its navy, and the libel alleges a capture pursuant to instructions from the president, and the court decides that the vessel was not liable to capture and decrees that the proceeds of the vessel and cargo be restored to the claimant, with damages and costs, the captors, if they have not intervened, are not liable, but the decree

or the government of the country in whose name the capture is made, if it voluntarily submits itself to the jurisdiction of the court,<sup>98</sup> will be held liable in damages for the unlawful capture, or for the injury to or destruction of the property. But for a loss resulting from the use of a stratagem which is essential to the exercise of the right of detention for examination, the captors are not liable.<sup>99</sup>

2. IN WHOM RIGHT OF INDEMNITY VESTS.—The right to indemnity for an unjust capture, whether against the captors or the sovereign, is a right attached to the ownership of the property itself, and passes, by cession, to the use of the ultimate sufferer, and is afterwards assignable by the person to whom it had been ceded.<sup>1</sup>

3. MEASURE OF DAMAGES.—The prime cost or value of the property, and in case of injury, the diminution in value, by reason of the injury, with interest thereon, affords the true measure for estimating damages.<sup>2</sup> But captors are not liable for loss by deterioration of the cargo, not occasioned by their improper conduct.<sup>3</sup> The probable or possible profits of an unfinished voyage

may be entered against the United States. *The Paquete Habana*, 189 U. S. 453, 464, 47 L. Ed. 901.

98. **Liability of United States.**—Without the consent of the United States no judgment for damages that can be enforced by execution can be rendered against them for the unlawful capture of a vessel. *The Nuestra Senora De Regla*, 108 U. S. 92, 102, 27 L. Ed. 662.

But if they voluntarily submit themselves to the court, for the purpose of having the question of such damages judicially settled according to the rules applicable to private persons in like cases, they will be bound by such submission. *The Nuestra Senora De Regla*, 108 U. S. 92, 102, 27 L. Ed. 662; *The Paquete Habana*, 189 U. S. 453, 464, 47 L. Ed. 901.

Such submission can, without express legislative authority, be made by the executive department of the government. *The Nuestra Senora De Regla*, 108 U. S. 92, 102, 27 L. Ed. 662.

During the Civil War a Spanish vessel was unlawfully seized as a prize of war, and used by the United States government. She was afterwards condemned as prize but subsequently ordered to be restored. She never was restored. It was held that her owner was entitled to fair indemnity for the loss sustained by the seizure and employment of the vessel, but that it might be well doubted whether it was not more properly a subject of diplomatic adjustment than of determination by the courts. *The Nuestra Senora De Regla*, 17 Wall. 29, 31, 21 L. Ed. 596.

99. **Use of stratagem essential to exercise of right of detention.**—The right of a belligerent to detain for examination necessarily carries with it all the means essential to its exercise; among these may, sometimes, be included the assumption of the disguise of a friend or an enemy, which is a lawful stratagem of war, and if, in consequence of the use of this stratagem, the crew of the vessel detained, abandon their duty, before they are ac-

tually made prisoners of war, and the vessel is thereby lost, the captors are not responsible. *The Eleanor*, 2 Wheat. 345, 4 L. Ed. 257.

1. **In whom right of indemnity vests.**—*Comegys v. Vasse*, 1 Pet. 193, 7 L. Ed. 108.

2. **Measure of damages.**—*The Amiable Nancy*, 3 Wheat. 546, 4 L. Ed. 456.

Where a vessel, for whose condemnation there is no warrant, was lost through the negligence of the captors, and under circumstances that amounted to a wanton marine trespass on their part, it was held that the measure of damages was the value of the vessel, and the prime cost of the cargo, with all charges, and the premium of insurance where it had been paid, with interest. *The Anna Maria*, 2 Wheat. 327, 335, 4 L. Ed. 252.

For injury to or spoliation of property captured by a privateer, by the officers and crew thereof, if such property is found upon adjudication not subject to condemnation, the measure of damages is the full value of the property injured or destroyed. *The Grand Sachem*, 3 Dall. 333, 335, 1 L. Ed. 624.

**Excessive damages.**—In *The Paquete Habana*, 189 U. S. 453, 466, 47 L. Ed. 901, certain captures made by the navy were held to be unlawful and decrees were entered against the United States for the amount of damages reported by a commissioner. It was held upon a review of the evidence that the damages were excessive, and the decrees were reversed and the cases remanded for a revision of the findings.

Counsel fees before a commissioner on the settlement of damages on an award of restitution, disallowed as excessive and unwarranted. *The Nuestra Senora De Regla*, 17 Wall. 29, 21 L. Ed. 596.

3. **Deterioration of cargo not occasioned by captor's improper conduct.**—*The Amiable Nancy*, 3 Wheat. 546, 4 L. Ed. 456.

afford no rule to estimate the damages.<sup>4</sup> On an illegal seizure, the original wrongdoers may be made responsible, beyond the loss actually sustained, in a case of gross and wanton outrage.<sup>5</sup> But the owners of a privateer, who are only constructively liable, are not bound to the extent of vindictive damages.<sup>6</sup> If a captor unnecessarily delays instituting judicial proceedings for the condemnation of his prize the court may, in case of restitution, decree demurrage against him as damages.<sup>7</sup>

**U. Jurisdiction and Procedure—1. JURISDICTION—**a. *Jurisdiction of Prize Courts—*(1) *In General—*(a) *Courts of the Nation to Which the Captor Belongs—*aa. *In General.*—The general rule is that the trial of captures, made on the high seas, jure belli, by a duly commissioned vessel of war, whether from an enemy, or a neutral, belongs exclusively to the courts of that nation, to which the captor belongs;<sup>8</sup> and to those courts only of that nation upon which the sovereign power thereof has conferred jurisdiction of the question.<sup>9</sup>

bb. *Liability of Captors for Damages.*—As incidental to the question of the lawfulness of the capture, prize courts have jurisdiction to determine the liability of the captors for damages, occasioned by their own wrongful acts, or by the fault of those in charge of the prize while in their custody.<sup>10</sup> The jurisdiction of prize courts in such cases is exclusive.<sup>11</sup>

(b) *Courts of Neutral Nations.*—In case of a capture by an alleged privateer, the courts of a neutral nation have jurisdiction to determine whether the vessel had been commissioned as a privateer.<sup>12</sup> And if a capture be made within the territorial limits of a neutral country, into which the prize is brought, or by a privateer which had been illegally equipped in such neutral country, the prize

**4. Probable or possible profits of unfinished voyage.**—*The Amiable Nancy*, 3 Wheat. 546, 4 L. Ed. 456.

**5. Liability beyond loss actually sustained.**—*The Amiable Nancy*, 3 Wheat. 546, 4 L. Ed. 456.

**6. The Amiable Nancy**, 3 Wheat. 546, 4 L. Ed. 456.

**7. Demurrage for unnecessary delay in instituting condemnation proceedings.**—*The Nuestra Senora De Regla*, 108 U. S. 92, 103, 27 U. 662.

In this case, it was held that upon the facts there could be no doubt of the propriety of such an allowance for the extraordinary detention of the vessel before she was delivered up for adjudication, especially since she was detained for the express purpose of use by the United States.

Where the United States were willing and actually contracted to pay \$200 a day for the use of a vessel captured if she was not in fact lawful prize, and that was shown to have been a reasonable price for her charter at the time, it was held that for an unnecessary and unusual delay in proceeding to adjudication the claimant was entitled to recover \$200 a day for the period of the delay. *The Nuestra Senora De Regla*, 108 U. S. 92, 103, 27 L. Ed. 662.

**8. Jurisdiction of courts of nation to which captor belongs.**—*The Alerta*, 9 Cranch 359, 364, 3 L. Ed. 758; *The Estrella*, 4 Wheat. 298, 4 L. Ed. 574.

The courts of another nation, whether an ally or a cobelligerent, can acquire no general right to entertain cognizance of a prize cause, unless by the assent, or upon

the voluntary submission, of the captors. *La Nereyda*, 8 Wheat. 108, 169, 5 L. Ed. 574.

Unless the neutral rights of the United States (as ascertained by the law of nations, the acts of congress and treaties) are violated by cruisers sailing under commissions from belligerent nations, the legality of the captures made by them cannot be determined in our courts. *The Divina Pastora*, 4 Wheat. 52, 4 L. Ed. 512. See post, "Courts of Neutral Nations," IV, U, 1, a, (1), (b).

The American owner could not reclaim, in the courts of this country, his property which had been seized and condemned in a French court under the Milan decree. *The Fortitude*, 7 Cranch 423, 3 L. Ed. 393.

**9. Jurisdiction exclusively in courts upon which sovereign power has conferred it.**—*Jecker v. Montgomery*, 13 How. 498, 515, 14 L. Ed. 240.

Under the constitution and laws of the United States neither the president nor any military officer can establish a court in a conquered country, and authorize it to decide upon the rights of the United States, or of individuals in prize cases. *Jecker v. Montgomery*, 13 How. 498, 515, 14 L. Ed. 240.

**10. Jurisdiction to determine liability of captors for damages.**—*Cushing v. Laird*, 107 U. S. 69, 82, 27 L. Ed. 391.

**11. *Lamar v. Browne***, 92 U. S. 187, 197, 23 L. Ed. 650. See post, "Jurisdiction of Courts of Common Law," IV, U, 1, b.

**12. Jurisdiction of question whether alleged privateer was duly commissioned.**—*Talbot v. Jansen*, 3 Dall. 133, 1 L. Ed. 540.



courts of such country may restore the property, so illegally captured, to the owner.<sup>13</sup> But the courts of a neutral nation have not jurisdiction of proceedings in rem against a public ship or privateer of a belligerent for illegal captures on the high seas, in violation of neutrality, unless such ship had been fitted out in violation of the neutrality of such neutral nation.<sup>14</sup>

(2) *Of District Courts of the United States*—(a) *In General*.—The district courts of the United States have exclusive original jurisdiction in questions of prize.<sup>15</sup>

(b) *What Determines Jurisdiction*.—The jurisdiction of a court of admiralty over a vessel captured *jure belli*, is determined by the fact of capture. The filing of a libel is not necessary to create it.<sup>16</sup> And when under the act of congress of the 25th of March, 1862, the prize commissioners authorized by the act certified to a district court that a prize vessel had arrived in their district, and had been delivered into their hands, this was a sufficient evidence to the court that the vessel was claimed as a prize of war and in its jurisdiction as a prize court.<sup>17</sup>

(c) *Extent of Jurisdiction*—aa. *In Relation to Place of Capture and Ownership of Property*.—In case of a capture on a navigable water, the question of prize or no prize is within the jurisdiction of the admiralty, though the property seized belong to a citizen of the state in which the capture was made.<sup>18</sup>

bb. *What Claims Are within Jurisdiction*.—A district court, sitting as a prize court, may hear and determine all questions respecting claims arising after the capture of the vessel.<sup>19</sup> But it cannot adjudicate outstanding claims upon the

**13. Breach of neutrality as conferring jurisdiction.**—The *Alerta*, 9 Cranch 359, 364, 3 L. Ed. 758; The *Estrella*, 4 Wheat. 298, 4 L. Ed. 574.

A district court of the United States was held to have jurisdiction to restore to the original Spanish owner his property captured by a French vessel, whose force had been increased in the United States where the prize was brought *infra præsidia*. The *Alerta*, 9 Cranch 359, 3 L. Ed. 758.

**14. United States v. Peters**, 3 Dall. 121, 1 L. Ed. 535; *L'Invincible*, 1 Wheat. 238, 4 L. Ed. 80. See, also, The *Santissima Trinidad*, 7 Wheat. 283, 350, 5 L. Ed. 454; The *Exchange*, 7 Cranch 116, 3 L. Ed. 287.

The courts of a neutral nation have no right to decide upon the lawfulness or unlawfulness of a capture taken by one belligerent from another. The *Mary Ford*, 3 Dall. 188, 1 L. Ed. 163.

If a privateer brings an enemy's ship which she has taken as prize on the high seas, into a neutral port, the courts of the neutral nation have not jurisdiction to inquire into the circumstances of the capture. *Talbot v. Jansen*, 3 Dall. 133, 159, 1 L. Ed. 540.

Assuming that the case of The *Grand Sachem*, 3 Dall. 333, 1 L. Ed. 624, was decided under the idea that the courts of a neutral can take cognizance of the legality of belligerent seizure, it was expressly overruled in the case of *L'Invincible*, 1 Wheat. 238, 259, 4 L. Ed. 80.

**15. District courts have exclusive original jurisdiction.**—The *Thompson*, 3 Wall. 155, 162, 18 L. Ed. 55.

The district court of the District of Columbia has jurisdiction of a libel for the condemnation of property which has been

sold by the captor under circumstances warranting such sale. *Jecker v. Montgomery*, 13 How. 498, 517, 14 L. Ed. 240; *Jecker v. Montgomery*, 18 How. 110, 111, 15 L. Ed. 311.

"Judicial cognizance of prize cases is derived from that article of the constitution which ordains that the judicial power shall extend to all cases of admiralty and maritime jurisdiction; and the district courts for many years exercised jurisdiction in such cases without any other authority from congress than what was conferred by the ninth section of the judiciary act, which gave those courts exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including the seizures therein mentioned, the rule adopted being that prize jurisdiction was involved in the general delegation of admiralty and maritime cognizance, as conferred by the language of that section." *United States v. Ames*, 99 U. S. 35, 25 L. Ed. 295.

The district courts of the United States had jurisdiction of questions of prize, and its incidents, independent of the special provisions of the prize act of the 26th of June, 1812, ch. 430. The *Amiable Nancy*, 3 Wheat. 546, 4 L. Ed. 456.

**16. Jurisdiction determined by fact of capture.**—The *Nassau*, 4 Wall. 634, 18 L. Ed. 413.

**17. Sufficient notice to court that vessel is in its jurisdiction.**—The *Nassau*, 4 Wall. 634, 18 L. Ed. 413.

**18. Jurisdiction in relation to place of capture and ownership of property.**—*W. B. v. Latimer*, 4 Dall., appx. i, 1 L. Ed. 915.

**19. Claims arising after capture within jurisdiction.**—The *Siren*, 7 Wall. 152, 19 L. Ed. 129.

vessel, existing previous to the capture.<sup>20</sup>

cc. *Power to Carry into Effect Sentences of Continental Courts.*—The district courts have power to carry into effect the sentences of the old continental courts of appeals in prize causes.<sup>21</sup>

(3) *In What Foreign Courts United States Courts Will Recognize Jurisdiction.*—If a claim be set up under the sentence of condemnation of a foreign court, the supreme court of the United States will examine into the jurisdiction of such court, and if it finds that it could not consistently with the law of nations, exercise the jurisdiction which it assumed, its sentence will be disregarded.<sup>22</sup> Where the United States has not acknowledged the existence of an alleged republic or state, a condemnation of a ship as prize by an alleged prize court of such state, will not be recognized by our courts.<sup>23</sup>

b. *Jurisdiction of Courts of Common Law.*—The question of prize or no prize is solely and exclusively of admiralty jurisdiction, and not triable at common law.<sup>24</sup> But a court of common law has jurisdiction of an action to recover the value of a vessel which was taken as prize by the defendant and has been ordered to be restored, by a prize court.<sup>25</sup> But after restoration to the owner of the property unlawfully captured, the captors are not liable to a suit at common law for the trespass.<sup>26</sup> A suit for prize money, when the question of prize or no prize is not involved, will lie in a common-law court.<sup>27</sup>

2. *PROCEDURE IN GENERAL.*—Prize proceedings are summary.<sup>28</sup> The court of prize is a court of the law of nations; and it takes neither its character nor its rules from the mere municipal regulations of any country.<sup>29</sup> The allegations, the proofs and the proceedings are, in general, modeled upon the civil law, with such additions and alterations as the practice of nations and the rights of belligerents and neutrals unavoidably impose.<sup>30</sup> It is essential, to the correct administration of prize law, that the regular modes of proceeding should be observed with the utmost strictness.<sup>31</sup>

3. *ORDER TO INSTITUTE PROCEEDINGS.*—A court of competent jurisdiction may order a captor to institute proceedings for condemnation by a day specified,<sup>32</sup>

A libel will lie, in the admiralty, by the crew of a privateer, for their respective propositions of a prize. The libellants in such case have a double remedy. They have an action at law, for money had and received to their use and they are entitled to a supplemental libel, upon which a decree and order may be obtained, to compel the marshal to pay the money. Such a libel is nothing more than a form of proceeding, to carry into execution the original decree; and if the admiralty courts are competent to give judgment, they must be competent to carry it into execution. *The Gloucester*, 2 Dall. 36, 37, 1 L. Ed. 278.

20. *Claims existing previous to capture not within jurisdiction.*—*The Siren*, 7 Wall. 152, 162, 19 L. Ed. 129. But see *The Nassau*, 4 Wall. 634, 18 L. Ed. 413.

"This exclusion rests not on the ground of any supposed inability of the court to pass upon these claims correctly, but because they are superseded by the capture." *The Siren*, 7 Wall. 152, 162, 19 L. Ed. 129.

21. *Power to carry into effect sentences of continental courts.*—*Jennings v. Carson*, 4 Cranch 2, 2 L. Ed. 531; *Penhallow v. Doane*, 3 Dall. 54, 1 L. Ed. 507.

22. *Sentence of court exercising jurisdiction without authority disregarded.*—*Rose v. Himely*, 4 Cranch 241, 2 L. Ed. 608.

23. *Court of alleged state existence of which is not acknowledged.*—*The Nueva Anna*, 6 Wheat. 193, 5 L. Ed. 239.

24. *Question of prize or no prize not triable at common law.*—*Doane v. Penhallow*, 1 Dall. 218, 220, 1 L. Ed. 108.

25. *Action to recover value of vessel ordered restored.*—*Taxier v. Sweet*, 2 Dall. 81, 1 L. Ed. 298; *Doane v. Penhallow*, 1 Dall. 218, 1 L. Ed. 108.

26. *No jurisdiction of action of trespass after restoration.*—*Lamar v. Browne*, 92 U. S. 187, 197, 23 L. Ed. 650.

27. *Suit for prize money.*—*Henderson v. Clarkson*, 2 Dall. 174, 176, 1 L. Ed. 337. See, also, *The Gloucester*, 2 Dall. 36, 37, 1 L. Ed. 278.

28. *Prize proceedings summary.*—*Cushing v. Laird*, 107 U. S. 69, 77, 27 L. Ed. 391.

29. *Character of procedure.*—*The Adeline*, 9 Cranch 244, 284, 3 L. Ed. 719.

30. *The Adeline*, 9 Cranch 244, 284, 3 L. Ed. 719.

31. *Regular modes of proceeding must be observed with utmost strictness.*—*The Dos Hermanos*, 2 Wheat. 76, 80, 4 L. Ed. 189.

32. *Order to institute proceedings.*—*Jecker v. Montgomery*, 13 How. 498, 517, 14 L. Ed. 240; *Jecker v. Montgomery*, 18 How. 110, 111, 15 L. Ed. 311.



and upon his failure to do so should proceed against him upon a libel for an unlawful seizure.<sup>33</sup>

4. **EXCUSE FOR DELAY IN INSTITUTING PROCEEDINGS.**—The fact that a captured vessel and cargo had been condemned by a court that was illegal and without jurisdiction, but which, nevertheless, had been constituted with the sanction of the executive department of the government, is a sufficient excuse for delay by the captor in instituting proceedings in a court of competent jurisdiction.<sup>34</sup>

5. **IN WHOSE NAME PROCEEDINGS SHOULD BE INSTITUTED OR CARRIED ON.—Generally, Proceedings Instituted in Name of United States.**—Generally, the proceedings for the condemnation of property as prize ought to be instituted in the name of the United States.<sup>35</sup>

**Substitution after Death of Commanding Officer Who Has Filed a Libel.**—Where a rear admiral in the United States Navy, who has filed a libel in prize in his own behalf and in behalf of all the officers and enlisted men who took part in the engagement, dies, someone to carry on the proceedings in the interest of all should be substituted. But it is not necessary that the personal representatives of those who have died should come in, or that any person should *ex officio* be designated.<sup>36</sup>

**In the case of a capture made within a neutral territorial jurisdiction,** it is well settled, that as between the captors and the captured, the question can never be litigated. It can arise only upon a claim of the neutral sovereign, asserted in his own courts, or the courts of the power having cognizance of the capture itself for the purposes of prize.<sup>37</sup>

**Suit for Prize Money.**—A prize agent appointed under the act of March 8, 1780, could sue for prize money in his own name.<sup>38</sup>

6. **THE LIBEL.**—The libel is filed as soon as possible after the prize has been brought into a port of the government of the captors.<sup>39</sup> It need not contain any allegation as to title, nor even set forth the grounds of condemnation,<sup>40</sup> but may simply pray that the vessel may be forfeited to the captors as lawful prize of war.<sup>41</sup>

7. **THE MONITION.**—The monition issued and published upon the filing of the libel summons all persons interested to show cause against the condemnation of the property as prize of war, and is returnable within a very few days.<sup>42</sup>

8. **THE CLAIM.—By Whom Made.**—The claim is often made by the master of the vessel or the managing owner,<sup>43</sup> and it may be made by an agent or the

33. *Jecker v. Montgomery*, 13 How. 498, 517, 14 L. Ed. 240; *Jecker v. Montgomery*, 18 How. 110, 112, 15 L. Ed. 311.

34. **Sufficient excuse for delay in instituting proceedings.**—*Jecker v. Montgomery*, 13 How. 498, 516, 14 L. Ed. 240.

35. **Proceedings generally instituted in name of United States.**—*Jecker v. Montgomery*, 18 How. 110, 115 L. Ed. 311.

36. **Substitution after death of commanding officer who has filed a libel.**—*United States v. Sampson*, 187 U. S. 436, 437, 47 L. Ed. 248.

37. **Capture made within neutral territorial jurisdiction.**—*The Santissima Trinidad*, 7 Wheat. 283, 349, 5 L. Ed. 454.

38. **Suit for prize money.**—*Henderson v. Clarkson*, 2 Dall. 174, 1 L. Ed. 337.

39. **Time of filing libel.**—*Cushing v. Laird*, 107 U. S. 69, 77, 27 L. Ed. 391.

40. **What libel should contain.**—*Cushing v. Laird*, 107 U. S. 69, 77, 27 L. Ed. 391.

A libel need not allege for what cause a vessel has been seized, or has become prize of war, as *ex gr.*, whether for an at-

tempted breach of blockade or as enemy property. *The Andromeda*, 2 Wall. 481, 17 L. Ed. 849.

41. *The Andromeda*, 2 Wall. 481, 17 L. Ed. 849; *Cushing v. Laird*, 107 U. S. 69, 77, 27 L. Ed. 391.

**Libel held to sufficiently allege** that a vessel captured was used with the knowledge and consent of her owner in aiding the rebellion against the United States, contrary to the act of August 6, 1861, and that she was seized for that reason. *Oakes v. United States*, 174 U. S. 778, 790, 43 L. Ed. 1169.

42. **The monition.**—*Cushing v. Laird*, 107 U. S. 69, 77, 27 L. Ed. 391.

43. **By whom claim is made.**—*United States v. Ames*, 99 U. S. 35, 43, 25 L. Ed. 295.

"From the necessity of the case, the claim is often put in by the master on behalf of the owner, and it is sufficient if the master's oath is to belief only." *Cushing v. Laird*, 107 U. S. 69, 78, 27 L. Ed. 391.



consignee;<sup>44</sup> and in the case of a foreign ship it may be filed by the consul of the nation to which the ship belongs.<sup>45</sup>

9. BOND FOR RELEASE OF PROPERTY.—The claimant, if he wishes to avoid the inconvenience and expense of having the property detained until the termination of the suit, may apply to the court at any time to have the property released on giving bond, which application it is competent for the court to grant or refuse.<sup>46</sup> Bail in such a case is a pledge or substitute for the property as regards all claims that may be made against it by the promotor of the suit.<sup>47</sup> It would seem that in case of misrepresentation or fraud or in case the order of release was improvidently given without any appraisement or any proper knowledge of the real value of the property, it may be recalled before judgment where the ends of justice require the matter to be reconsidered.<sup>48</sup> And the question whether a case is made for the recall of the property must be determined before a final decree on the bond is rendered in the district court, or in the circuit court on appeal.<sup>49</sup>

10. EXAMINATION IN PREPARATORIO AND FIRST HEARING.—It is the duty of the captors, as soon as practicable, to bring the ship's papers into the registry of the district court,<sup>50</sup> and to have the examinations of the principal officers and seamen of the captured ship taken before the district judge, or commissioners appointed by him, upon the standing interrogatories;<sup>51</sup> and without communication with or instruction by counsel.<sup>52</sup> It is exclusively upon these papers and examinations, that the cause is to be heard before the district court.<sup>53</sup> If they show clear ground for condemnation or for acquittal, no further proof is ordinarily required or permitted,<sup>54</sup> but condemnation or acquittal immediately follows.<sup>55</sup> If, on the other hand, the property appear doubtful, or the case be clouded, with suspicions or inconsistencies, it then becomes a case of further proof, which the court will direct or deny, according to the rules which govern its legal discretion on this subject.<sup>56</sup> Original evidence and depositions taken on the standing interrogatories, may be invoked from one prize cause in to another.<sup>57</sup>

11. FURTHER PROOF—*a. When Allowed.*—After the first hearing it is in the

44. *United States v. Ames*, 99 U. S. 35, 43, 25 L. Ed. 295.

45. *United States v. Ames*, 99 U. S. 35, 43, 25 L. Ed. 295.

46. **Bond for release of property.**—*United States v. Ames*, 99 U. S. 35, 25 L. Ed. 295.

47. *United States v. Ames*, 99 U. S. 35, 26, 25 L. Ed. 295.

48. *United States v. Ames*, 99 U. S. 35, 42, 25 L. Ed. 295.

49. *United States v. Ames*, 99 U. S. 35, 25 L. Ed. 295.

50. **Duty of captors to bring ship's papers into registry of court.**—*The Dos Hermanos*, 2 Wheat. 76, 79, 4 L. Ed. 189; *The Pizarro*, 2 Wheat. 227, 240, 4 L. Ed. 226.

**The papers must be verified on oath, by the captors.** *The Pizarro*, 2 Wheat. 227, 240, 4 L. Ed. 226.

51. **Examination in preparatorio.**—*The Dos Hermanos*, 2 Wheat. 76, 79, 4 L. Ed. 189; *Cushing v. Laird*, 107 U. S. 69, 77, 27 L. Ed. 391.

**The examinations of the captured crew must be taken upon the standing interrogatories, and not viva voce in open court.** *The Pizarro*, 2 Wheat. 227, 240, 4 L. Ed. 226.

52. *Cushing v. Laird*, 107 U. S. 69, 77, 27 L. Ed. 391.

53. **First hearing exclusively upon ship's papers and examination in preparatorio.**

—*The Dos Hermanos*, 2 Wheat. 76, 80, 4 L. Ed. 189; *The Amiable Isabella*, 6 Wheat. 1, 2, 5 L. Ed. 191; *The Adula*, 176 U. S. 361, 380, 44 L. Ed. 505; *The Sir William Peel*, 5 Wall. 517, 18 L. Ed. 696; *The Anne*, 3 Wheat. 435, 444, 4 L. Ed. 428; *The Pizarro*, 2 Wheat. 227, 240, 4 L. Ed. 226; *The Sally Magee*, 3 Wall. 451, 452, 18 L. Ed. 197.

If, preparatory to the first hearing, testimony was taken of persons not in any way connected with the ship, such evidence is properly excluded, and the hearing takes place on the proper proofs. *The Sir William Peel*, 5 Wall. 517, 18 L. Ed. 696.

54. **When further proof allowed.**—*Cushing v. Laird*, 107 U. S. 69, 77, 27 L. Ed. 391.

55. *The Dos Hermanos*, 2 Wheat. 76, 80, 4 L. Ed. 189; *The Adula*, 176 U. S. 361, 380, 44 L. Ed. 505; *The George*, 1 Wheat. 408, 409, 4 L. Ed. 128.

56. *The Pizarro*, 2 Wheat. 227, 240, 4 L. Ed. 226; *The Dos Hermanos*, 2 Wheat. 76, 80, 4 L. Ed. 189. See post, "When Allowed," IV, U, 11, a.

57. **Evidence may be invoked from one prize cause into another.**—*The Experiment*, 4 Wheat. 84, 4 L. Ed. 520.

discretion of the court to make or not to make, an order for further proof.<sup>58</sup> The making of it is controlled by the circumstances of each case.<sup>59</sup> It is always made with extreme caution, and only where the ends of justice clearly require it.<sup>60</sup> If upon the evidence admissible at the first hearing, the case is not sufficiently clear to warrant condemnation or restitution, the court should make the order. This it may do either of its own accord, or upon motion and proper grounds shown.<sup>61</sup> The order should not be made, however, unless the first hearing leaves the matter in grave doubt.<sup>62</sup> It is granted in cases of honest mistake or ignorance, or to clear away any doubts or defects consistent with good faith.<sup>63</sup> But if the parties have been guilty of gross fraud or misconduct, or illegality, further proof is not allowed.<sup>64</sup> If the United States interpose a claim, charging that the capture was collusive, further proof will almost universally be allowed.<sup>65</sup> Further proof will not be required to ascertain whether the captor was duly commissioned, as that is a question which the claimant has no right to litigate.<sup>66</sup> The foregoing principles have received concrete illustration in cases that have come on appeal before the supreme court.<sup>67</sup>

b. *Foundation for Introduction.*—A bill of lading consigning goods captured to a neutral, but unaccompanied by an invoice or letter of advice, is

58. When court will make order for further proof.—The Sally Magee, 3 Wall. 451, 452, 18 L. Ed. 197.

59. The Sally Magee, 3 Wall. 451, 452, 18 L. Ed. 197.

60. The Gray Jacket, 5 Wall. 342, 18 L. Ed. 646; The Sally Magee, 3 Wall. 451, 452, 18 L. Ed. 197.

61. The Sir William Peel, 5 Wall. 517, 18 L. Ed. 696; The Dos Hermanos, 2 Wheat. 76, 80, 4 L. Ed. 189; The Pizarro, 2 Wheat. 227, 240, 4 L. Ed. 226; The Amiable Isabella, 6 Wheat. 1, 2, 5 L. Ed. 191. See post, "Motion for Order," IV, U, 11, d.

62. The Adula, 176 U. S. 361, 381, 44 L. Ed. 505.

Further proof will not be allowed, where the court is satisfied, that the evidence, as it stands, is not susceptible of any satisfactory explanation. The Hazard's Cargo, 9 Cranch 205, 3 L. Ed. 706.

If an examination of the ship's papers and of the crew, taken in preparatorio, upon which the cause is first heard, make a case for condemnation, the order for further proof is always made with extreme caution, and only where the interests of justice clearly require it. The Adula, 176 U. S. 361, 381, 44 L. Ed. 505. See, also, The Guido, 175 U. S. 382, 383, 44 L. Ed. 206.

On the other hand, if the evidence in preparatorio shows no ground for condemnation, and no circumstances of suspicion, the captors will not ordinarily be allowed to introduce further proofs. Cushing v. Laird, 107 U. S. 69, 78, 27 L. Ed. 391.

63. The Dos Hermanos, 2 Wheat. 76, 80, 4 L. Ed. 189.

64. The Dos Hermanos, 2 Wheat. 76, 80, 4 L. Ed. 189. See, also, The Amiable Isabella, 6 Wheat. 1, 2, 5 L. Ed. 191.

Concealment, suppression or spoliation of papers.—It is a relaxation of the rules

of the prize court, to allow time for further proof, in a case where there has been concealment of material papers. The Fortuna, 3 Wheat. 236, 237, 4 L. Ed. 379.

Suppression of papers, where it appears to have been intentional and fraudulent, and attended with other suspicious circumstances, is good cause for refusing further proof. The St. Lawrence, 8 Cranch 434, 3 L. Ed. 615.

But where the suppression appears to be owing to accident or mistake, and no other suspicious circumstances appear in the case, further proof may be allowed. The St. Lawrence, 8 Cranch 434, 3 L. Ed. 615.

If there was a spoliation of the ship's papers, and it is unexplained, or the explanation is unsatisfactory, and the cause labors under heavy suspicions, or there is a vehement presumption of bad faith or gross prevarication, further proof will be denied and condemnation decreed. The Pizarro, 2 Wheat. 227, 241, 4 L. Ed. 226.

65. Further proof allowed where United States interpose claim charging collusion.—The George, 1 Wheat. 408, 4 L. Ed. 128.

"The collusiveness of the capture must be almost confessed before the court could think a refusal to allow other proof than is furnished by the captured vessel justifiable." The George, 1 Wheat. 408, 411, 4 L. Ed. 128.

66. Further proof not allowed to ascertain whether captor was duly commissioned.—The Dos Hermanos, 2 Wheat. 76, 99, 4 L. Ed. 189. See, also, The Amiable Isabella, 6 Wheat. 1, 66, 5 L. Ed. 191.

67. Further proof ordered.—Facts as to validity of capture being not sufficiently clear, further proof was ordered to be furnished by both captors and claimants with respect to the circumstances of capture. The Grotius, 8 Cranch 456, 461, 3 L. Ed. 623.

sufficient to lay a foundation for the introduction, by the claimant, of further proof.<sup>68</sup>

c. *Character of Proof Admitted and Competency of Witnesses.*—When further proof is ordered, it is only from such witnesses and upon such points as the prize court may in its discretion think fit.<sup>69</sup> Upon such an order, it is almost the invariable practice for the claimant, besides other testimony, to make proof by his own oath, of his proprietary interest, and to explain the other circumstances of the transaction.<sup>70</sup> The captors are competent witnesses, upon an order for further proof, where the benefit of it is extended to both parties.<sup>71</sup>

d. *Motion for Order.*—The claimant may move for an order for further proof, and show the grounds of the application by affidavit, or otherwise, at any time before the final decree is rendered.<sup>72</sup> But he forfeits the right to make such motion, by any guilty concealments previously made in the case.<sup>73</sup>

e. *Effect of Failure to Comply with Order.*—Where an order for further proof is made, and the party disobeys its injunctions, or neglects to comply with them, courts of prize are in the habit of considering such negligence as contumacy, leading to presumptions fatal to his claim.<sup>74</sup>

f. *Effect of Failure to Put in Affidavits of Title or Neutral Ownership.*—Failure of claimants to put in affidavits of title to, or neutral ownership of the cargo under notice obtained for further proof, amounts to an admission that they are not entitled to restitution.<sup>75</sup>

g. *Depositions Taken in One Prize Cause Cannot Be Used in Another.*—Depositions, taken as further proof, in one prize cause, cannot be used in another.<sup>76</sup>

12. **BURDEN OF PROVING NEUTRAL OWNERSHIP.**—By the rules of the prize court, the onus probandi of a neutral interest rests on the claimant.<sup>77</sup>

13. **INTERLOCUTORY APPLICATION BY GOVERNMENT WHERE CAPTURE IS MADE BY A NONCOMMISSIONED VESSEL.**—If the capture be made by a noncommissioned captor, the government may contest the right of the captor, by an inter-

Upon the question of proprietary interest and concealment of papers, further proof ordered, open to both parties. *The Fortuna*, 2 Wheat. 161, 168, 4 L. Ed. 209.

Further proof ordered on the part of both the captors and claimants. *The Venus*, 1 Wheat. 112, 4 L. Ed. 49.

Leave to make further proof granted to both the captors and the claimant. *The Mary*, 8 Cranch 388, 398, 3 L. Ed. 599.

Further proof required from claimant. *The Atalanta*, 3 Wheat. 409, 416, 4 L. Ed. 422.

**Motion for further proof denied.**—Application by claimant for an order for further proof rejected, because such proof would be incompetent to make out a title in claimant. *The Euphrates*, 8 Cranch 385, 387, 3 L. Ed. 598.

Goods condemned as enemies' property and further proof as to their ownership refused. *The Frances*, 8 Cranch 335, 347, 3 L. Ed. 581.

Denial of claimants' motion for further proofs held not erroneous. *The Adula*, 176 U. S. 361, 44 L. Ed. 505.

68. **Bill of lading consigning goods captured to a neutral.**—*The Friendschaft*, 3 Wheat. 14, 4 L. Ed. 322.

The fact of invoices and letters of advice not being found on board, may induce a suspicion that papers have been spoliated. But even if it were proved, that an enemy master, carrying a cargo

chiefly hostile, had thrown papers overboard, a neutral claimant, to whom no fraud is imputable, ought not thereby to be precluded from further proof. *The Friendschaft*, 3 Wheat. 14, 4 L. Ed. 322.

69. **Character of proof admitted and competency of witnesses.**—*Cushing v. Laird*, 107 U. S. 69, 78, 27 L. Ed. 391.

70. *La Nereyda*, 8 Wheat. 108, 5 L. Ed. 574.

71. *The Anne*, 3 Wheat. 435, 4 L. Ed. 428.

72. **When motion may be made.**—*The Sally Magee*, 3 Wall. 451, 452, 18 L. Ed. 197.

73. **Forfeiture of right to make motion.**—*The Gray Jacket*, 5 Wall. 342, 343, 18 L. Ed. 646.

74. **Effect of failure to comply with order for further proof.**—*La Nereyda*, 8 Wheat. 108, 170, 5 L. Ed. 574; *The Atalanta*, 5 Wheat. 433, 5 L. Ed. 127.

75. **Effect of failure to put in affidavits of title or neutral ownership.**—*The Pearl*, 5 Wall. 574, 578, 18 L. Ed. 677.

76. **Depositions taken in one prize cause cannot be used in another.**—*The Experiment*, 4 Wheat. 84, 4 L. Ed. 520.

77. **Onus probandi of a neutral interest rests on claimant.**—*The Amiable Isabella*, 6 Wheat. 1, 5 L. Ed. 191; *The Jenny*, 3 Wall. 183, 18 L. Ed. 693.

When there is no proof of neutral ownership, and still more when the weight of



locutory application after a decree of condemnation, and before a distribution of the prize proceeds.<sup>78</sup>

14. DECREE—*a. Who Are Concluded or Bound by Decree.*—The proceedings of a prize court being in rem, its decree is conclusive, against all the world, as to all matters decided and within its jurisdiction.<sup>79</sup> The owner of a privateer, capturing neutral property, is not bound by a decree of restitution, not naming him, unless the property or its proceeds came to his hands.<sup>80</sup>

*b. What Is Concluded by Decree.*—(1) *Decree of Condemnation and Sale.*—A decree of condemnation and sale by a court of competent jurisdiction is conclusive of the lawfulness of the capture,<sup>81</sup> and of the title of the purchaser,<sup>82</sup> but it does not establish any particular fact, without which it may have been rightfully pronounced.<sup>83</sup>

**Effect upon Cargo of Condemnation of Vessel for Want of a Claim.**—The condemnation of a vessel as enemy's property, for want of a claim, cannot prejudice the claim for her cargo; but it is still competent for the claimant of the cargo to controvert the fact that the vessel was enemy's property, so far as that fact could prejudice his claim.<sup>84</sup>

(2) *Decree of Acquittal and Restitution.*—A decree of acquittal and restitution conclusively determines as to all the world that the vessel is not lawful prize of war.<sup>85</sup> But it does not establish the title of any particular person, unless conflicting claims are presented to the court and passed upon.<sup>86</sup>

*c. To What Property Decree of Condemnation Applies.*—To what property a decree of condemnation applies is to be determined by a proper construction of

the evidence is that the ownership is enemy ownership, condemnation will be pronounced. *The Jenny*, 5 Wall. 183, 18 L. Ed. 693.

On the production of further proof, if the neutrality of the property is not established beyond reasonable doubt, condemnation follows. *The Amiable Isabella*, 6 Wheat. 1, 2, 5 L. Ed. 191.

78. **Interlocutory application by government where capture is made by a non-commissioned vessel.**—*The Amiable Isabella*, 6 Wheat. 1, 5 L. Ed. 191.

79. **Decree conclusive against all the world.**—*Cushing v. Laird*, 107 U. S. 69, 80, 27 L. Ed. 391; *Penhallow v. Doane*, 3 Dall. 54, 1 L. Ed. 507.

A vessel was captured under the authority of the act of August 6, 1861, for being used with the consent of her owner in aiding the rebellion, and proceedings for condemnation instituted in the manner prescribed by that act. Notice was published to all persons interested to appear and show cause against condemnation. No one appeared or interposed a claim. It was held that the decree of condemnation thereupon entered was valid, under the act of 1861, as against the former owners of the vessel and all other persons. *Oakes v. United States*, 174 U. S. 778, 791, 43 L. Ed. 1169.

80. **When owner of privateer bound by decree of restitution.**—*Jennings v. Carson*, 4 Cranch 2, 2 L. Ed. 531.

81. **Conclusive of lawfulness of capture.**—*Cushing v. Laird*, 107 U. S. 69, 80, 27 L. Ed. 391.

82. **Conclusive of title of purchaser.**—*Cushing v. Laird*, 107 U. S. 69, 80, 27 L. Ed. 391; *Rose v. Himely*, 4 Cranch 241, 2 L. Ed. 608.

**Sentence of condemnation transfers title to captors or their sovereign.**—"A sentence of condemnation completely extinguishes the title of the original proprietor, and transfers a rightful title to the captors or their sovereign." *The Star*, 3 Wheat. 78, 86, 4 L. Ed. 338.

The decree of a foreign tribunal, condemning neutral property, under an edict, unjust in itself, contrary to the law of nations, and in violation of neutral rights, and which has been so declared by the legislative and executive departments of the government of the United States, changes the property of the thing condemned. *The Fortitude*, 7 Cranch 423, 3 L. Ed. 393.

83. **Facts not established by decree of condemnation.**—*Cushing v. Laird*, 107 U. S. 69, 80, 27 L. Ed. 391; *Maley v. Shattuck*, 3 Cranch 458, 488, 2 L. Ed. 498.

If, as is usual, the decree does not state the ground of condemnation, it is not even conclusive that the vessel is enemy's property, for it may have been neutral property condemned for resisting a search, or attempting to enter a blockaded port; and, of consequence, the sentence, being only conclusive of its own correctness, leaves the fact of real title open to investigation. *Cushing v. Laird*, 107 U. S. 69, 80, 27 L. Ed. 391; *Maley v. Shattuck*, 3 Cranch 458, 488, 2 L. Ed. 498.

84. **Effect upon cargo of condemnation of vessel for want of a claim.**—*The Mary*, 9 Cranch 126, 3 L. Ed. 678.

85. **What concluded by decree of acquittal and restitution.**—*Cushing v. Laird*, 107 U. S. 69, 80, 27 L. Ed. 391.

86. *Cushing v. Laird*, 107 U. S. 69, 80, 27 L. Ed. 391.

its language.<sup>87</sup>

d. *When Final Decree Is Entered*.—In prize proceedings if the captured property appears to belong to enemies, it is immediately condemned, but if its national character appear doubtful, or even neutral, and no claim is interposed, the court do not proceed to a final decree, but the cause is postponed, with a view to enable any person, having title, to assert it, within a reasonable time, before the court. This reasonable time has been, by the general usage of nations, fixed at a year, and a day after the institution of the prize proceedings; and if no claim be interposed within that period, the property is deemed to be abandoned, and is condemned to the captors.<sup>88</sup>

e. *Effect of Death of Claimant Pending Proceedings*.—As a decree of acquittal and restitution operates in rem, it is not invalidated by the fact that pending the proceedings, the sole claimant has died and his representatives have not been made parties.<sup>89</sup>

15. REPORT OF COMMISSIONERS APPOINTED TO ASSESS DAMAGES.—The report of commissioners appointed to assess the damages for an unlawful capture ought to state the principles on which it is founded, and not a gross sum, without explanation.<sup>90</sup>

16. NECESSITY FOR ORDER OF DISTRIBUTION.—If the marshal undertake to make distribution among the captors, without the orders of the court, he does it at his peril.<sup>91</sup>

17. COSTS AND EXPENSES.—Where a vessel is restored, if there was probable cause for her seizure, costs will be denied to the claimant,<sup>92</sup> and if the case is one of strong and vehement suspicion, or requires further proof to entitle the claimant to restitution, the captors will be awarded their costs and expenses in proceeding to adjudication.<sup>93</sup> Costs and expenses will also be decreed against

**87. A decree condemning shipments evidenced by bills of lading with blank indorsements, or without indorsement, followed by a blank obviously left for the enumeration of the bills intended, was held to apply to those bills only which required indorsement, or which were in a situation to admit of it.** *The Friendschaft*, 3 Wheat. 14, 45, 4 L. Ed. 322.

**88. When final decree is entered.**—*The Harrison*, 1 Wheat. 298, 4 L. Ed. 95.

**89. Effect of death of claimant pending proceedings.**—*Cushing v. Laird*, 107 U. S. 69, 80, 27 L. Ed. 391.

**90. Report of commissioners appointed to assess damages.**—*The Charming Betsy*, 2 Cranch 64, 2 L. Ed. 208.

**91. Necessity for order of distribution.**—*The Gloucester*, 2 Dall. 36, 1 L. Ed. 278.

**92. Costs denied claimant if there was probable cause for seizure.**—*The Thompson*, 3 Wall. 155, 18 L. Ed. 55.

**93. When captors will be awarded their costs and expenses.**—*The Apollon*, 9 Wheat. 362, 372, 6 L. Ed. 111; *The Olinde Rodrigues*, 174 U. S. 510, 536, 43 L. Ed. 1065; *The Mary*, 9 Cranch 126, 151, 3 L. Ed. 678; *The Thompson*, 3 Wall. 155, 162, 18 L. Ed. 55; *The Peterhoff*, 5 Wall. 28, 61, 18 L. Ed. 564; *The Volant*, 5 Wall. 179, 180, 18 L. Ed. 626.

**Carriage of contraband.**—Where the search of a neutral vessel leads the captors to believe that there is contraband on board, it is their duty to bring her in for adjudication, and they are not liable for the costs and expenses of doing so. *The Peterhoff*, 5 Wall. 28, 61, 18 L. Ed. 564.

Upon the restoration of a neutral vessel, which at the time of capture had papers showing a voyage between neutral ports, but which had contraband on board, it was held that the misrepresentation of the master as to his knowledge of the ground of capture was sufficient ground for depriving the owners of costs. *The Springbok*, 5 Wall. 1, 23, 18 L. Ed. 480.

**Restitution without costs or expenses to either party as against the other.**—In a case where the court, upon evidence which was conflicting, did not feel warranted on the one hand in condemning or on the other in quite excusing the vessel or her cargo, it directed restitution, without cost or expenses to either party as against the other. *The Sir William Peel*, 5 Wall. 517, 536, 18 L. Ed. 696.

**Costs and expenses apportioned ratably between vessel and coin carried by her.**—On a capture of a neutral vessel which was unobservant, through mere carelessness, of the duty of keeping on the neutral side of a blockading line, and containing money shipped under circumstances warranting a suspicion that it belonged to an enemy, a decree was made restoring the vessel and cargo, including the money, but apportioning the costs and expenses consequent on the capture ratably between the vessel and the coin, exempting from contribution the rest of the cargo. *The Dashing Wave*, 5 Wall. 170, 18 L. Ed. 622.

**Expenses but not costs deducted upon restoration of moneys arising from sale of vessel.**—Where the capture of a vessel was unwarranted, but there existed prob-



claimants upon restoration, if the captors had been put to great expense, in consequence of imperfect documents found on board the captured vessel, and great delay had attended the production of the further proof.<sup>94</sup>

**V. Appeal.**—When the record presents a case in the supreme court which has been prosecuted exclusively as prize, the property cannot be there condemned as for a statutory forfeiture.<sup>95</sup> On the other hand property cannot in the supreme court be condemned as prize when the record presents a case prosecuted below on the instance side of the court, for forfeiture under a statute.<sup>96</sup> In either of these cases, if the facts disclosed in the record justify it, the case will be remanded to the court below for a new libel, and proper proceedings according to the true nature of the case.<sup>97</sup>

### V. Recapture.

**A. In General.**—Recaptures are cases of prize,<sup>98</sup> and the captors have an undoubted right to proceed against the property captured as belligerent property, in a court of prize.<sup>99</sup> The very circumstance that it is found in the possession of the enemy, affords prima facie evidence that it is his property.<sup>1</sup>

**B. Before Condemnation.**—Under the federal statutes if a vessel or goods belonging to a person resident within or under the protection of the United States are taken by an enemy and subsequently recaptured before they are condemned as prize of war, they will be restored to the former owner upon his paying salvage.<sup>2</sup> This rule applies only to recaptures from the enemy, and not to property which had come into the enemy's possession by purchase or otherwise, with the consent of the owner or his agent.<sup>3</sup> To support a demand for salvage, the recapture must be lawful, and a meritorious service must be rendered.<sup>4</sup> If it appears that there were well-founded reasons for the opinion that the vessel recaptured was in imminent hazard of being condemned as a prize, the recaptors

able cause therefor, and she had been sold, it was decreed that the moneys arising from the sale should be paid to the claimant without deducting costs arising in the proceedings, but after deducting the expenses properly incident to her custody and preservation up to the time of her sale. *The Buena Ventura*, 175 U. S. 384, 395, 44 L. Ed. 206.

Upon the restoration of the cargo of a ship which had on board defective documents furnished by the owners' agent, the captors' costs and expenses were ordered to be paid by the claimant. *The Venus*, 5 Wheat. 127, 132, 5 L. Ed. 50.

**94. Facts warranting imposition upon claimants of costs and expenses.**—*The London Packet*, 5 Wheat. 132, 143, 5 L. Ed. 52.

**95. Condemnation in supreme court as dependent on case presented by record.**—*United States v. Weed*, 5 Wall. 62, 18 L. Ed. 531.

**96. United States v. Weed, 5 Wall. 62, 18 L. Ed. 531.**

**97. When case will be remanded to lower court for a new libel.**—*United States v. Weed*, 5 Wall. 62, 18 L. Ed. 531; *The Watchful*, 6 Wall. 91, 93, 18 L. Ed. 763.

**Decree dismissing libel and restoring property affirmed.**—In *United States v. Weed*, 5 Wall. 62, 18 L. Ed. 531, which was prosecuted as prize of war exclusively, the facts did not prove a case of prize, nor did they show a probable case of violation of any statutes. A decree of

the court below dismissing the libel and restoring the property was therefore affirmed.

For other matters relating to appeals in prize cases, see the titles ADMIRALTY, vol. 1, p. 182; APPEAL AND ERROR, vol. 1, p. 333.

**98. Recaptures are cases of prize.**—*The Adeline*, 9 Cranch 244, 284, 3 L. Ed. 719.

**Prize goods** are goods taken on the high seas, jure belli, out of the hands of the enemy. *The Adeline*, 9 Cranch 244, 284, 3 L. Ed. 719.

**99. Captors may proceed in prize court against property recaptured.**—*The Adeline*, 9 Cranch 244, 285, 3 L. Ed. 719.

"In no other way, and in no other court, can the questions presented on a capture jure belli be properly or effectually examined." *The Adeline*, 9 Cranch 244, 285, 3 L. Ed. 719.

**1. Property recaptured prima facie enemy's property.**—*The Adeline*, 9 Cranch 244, 285, 3 L. Ed. 719.

**2. Property recaptured before condemnation restored to former owner.**—Act of March 3, 1800, c. 14, § 1; Act of June 30, 1864, c. 174, § 29; 13 Stats. 314; Revised Statutes, § 4652. *Oakes v. United States*, 174 U. S. 778, 792, 43 L. Ed. 1169.

**3. Oakes v. United States**, 174 U. S. 778, 792, 43 L. Ed. 1169.

**4. What essential to support demand for salvage.**—*The Amelia*, 1 Cranch 1, 2 L. Ed. 15.



will be entitled to salvage.<sup>5</sup> If property recaptured is unclaimed, it will be condemned as good prize.<sup>6</sup>

**C. After Condemnation.**—Property recaptured from an enemy, after condemnation, is by the law of nations lawful prize of war, and the original owner is not entitled to restitution;<sup>7</sup> nor in such case, after condemnation and sale, is the original owner entitled to restitution, on payment of salvage, under the salvage act of March 3, 1800, or the prize act of June 26, 1812.<sup>8</sup>

**D. Rule of Reciprocity.**—By act of congress, as well as by the general law, in cases of recapture, the rule of reciprocity is to be applied; that is, if property recaptured belongs to parties domiciled in a foreign country, whether natives or Americans, or other foreigners, their rights depend altogether upon the law of that country as to recaptures.<sup>9</sup>

**E. In Whom Prize Vests Where Enemy's Vessel Is Captured, Recaptured, and Again Recaptured.**—An interest acquired in war by possession is divested by the loss of possession. Therefore, if an enemy's vessel is captured by a privateer, recaptured by another enemy's vessel, and again recaptured by another privateer, and brought in for adjudication, the prize vests in the last captor.<sup>10</sup>

**F. The Libel.**—American property, recaptured, may be restored on payment of salvage, although the libel pray condemnation of it as prize of war, and do not claim salvage.<sup>11</sup>

**G. Claimant's Test Affidavit.**—In prize proceedings against property recaptured the claimant's test affidavit should state that the property, at the time of shipment, and also at the time of capture, did belong, and will, if restored, belong to the claimant. But an irregularity of this nature, is not fatal. The informality may be corrected by amendment.<sup>12</sup> A test affidavit, by an agent, is

**5. Salvage allowed if there was reason to believe vessel was in danger of condemnation.**—*The Amelia*, 1 Cranch 1, 2 L. Ed. 15; *The Charming Betsy*, 2 Cranch 64, 121, 2 L. Ed. 208.

**Facts not entitling captors to salvage.**—In *The Charming Betsy*, 2 Cranch 64, 121, 2 L. Ed. 208, it was not proved to the satisfaction of the court that the vessel recaptured was in such imminent hazard of being condemned as to entitle the recaptors to salvage.

**Allowance of salvage for recapture of neutral vessels.**—The officers and crew of a ship of war are entitled to salvage, for the recapture of an armed neutral vessel, from a foreign belligerent, by whom she had been manned with a prize crew. *The Amelia*, 4 Dall. 34, 1 L. Ed. 730.

**Salvage allowed to a United States ship of war, for the recapture of a Hamburg vessel out of the hands of the French (France and Hamburg being neutral to each other), on the ground that she was in danger of condemnation under the French decree of the 18th of January, 1798.** *The Amelia*, 1 Cranch 1, 2 L. Ed. 15.

**Salvage allowed under act of March 2, 1799.**—An American vessel, captured by a French privateer, on the 31st of March, 1799, and recaptured by a public armed American ship, on the 21st of April, 1799, was condemned to pay salvage, under the act of congress of the 2d of March, 1799. *The Eliza*, 4 Dall. 37, 1 L. Ed. 731.

**Amount allowed for salvage.**—By the act of March 3, 1800, ch. 14, one-sixth part

only was allowed to a privateer for salvage, upon the recapture of the cargo on board a private armed vessel of the United States, although one-half was allowed for the recapture of the vessel. *The Adeline*, 9 Cranch 244, 3 L. Ed. 719. Generally, as to salvage, see the title SALVAGE.

**6. Unclaimed property condemned as prize.**—*The Adeline*, 9 Cranch 244, 289, 3 L. Ed. 719.

**7. Property recaptured after condemnation lawful prize.**—*The Star*, 3 Wheat. 78, 86, 4 L. Ed. 338.

**8. The Star**, 3 Wheat. 78, 86, 4 L. Ed. 338.

**9. Rule of reciprocity.**—*The Adeline*, 9 Cranch 244, 288, 3 L. Ed. 719; *The Star*, 3 Wheat. 78, 4 L. Ed. 338.

**The law of France, denying restitution upon salvage, after twenty-four hours possession by the enemy, the property of persons domiciled in France is condemned as prize, by our courts, on recapture, after being in possession of the enemy that length of time.** *The Star*, 3 Wheat. 78, 4 L. Ed. 338; *The Adeline*, 9 Cranch 244, 3 L. Ed. 719.

**10. Prize vests in last captor.**—*The Astrea*, 1 Wheat. 125, 4 L. Ed. 52.

**11. Restoration on payment of salvage though libel does not claim salvage.**—*The Adeline*, 9 Cranch 244, 3 L. Ed. 719.

**12. What affidavit should state—Informality may be corrected by amendment.**—*The Adeline*, 9 Cranch 244, 286, 3 L. Ed. 719.

not sufficient, if the principal be within the country, and within a reasonable distance from the court. But if test affidavits, liable to such objections, have been acquiesced in by the parties in the courts below, the objection will not prevail in the supreme court.<sup>13</sup>

**PRIZE AND CAPTURE.**—See note 1.

**PRIZE MONEY.**—See note 2.

**PROBABLE CAUSE.**—For change of venue, see the title **VENUE**. As to certificate of probable cause of seizure, see the title **REVENUE LAWS**. Want of probable cause as defense to action for mal pros. or wrongful attachment, see the titles **ATTACHMENT AND GARNISHMENT**, vol. 2, p. 690; **MALICIOUS PROSECUTION**, vol. 7, p. 1080. A mistaken view of the law may constitute probable cause in some instances. Probable cause does not mean sufficient cause.<sup>3</sup>

**PROBATE.**—See the titles **EXECUTORS AND ADMINISTRATORS**, vol. 6, p. 119; **WILLS**. See note 4.

**PROBATE COURT.**—See **SURROGATE**.

**PROCEDENDO.**—See the title **MANDATE AND PROCEEDINGS THEREON**, vol. 8, p. 97.

**PROCEDURE.**—See the title **WILLS**. And see note 5.

**PROCEEDING.**—See note 6.

**13. Affidavit by agent.**—The *Adeline*, 9 Cranch 244, 3 L. Ed. 719.

**1. Prize and capture.**—Upon the meaning of these terms as used in the act of congress of 1861 providing for the confiscation of property used for insurrectionary purposes, the court said: "In ordinary use the words '**prizes and capture**' refer, doubtless, to captures on water, as maritime prize; but in the section under consideration here they plainly refer to property taken on land as well as on water." *Union Ins. Co. v. United States*, 6 Wall. 759, 763, 18 L. Ed. 879. See, also, the titles **ABANDONED AND CAPTURED PROPERTY**, vol. 1, p. 1; **PRIZE**, ante, p. 744.

**2. Prize money.**—See the title **PRIZE**, ante, p. 744. And see *United States v. Steever*, 113 U. S. 747, 28 L. Ed. 1133.

**3. Burt v. Smith**, 203 U. S. 129, 134, 51 L. Ed. 121. See the title **MALICIOUS PROSECUTION**, vol. 7, p. 1082.

**Prize—Revenue Laws.**—See the titles **PRIZE**, ante, p. 744; **REVENUE LAWS**.

**Probable cause** for seizure exists where there are circumstances sufficient to warrant suspicion, even though not sufficient to warrant condemnation. *The Thompson*, 3 Wall. 155, 18 L. Ed. 55.

In *Locke v. United States*, 7 Cranch 339, 348, 3 L. Ed. 364, it is said: "It may be added, that the term **probable cause**, according to its usual acceptation, means less than evidence which would justify condemnation; and in all cases of seizure, has a fixed and well known meaning. It imports a seizure made under circumstances which warrant suspicion. In this, its legal sense, the court must understand the term to have been used by congress." *Averill v. Smith*, 17 Wall. 82, 92, 21 L. Ed. 613.

In *Wood v. United States*, 16 Pet. 342, 9 U S Enc—50

366, 10 L. Ed. 987, it is said: "The 71st section of the act of 1799 declares, that, 'in actions, suits or informations to be brought, where any seizure shall be made pursuant to this act, if the property be claimed by any person, in every such case, the onus probandi shall lie upon such claimant;' and it is afterwards added, 'but the onus probandi shall lie on the claimant, only where **probable cause** is shown for the prosecution, to be judged of by the court before whom the prosecution is had.' **Probable cause** must, in this connection, mean reasonable ground of presumption, that the charge is, or may be, well founded."

**4. Probate and testamentary.**—In *Bank v. Dudley*, 2 Pet. 492, 524, 7 L. Ed. 496, it is said: "Jurisdiction of all **probate** and **testamentary** matters, may be completely exercised, without possessing the power to order the sale of the lands of an intestate. Such jurisdiction does not appear to us to be identical with that power, or to comprehend it."

**5. Procedure.**—In *Kring v. Missouri*, 107 U. S. 221, 231, 27 L. Ed. 506, it is said: "The word **procedure**, as a law term, is not well understood, and is not found at all in *Bouvier's Law Dictionary*, the best work of the kind in this country. Fortunately a distinguished writer on Criminal Law in America has adopted it as the title to a work of two volumes. Bishop on Criminal Procedure. In his first chapter he undertakes to define what is meant by **procedure**. He says: 'S. 2. The term **procedure** is so broad in its signification that it is seldom employed in our books as a term of art. It includes in its meaning whatever is embraced by the three technical terms, Pleading, Evidence, and Practice.'"

**6. Proceedings.**—In *Beers v. Haughton*,

**PROCEEDINGS IN REM AND IN PERSONAM.**—See note 1.

**PROCEEDS.**—See note 2.

**PROCESS.**—See the titles **PATENTS**, ante, p. 136; **SUMMONS AND PROCESS**.

**PROCESS OF LAW.**—See note 3.

9 Pet. 329, 368, 9 L. Ed. 145, it is said: "**Proceedings**, both in common parlance and in legal acceptation, imply action, procedure, prosecution. And such is the explanation given to the term **proceedings**, in the case of *Wayman v. Southard*, 10 Wheat. 1, 6 L. Ed. 252. 'It is applicable,' say the court, 'to writs and executions, and is applicable to every step taken in a cause; it indicates the progressive course of the business, from its commencement to its termination.'"

The examination of a witness before a grand jury is a **proceeding** within the anti-trust law providing that no person shall be prosecuted on account of anything which he may testify in any **proceeding** under the act. *Hale v. Henkel*, 201 U. S. 43, 66, 50 L. Ed. 652. See, generally, the titles **MONOPOLIES AND CORPORATE TRUSTS**, vol. 8, p. 431; **WITNESSES**.

**Forthcoming bonds.**—See the title **COURTS**, vol. 4, p. 1122.

**Eminent domain.**—In *Bauman v. Ross*, 167 U. S. 548, 598, 42 L. Ed. 270, it is said: "The last clause of § 18, which provides that if the court enters judgment of condemnation in any case, and appropriation for the payment of the award of damages is not made by congress, after being six months in session, 'the **proceedings** shall be void and the land shall revert to the owners,' clearly means, by the words 'the **proceedings**,' all the **proceedings**, not merely the award of damages, but also the assessment of benefits, for if the award of damages is void, there remains no sum to be assessed for benefits."

**Proceeding in court.**—A preliminary examination by a commissioner is not a **proceeding** "in any court of the United States" within the meaning of U. S. Rev. Stat., § 5406, U. S. Comp. Stat. 1901, p. 3657, relating to conspiracy to injure witnesses in such a court. *Todd v. United States*, 158 U. S. 278, 39 L. Ed. 982.

**Modes of process.**—In *Duncan v. Darst*, 1 How. 301, 306, 11 L. Ed. 139, it is said: "The terms, 'modes of process,' in the act of 1789 and, '**proceedings** upon executions, and other final process,' in the act of 1823, have the same meaning, and include all the regulations and steps incident to that process, from its commencement to its termination as prescribed by the state laws; so far as they can be made to apply to the federal courts; as this court held in *Wayman v. Southard*, 10 Wheat. 1, 27, 28, 6 L. Ed. 252, and, also, in *Beers v. Haughton*, 9 Pet. 329, 9 L. Ed. 145; *United States v. Knight*, 14 Pet. 301, 10 L. Ed. 465; *Amis v. Smith*, 16 Pet. 303, 312, 10 L. Ed. 973."

**Proceedings at law—Proceedings in equity.**—In *Fenn v. Holme*, 21 How. 481, 484, 16 L. Ed. 198, it is said: "In every instance in which this court has expounded the phrases, **proceedings** at the common law and **proceedings** in equity, with reference to the exercise of the judicial powers of the courts of the United States, they will be found to have interpreted the former as signifying the application of the definitions and principles and rules of the common law to rights and obligations essentially legal; and the latter, as meaning the administration with reference to equitable as contradistinguished from legal rights, of the equity law as defined and enforced by the court of chancery in England."

**Forms and modes of proceedings.**—See the title **COURTS**, vol. 4, pp. 1122, 1137. And see **FORM**, vol. 6, p. 386.

1. **Proceedings in rem and in personam.**—As to **proceedings in rem** and **in personam**, see the titles **ADMIRALTY**, vol. 1, pp. 128, 130, 156, 159; **ATTACHMENT AND GARNISHMENT**, vol. 2, p. 691; **DIVORCE AND ALIMONY**, vol. 5, p. 425; **DUE PROCESS OF LAW**, vol. 5, p. 651; **MARITIME LIENS**, vol. 8, pp. 238, 241; **RES ADJUDICATA**; **SUMMONS AND PROCESS**. As to nature of proceeding to sell intestate's property see the title **EXECUTORS AND ADMINISTRATORS**, vol. 6, p. 147. As to nature of foreclosure proceeding, see the title **MORTGAGES AND DEEDS OF TRUST**, vol. 8, p. 495. As to supplementary proceedings, see the title **EXECUTIONS**, vol. 6, p. 116.

2. **Proceeds.**—In *Phelps v. Harris*, 101 U. S. 370, 380, 25 L. Ed. 855, it is said: "It is argued, however, that the subsequent direction to invest the **proceeds** indicates that a sale was meant. But this does not necessarily follow. **Proceeds** are not necessarily money. This is also a word of great generality. Taking the words in their ordinary sense, a general power to dispose of land or real estate and to take in return therefor such **proceeds** as one thinks best, will include the power of disposing of them in exchange for other lands."

3. **Process of law.**—A treaty between the United States and Spain provided for the satisfaction of certain injuries, if any, which by **process of law** should be established by Spanish subjects. Congress directed a district judge to determine these claims but provided that the secretary of the treasury should have the right of supervision over the decision of the district judge. It was held that this did not violate the treaty. The court said: "It is



**PROCHEIN AMI.**—See the title **INFANTS**, vol. 6, p. 1018.

**PROCLAMATION.**—See the titles **JUDICIAL NOTICE**, vol. 7, p. 689; **PRESIDENT OF THE UNITED STATES**. And see the specific cross references under **PARDON**, ante, p. 1.

**PRO CONFESSO.**—See note 1.

**PROCURADOR DEL COMUN.**—See note 2.

**PROCURATION.**—See note 3.

**PROCURE.**—See note 4.

**PRODUCER.**—The word “producer” does not differ essentially in its legal aspects from the word “manufacturer,” except that it is more commonly used to denote a person who raises agricultural crops and puts them in a condition for the market.<sup>5</sup>

said, however, on the part of the claimant, that the treaty requires that the injured parties should have an opportunity of establishing their claims by a **process of law**; that **process of law** means a judicial proceeding in a court of justice and that the right of supervision given to the secretary, over the decision of the district judge, is therefore a violation of the treaty. The court think differently.” *United States v. Ferreira*, 13 How. 40, 47, 14 L. Ed. 42.

1. **Pro confesso.**—In *Thomson v. Wooster*, 114 U. S. 104, 111, 29 L. Ed. 105, it is said: “We may properly say, therefore, that to take a bill **pro confesso** is to order it to stand as if its statements were confessed to be true; and that a decree **pro confesso** is a decree based on such statements, assumed to be true, 1 *Smith's Ch. Pract.* 153, and such a decree is as binding and conclusive as any decree rendered in the most solemn manner.” See the title **JUDGMENTS AND DECREES**, vol. 7, p. 656.

2. **Procurador del comun.**—In *Lecompte v. United States*, 11 How. 115, 125, 13 L. Ed. 627, it is said: “The **procurador del comun** was the officer appointed to make inquiry, put the petitioner in possession of the land prayed for, and execute the lieutenant governor's and commandant's orders relative to the premises. Such, we are told, were the functions and duties of the **procurador** or solicitor general relative to grants of land in this district.” See, generally, the title **PUBLIC LANDS**.

3. **Procuration.**—In *Washington v. Con-*

*ger*, 125 U. S. 397, 422, 31 L. Ed. 778, it is said: “Under the word **mandato**, the same *Escriche* says: ‘Mandate: A consensual contract, by which one of the parties confides the carrying on or execution of one or more matters of business to the other, who takes it in his charge \* \* \* Mandate has also the name of **procuration**, and the mandatory that of “procurator;” but the word “mandate” is more general, and comprehends every power given to another, in whatsoever mode it be, whilst **procuration** supposes a power given by writing.’”

4. **Procure.**—In *Wilson v. City Bank*, 17 Wall. 473, 21 L. Ed. 723, it was held that the mere passive nonresistance of an insolvent debtor to the suit brought was not sufficient to establish the fact that he had **procured** or suffered his property to be taken on legal process.

**Procuring.**—The defendant was indicted for advising, **procuring** and assisting another to rob the mail, it was held that the indictment sufficiently alleged that the mail was robbed. The court said: “It charges the defendant not only with advising, but **procuring** and assisting *Straughan* to secrete and embezzle, etc. This necessarily implies that the act was done; and is such an averment or allegation, as made it necessary on the part of the prosecution to prove that the act had been done.” *United States v. Mills*, 7 Pet. 138, 142, 8 L. Ed. 636. See, generally, the title **POSTAL LAWS**, ante, p. 549.

5. *Allen v. Smith*, 173 U. S. 389, 399, 43 L. Ed. 741.

## PRODUCTION OF DOCUMENTS.

BY JOSEPH W. TIMBERLAKE.

- I. Definition and Nature of Subpœna Duces Tecum, 788.
- II. Power to Compel Production, 789
  - A. Power of Federal Courts, 789.
    1. In General, 789.
    2. In Revenue Cases, 790.
  - B. Power of Interstate Commerce Commission, 790.
- III. Constitutionality of Statutes Authorizing Seizure or Compulsory Production of Private Books and Papers, 790.
- IV. Who May Be Compelled to Produce, 790.
  - A. Witness to Deed, 790.
  - B. Counsel for Government, 790.
  - C. Officers of Corporations, 791.
- V. When Unnecessary to Produce, 791.
- VI. Effect of Failure to Produce Documents after Notice, 791.
  - A. As Laying Foundation for Introduction of Secondary Evidence, 791.
  - B. As Ground for Judgment of Nonsuit, 791.
  - C. As Ground for Judgment by Default, 791.
  - D. Presumptions in Case of Failure to Produce, 792.
- VII. Appeal, 792.

### CROSS REFERENCES.

See the titles ANCIENT DOCUMENTS, vol. 1, p. 313; BEST AND SECONDARY EVIDENCE, vol. 3, p. 214; CIVIL RIGHTS, vol. 3, p. 814; CONSTITUTIONAL LAW, vol. 4, p. 1; CONTEMPT, vol. 4, p. 531; DISCOVERY, vol. 5, p. 350; DISMISSAL, DISCONTINUANCE AND NONSUIT, vol. 5, p. 556; DOCUMENTARY EVIDENCE, vol. 5, p. 431; EVIDENCE, vol. 5, p. 1004; INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 269; LOST INSTRUMENTS AND RECORDS, vol. 7, p. 1004; PRESUMPTIONS AND BURDEN OF PROOF, ante, p. 618; SEARCHES AND SEIZURES; WITNESSES.

As to the admissibility of documents in evidence, see the title DOCUMENTARY EVIDENCE, vol. 5, p. 431. As to the nonproduction of documents as laying the foundation for the introduction of secondary evidence of their existence and contents, see the titles BEST AND SECONDARY EVIDENCE, vol. 3, pp. 214, 218, 222; DOCUMENTARY EVIDENCE, vol. 5, pp. 431, 435, 464, et seq. As to bill of discovery to compel production of documents, see the title DISCOVERY, vol. 5, p. 350.

### I. Definition and Nature of Subpœna Duces Tecum.

A subpœna duces tecum is a writ or process of the same kind as the subpœna ad testificandum, including a clause requiring the witness to bring with him and produce to the court books, papers, etc., in his hands, tending to elucidate the matter in issue.<sup>1</sup> And it has been said that it would be utterly im-

1. Subpœna duces tecum defined.—  
2 Bouv. Law. Dict., 1055. See, also, Hale v. Henkel, 201 U. S. 43, 50 L. Ed. 652; McAlister v. Henkel, 201 U. S. 90, 50 L. Ed. 671; Nelson v. United States, 201 U. S. 92, 50 L. Ed. 673.

Where an exception was taken to the refusal of the lower court to grant a writ of subpœna duces tecum on jury commissioners, not commanding them to produce specified books or papers, but that they should furnish the names and resi-

possible to carry on the administration of justice without this writ.<sup>2</sup> It is a general principle of law that a subpoena duces tecum should describe with particularity the documents sought to be produced.<sup>3</sup>

## II. Power to Compel Production.

**A. Power of Federal Courts**—1. **IN GENERAL.**—By § 15 of the judiciary act of 1789, reproduced now in § 724 of the Revised Statutes, in the trial of all actions at law, the courts of the United States are authorized, upon motion and due notice thereof, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery.<sup>4</sup> Under the judiciary act the courts of the United States can only require the production of documents in cases and under circumstances where a court of chancery would grant discovery,<sup>5</sup> and the provision was intended to prevent the necessity of instituting suits in equity merely to obtain from an adverse party the production of deeds and papers relative to the litigated issue.<sup>6</sup> The act does not specify to whom the notice required thereby shall be given, i. e., to the party himself, or his

dences of the 3,500 citizens whom they had summoned to qualify as jurors, the court said: "The court thought that the writ asked for was not a writ of subpoena duces tecum, and that the defendant, if he desired information from the commissioners, should have subpoenaed them to attend as witnesses. Besides, the defendant had the advantage of their testimony by consenting to the use of their evidence in the Heard Case. At all events, no injury was suffered by the defendant by refusal of the court to grant him the writs prayed for, because the evidence he desired to get did not tend to show that the rights of the accused were denied by the constitution or laws of the state, and therefore did not authorize the removal of the prosecution from the state court." *Murray v. Louisiana*, 163 U. S. 101, 107, 41 L. Ed. 87.

2. **Necessity for writ.**—*Hale v. Henkel*, 201 U. S. 43, 73, 50 L. Ed. 652.

3. **Particularity required in description of documents.**—*Hale v. Henkel*, 201 U. S. 43, 77, 50 L. Ed. 652; *McAlister v. Henkel*, 201 U. S. 90, 50 L. Ed. 671.

A subpoena pointing out the particular writings sought for (three agreements) giving in each case the date, names of the parties, and, in one instance, a suggestion of the contents, held to be unobjectionable. *McAlister v. Henkel*, 201 U. S. 90, 50 L. Ed. 671.

"An exception was taken to the refusal of the court to grant what was termed a subpoena duces tecum, directed to Francis E. Zacharie, registrar of voters. The reason given by the court was that the so-called writ of subpoena duces tecum did not purport to be such, did not describe or refer to any paper or document which was in the possession of the registrar, and which the defendant required. The court was of opinion that either the defendant should have specified

the books or documents required; or, if he wished information from the registrar, he should have subpoenaed him to attend and testify. We perceive no error in this action." *Murray v. Louisiana*, 163 U. S. 101, 107, 41 L. Ed. 87.

4. **Power of federal courts to compel production of documents**—In general.—*Boyd v. United States*, 116 U. S. 616, 630, 29 L. Ed. 746; *Hanson v. Eustace*, 2 How. 653, 654, 704, 11 L. Ed. 416; *Thompson v. Selden*, 20 How. 194, 15 L. Ed. 1001; *Geyger v. Geyger*, 2 Dall. 332, 1 L. Ed. 403.

When one party gives notice to another to produce on trial a written instrument, and the party who so receives the notice produces and offers to verify it by his oath, the other party cannot refuse to use that paper and introduce a copy in the first instance, on the allegation that the first is not genuine, although he might show wherein it was erroneous or defective after it was once introduced. *Slitt v. Huidekopers*, 17 Wall. 384, 21 L. Ed. 644.

As to plaintiff's failure to comply with order as giving defendant the right to a judgment of nonsuit, see post, "As Ground for Judgment of Nonsuit," VI, B.

As to defendant's failure to comply with order as giving the plaintiff the right to a judgment by default, see post, "As Ground for Judgment by Default," VI, C.

5. **Limitation of power.**—*Boyd v. United States*, 116 U. S. 616, 631, 29 L. Ed. 746. See the title DISCOVERY, vol. 5, p. 350.

6. **Purpose of provision.**—*Geyger v. Geyger*, 2 Dall. 332, 1 L. Ed. 403.

The provision enables courts of law to apply the same rules and principles, where papers or books are withheld, as have been adopted by courts of equity. *Hanson v. Eustace*, 2 How. 653, 654, 704, 11 L. Ed. 416.

In an action of trespass or trover to recover damages sustained by plaintiff by



attorney, but the court will always keep the cause under its control, for the purposes of substantial justice, and never suffer either party to be entrapped.<sup>7</sup> If notice of a rule to produce deeds and papers be served on an attorney, whose client resides at a distance, the trial will be postponed, until full opportunity has been afforded him to communicate with his client.<sup>8</sup> The search and seizure clause of the fourth amendment to the federal constitution was not intended to interfere with the power of courts, through a subpoena duces tecum, to compel the production of documentary evidence upon a trial in court.<sup>9</sup> But an order for the production of books and papers may constitute an unreasonable search and seizure within the fourth amendment.<sup>10</sup>

2. **IN REVENUE CASES.**—As to the power of a court of the United States, in revenue cases, to require the defendant to produce in court his private books and papers, see the title *CONSTITUTIONAL LAW*, vol. 4, pp. 506, 507. See, also, the title *REVENUE LAWS*.

**B. Power of Interstate Commerce Commission.**—As to the power of the interstate commerce commission to require, by subpoena, the production of all books, papers, and other documents relating to any matter under investigation, see the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 510, et seq.

### III. Constitutionality of Statutes Authorizing Seizure or Compulsory Production of Private Books and Papers.

As to whether statutes authorizing the seizure or compulsory production of a man's private books or papers to be used in evidence against him, are unconstitutional as being within the prohibition of the fourth amendment to the federal constitution, relating to unreasonable searches and seizures, and the prohibition of the fifth amendment declaring that no person shall be compelled in any criminal case to be a witness against himself, see the titles *CONSTITUTIONAL LAW*, vol. 4, p. 504, et seq.; *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 510, et seq. See, also, the title *SEARCHES AND SEIZURES*.

### IV. Who May Be Compelled to Produce.

See ante, "In General," II, A, 1.

**A. Witness to Deed.**—Where the defendant in an action is not a party to an alleged deed, no notice can be given him to produce it, within the general rule for the production of deeds, nor if he stands merely in the character of a witness to the deed, is he compellable to produce it.<sup>11</sup>

**B. Counsel for Government.**—The counsel for the government cannot be compelled to produce either copies of papers on file in any of the departments or public offices of the government, or the originals, for the benefit of parties who may be litigating with the government.<sup>12</sup>

reason of the wrongful cutting, carrying away and conversion of his property consisting of timber, the plaintiff is entitled to an inspection of the books and papers of the defendant, and he has the same power to obtain the facts therefrom in such an action as he would have in a suit in equity. *United States v. Bitter Root, etc., Co.*, 200 U. S. 451, 472, 473, 50 L. Ed. 550. See the titles *DISCOVERY*, vol. 5, p. 350; *TRESPASS*; *TROVER AND CONVERSION*.

7. **To whom notice given.**—*Geyger v. Geyger*, 2 Dall. 332, 333, 1 L. Ed. 403.

8. **Notice served on attorney.**—*Geyger v. Geyger*, 2 Dall. 332, 1 L. Ed. 403.

9. **Right to compel production not affected by fourth amendment.**—*Hale v. Henkel*, 201 U. S. 43, 73, 50 L. Ed. 652. See the titles *CONSTITUTIONAL LAW*,

vol. 4, p. 504, et seq.; *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 510, et seq.

10. **Order may constitute unreasonable search, etc.**—*Hale v. Henkel*, 201 U. S. 43, 76, 50 L. Ed. 652.

For full treatment of the question whether an order for the production of documents constitutes an unreasonable search or seizure, see the title *SEARCHES AND SEIZURES*.

11. **Witness to deed.**—*Edgar v. Robinson*, 4 Dall. 132, 1 L. Ed. 772.

12. **Counsel for government.**—*Barney v. Schneider*, 9 Wall. 248, 19 L. Ed. 648.

"The proper mode of proving papers on file, in any of the departments or public offices of the government, is by procuring certified copies from those persons who have them in custody. \* \* \*

**C. Officers of Corporations.**—Officers of a corporation summoned as witnesses cannot refuse to produce the books and other documents of the corporation on the ground that the possession of the documents by the witnesses is not personal, but is that of the corporation of which they are officers.<sup>13</sup>

### V. When Unnecessary to Produce.

The court will not make an order for the production of deeds, which are duly recorded, unless a special reason be assigned.<sup>14</sup> If a certified copy of a duly-recorded deed is evidence, it is not necessary to produce the original book in which the same was recorded.<sup>15</sup> And parol evidence of a deed is admissible, without a notice to produce it, as against one not a party to the deed.<sup>16</sup>

### VI. Effect of Failure to Produce Documents after Notice.<sup>17</sup>

**A. As Laying Foundation for Introduction of Secondary Evidence.**—See the title *BEST AND SECONDARY EVIDENCE*, vol. 3, p. 222.

**B. As Ground for Judgment of Nonsuit.**—By § 15 of the judiciary act of 1789, the substance of which is found in § 724 of the Revised Statutes, if a plaintiff fails to comply with an order of the court for the production of books and writings, the court may, on motion, give a like judgment for the defendant as in cases of nonsuit.<sup>18</sup>

**C. As Ground for Judgment by Default.**—Under § 15 of the judiciary act of 1789 reproduced now in § 724 of the Revised Statutes, upon failure of the defendant to comply with an order to produce books or writings, the court may,

Notice, therefore, to the party or counsel representing the government to produce such papers, does not authorize the party giving the notice to use other copies than those properly certified as above stated." *Barney v. Schneider*, 9 Wall. 248, 19 L. Ed. 648.

**13. Officers of corporations.**—*Nelson v. United States*, 201 U. S. 92, 115, 50 L. Ed. 673.

A corporation can have possession of nothing except by the human beings who are its officers, and it is to them, not the intangible being they represent and act for, that the law directs its process of subpoena and must procure its evidence. *Nelson v. United States*, 201 U. S. 92, 115, 50 L. Ed. 673.

The officers have the custody (actual possession) of the books and are summoned from necessity as representing the corporations. They have all the possession human beings can have, and if they can refuse to produce, the books of a corporation can be withdrawn from the reach of compulsory process. *Nelson v. United States*, 201 U. S. 92, 115, 50 L. Ed. 673. See the titles *CONSTITUTIONAL LAW*, vol. 4, p. 504, et seq.; *CORPORATIONS*, vol. 4, p. 621; *OFFICERS AND AGENTS OF PRIVATE CORPORATIONS*, vol. 8, p. 957.

In an action of trespass or trover for wrongfully cutting and carrying away plaintiff's timber, the plaintiff is entitled to an inspection of the books and records of the defendant corporations, and he has the same power to obtain facts therefrom as he would have in a suit in equity. *United States v. Bitter Root, etc., Co.*,

200 U. S. 451, 472, 473, 50 L. Ed. 550. See the titles *DISCOVERY*, vol. 5, p. 350; *EQUITY*, vol. 5, p. 803; *TRESPASS; TROVER AND CONVERSION*.

**14. Deeds on record.**—*Geyger v. Geyger*, 2 Dall. 332, 1 L. Ed. 403.

"The originals may, sometimes, indeed, be necessary, for a special reason, detached from the evidence; but in that case, the special reason must be assigned to the court. The defendant's counsel offering to refer their opponents to the pages, etc., where the deeds in question are recorded, the court declared, that this put an end to the matter; but added, that if it was not satisfactorily done, they would not allow the cause to be brought to trial." *Geyger v. Geyger*, 2 Dall. 332, 1 L. Ed. 403.

**15. Original record book need not be produced.**—*Winn v. Patterson*, 9 Pet. 663, 9 L. Ed. 266.

**16. Edgar v. Robinson**, 4 Dall. 132, 1 L. Ed. 772.

**17. Effect of failure to produce documents.**—Generally, as to the effect of a failure to produce documents after notice to produce, see *Hanson v. Eustace*, 2 How. 653, 11 L. Ed. 16.

**18. As ground for judgment of nonsuit.**—*Boyd v. United States*, 116 U. S. 616, 630, 29 L. Ed. 746; *Hanson v. Eustace*, 2 How. 653, 654, 704, 11 L. Ed. 416; *Thompson v. Selden*, 20 How. 194, 15 L. Ed. 1001; *Geyger v. Geyger*, 2 Dall. 332, 1 L. Ed. 403. See ante, "In General," II, A. 1. See the title *DISMISSAL, DISCONTINUANCE AND NONSUIT*, vol. 5, p. 391.

upon motion give judgment against him by default.<sup>19</sup>

**D. Presumptions in Case of Failure to Produce.**—See the titles BEST AND SECONDARY EVIDENCE, vol. 3, p. 222; PRESUMPTIONS AND BURDEN OF PROOF, ante, p. 618.

## VII. Appeal.

As to appeals from orders directing witness to testify and produce documents, see the title APPEAL AND ERROR, vol. 1, p. 974.

**19. As ground for judgment by default.**—Boyd *v.* United States, 116 U. S. 616, 630, 29 L. Ed. 746; Hanson *v.* Eustace, 2 How. 653, 654, 704, 11 L. Ed. 416. See ante, "In General," II, A, 1. See the title JUDGMENTS AND DECREES, vol. 7, p. 656.



# PROFERT AND OYER.

BY HOMER RICHEY.

## I. Profert, 793.

- A. Instruments of Which Profert Must or May Be Made, 793.
- B. When Necessary, 793.
- C. Sufficiency of Profert, 794.
- D. Excuse of Profert; Lost Deed, 794.
- E. Want of Profert, 794.
  - 1. How Objection Raised, 794.
  - 2. Aided by Verdict, Pleading Over, etc., 794.

## II. Oyer, 795.

- A. General Nature, Purpose and Effect, 795.
- B. Necessity for Oyer, 795.
  - 1. Generally, 795.
  - 2. Where Profert Improperly Made, 795.
- C. Sufficiency of Demand of Oyer, 795.
  - 1. Oyer of Bond and Condition, 795.
  - 2. Where Deed Set Forth in Only One of Several Counts, 795.
- D. Effect of Improper Demand of Oyer, 796.
- E. Procedure upon Oyer; Demurrer or Plea in Abatement, 796.
  - 1. Variance between Writ and Declaration, 796.
  - 2. Validity of Letters Testamentary, 796.

### I. Profert.

**A. Instruments of Which Profert Must or May Be Made.**—At the common law profert is required and oyer is demandable as to deeds and letters of probate and administration;<sup>1</sup> but oyer is not demandable of a record.<sup>2</sup>

**B. When Necessary.**—Where Deed Is Stated Merely as Inducement, etc.—No profert of a deed is necessary where it is stated only as inducement, and where the plaintiff is neither a party nor privy to it.<sup>3</sup>

**Where Deed Must Come from Other Side.**—Nor in an action upon a bond for performance of covenants in another deed, can oyer of such deed be craved; for the defendant and not the plaintiff must show it, with a profert of it, or an excuse for the omission.<sup>4</sup>

**In Action upon Judgment Recovered by Administrator.**—See the title EXECUTORS AND ADMINISTRATORS, vol. 6, p. 179.

**1. Profert; of what instruments.**—*Suydam v. Williamson*, 20 How. 427, 436, 15 L. Ed. 978; *Wilson v. Codman*, 3 Cranch 193, 207, 2 L. Ed. 408; *Duval v. Craig*, 2 Wheat. 45, 4 L. Ed. 180. See the title EXECUTORS AND ADMINISTRATORS, vol. 6, p. 179.

Where a plaintiff in a pending action dies, his executor desiring to prosecute, must show himself to be executor by making profert of his letters testamentary, unless the fact be admitted by the parties; and the defendant may insist on the production of his letters testamentary before he shall be permitted to prosecute. *Wilson v. Codman*, 3 Cranch 193, 207, 2 L. Ed. 408.

**2. Oyer not demandable of a record.**—

*Sneed v. Wister*, 8 Wheat. 690, 5 L. Ed. 717.

**3. Where deed stated merely as inducement, etc.**—*Duval v. Craig*, 2 Wheat. 45, 4 L. Ed. 180.

**Breach of covenant; previous assignment made by grantor.**—Thus, in an action for a breach of covenant of title, the plaintiff is not bound to make profert of a previous assignment alleged to have been made by the grantor and described in the breach as constituting a defect in his title where the plaintiff was neither a party nor privy to such assignment. *Duval v. Craig*, 2 Wheat. 45, 4 L. Ed. 180.

**4. Where deed must come from other side.**—*Sneed v. Wister*, 8 Wheat. 690, 5 L. Ed. 717.

**Depends Now upon Law of Each State.**—The necessity of a profert of letters of administration depends upon the local laws of each state.<sup>6</sup>

**C. Sufficiency of Profert.**—A general profert of letters testamentary is sufficient. Their validity cannot be gone into unless oyer be craved and granted so as to bring them before the court.<sup>7</sup>

**Necessity for Presenting the Original.**—Originally when profert was made of letters-patent the principles of pleading required that the original, under the great seal, should be produced; for a profert could not be of any copy or exemplification.<sup>8</sup> It was to cure this difficulty that the statutes of 3 Edw. VI. ch. 4, and 13 Elizabeth, ch. 6, were passed; so, too, the statutes of 10 Anne, ch. 18, made copies of enrolled deeds of bargain and sale, offered by profert in pleading, evidence. These statutes having been passed before the emigration of our ancestors, and being applicable to our systems, and in amendment of the law, constitute a part of our common law.<sup>9</sup>

**D. Excuse of Profert; Lost Deed.**—In a case at common law profert of a deed has been dispensed with in a court of law upon a special declaration stating the loss of the deed.<sup>10</sup> It was while the possession and the right were confounded that this objection of being unable to make profert was thought of weight.<sup>11</sup>

**E. Want of Profert**—1. **HOW OBJECTION RAISED.**—Objection for want of profert must be raised by demurring generally for the defect.<sup>12</sup>

2. **AIDED BY VERDICT, PLEADING OYER, ETC.**—Failure of an executor to make profert of his letters testamentary in his declaration is aided by pleading over, and cannot be taken advantage of unless the defendant demurs generally for the defect.<sup>13</sup> Failure to make profert of letters of administration is also cured by the verdict.<sup>14</sup>

6. **Governed by local law.**—*Matheson v. Grant*, 2 How. 263, 283, 11 L. Ed. 261.

7. **Sufficiency of profert.**—*Childress v. Emory*, 8 Wheat. 642, 671, 5 L. Ed. 703.

8. **Necessity for presenting the original.**—*Patterson v. Winn*, 5 Pet. 233, 8 L. Ed. 108.

9. **Same; statutes.**—*Patterson v. Winn*, 5 Pet. 233, 8 L. Ed. 108.

10. **Excuse of profert; lost deed.**—*Ware v. Hylton*, 3 Dall. 199, 265, 1 L. Ed. 568.

11. *Ware v. Hylton*, 3 Dall. 199, 265, 1 L. Ed. 568.

12. **Want of profert; how objection raised.**—*Kane v. Paul*, 14 Pet. 33, 42, 10 L. Ed. 341.

13. **Want of profert aided by verdict; pleading over, etc.**—*Thompson v. Musser*, 1 Dall. 458, 461, 1 L. Ed. 222; *Kane v. Paul*, 14 Pet. 33, 42, 10 L. Ed. 341; *Wilson v. Codman*, 3 Cranch 193, 207, 2 L. Ed. 408.

If upon the death of a plaintiff an order for the admission of his executor as a party be made without requiring him to make profert of his letters testamentary, it is then too late to contest the fact of his being an executor. *Wilson v. Codman*, 3 Cranch 193, 207, 2 L. Ed. 408.

But if the court has unguardedly permitted a person to prosecute who has not given satisfactory evidence of his right to do so, it possesses the means of preventing any mischief from the inadvertence, and will undoubtedly employ those means. *Wilson v. Codman*, 3 Cranch 193, 207, 2 L. Ed. 408.

14. *Matheson v. Grant*, 2 How. 263, 283,

11 L. Ed. 261; *Thompson v. Musser*, 1 Dall. 458, 461, 1 L. Ed. 222.

"But the counsel for the defendant in error have answered these cases, by urging that oyer of the penal bill was prayed and granted; that the defendant below pleaded in chief to the declaration, payment, and joined issue; and that the verdict was for the plaintiff below. They contended, that the plaintiff was only bound to prove the gist of the action; that it was not incumbent on him to prove that the smaller quantity of 100,000 weight of tobacco was not paid; that under the act for defalcation (1 Sm. L. 49), the jury are to find the sum really due; and that the defect, if it was one, is cured by pleading over in chief, and also by the verdict. \* \* \* We are clearly of opinion, that this defect in the declaration, with respect to the averment, cannot now be taken advantage of as an error. It might, indeed, have been fatal on demurrer; but, at this period of the cause, it is cured by the plea in bar, by the verdict, and by the statutes of jeofails. The defendant below pleaded payment, which admits the declaration to be good. 10 Vin. Abr. 3, pl. 12. The penal bill became part of the record by the oyer; and if the jury had not been satisfied that the smaller quantity was not paid, they would never have given a verdict for 114,286 weight of tobacco. This was the very thing litigated and determined; and it was the province of the jury, under the act of defalcation, to ascertain the

## II. Oyer.

**A. General Nature, Purpose and Effect.**—Oyer is a method by which certain evidence may be incorporated into the record at the nisi prius trial, and occurs where the plaintiff in his declaration or the defendant in his plea finds it necessary to make profert of a deed, probate, letters of administration, or other instrument under seal, and the other party prays that it may be read to him, which in such a case cannot, as a general rule, be denied by the court. The effect of the proceeding is to make the instrument of which oyer is demanded a part of the proceedings, and consequently to place it within the operation of a writ of error, which, in every case where the proceeding is according to the course of the common law, brings up the whole record; and the evidence, whatever it may be, having been made a part of the record by such proceedings, the questions of law arising upon it become a proper subject of revision upon the writ of error.<sup>15</sup>

**B. Necessity for Oyer**—1. **GENERALLY.**—If the defendant would object to the sufficiency or validity of the instrument of which profert is made, he must crave oyer so as to bring it before the court; otherwise it cannot be judicially examined.<sup>16</sup>

2. **WHERE PROFERT IMPROPERLY MADE.**—If profert be unnecessarily or improperly made, the defendant is not entitled to demand oyer of the instrument, but is bound to plead without it.<sup>17</sup>

**C. Sufficiency of Demand of Oyer**—1. **OYER OF BOND AND CONDITION.**—Oyer of a bond does not include oyer of its condition; nor e converso.<sup>18</sup>

2. **WHERE DEED SET FORTH IN ONLY ONE OF SEVERAL COUNTS.**—Oyer of a deed, set forth in the first count, does not make that deed part of the record, so as to apply to other counts in the declaration.<sup>19</sup>

**Reason for Rule.**—The explanation of this is that different counts allege different contracts and different assumpsits. It is upon this idea alone that a verdict can be rendered for the plaintiff upon one count, and for the defendant upon another; therefore, the oyer of his contract set forth in one count cannot be the oyer of another contract set forth in another count, and cannot spread

balance, which must have appeared from the evidence. The verdict, therefore, also aids the omission of the averment. See 3 Black. Com. 394; Carth. 389; Jenk. Cent. 21, ca. 39; Ibid. 288, ca. 24. Several of the cases cited on both sides do not apply; but all the late authorities (many of which are in point) support our judgment on this occasion. Those cases which bear a contrary aspect, occurred before the last of the statutes of jeofails, and previous to the more liberal decisions of modern judges. 2 Burr. 756. The general rule, however, is now well established, that if a plaintiff states his title in his declaration in a defective manner, it will be cured by a verdict; but not so, if the title is totally defective in itself. Cro. Eliz. 778." *Thompson v. Musser*, 1 Dall. 458, 461, 1 L. Ed. 222.

**15. Oyer; general nature, purpose and effect.**—*Suydam v. Williamson*, 20 How. 427, 436, 15 L. Ed. 978.

**Bond made part of the declaration.**—By oyer the bond is made a part of the declaration. *Cooke v. Graham*, 3 Cranch 229, 235, 2 L. Ed. 420.

**16. Necessity for oyer.**—*Kane v. Paul*, 14 Pet. 33, 41, 42, 10 L. Ed. 341; *United*

*States v. Arthur*, 5 Cranch 257, 261, 3 L. Ed. 94; *Childress v. Emory*, 8 Wheat. 642, 671, 5 L. Ed. 705.

The want of oyer of the condition of a bond, in plea of performance, is fatal. *United States v. Arthur*, 5 Cranch 257, 261, 3 L. Ed. 94.

**A general profert of letters testamentary is sufficient.**—*Kane v. Paul*, 14 Pet. 33, 41, 42, 10 L. Ed. 341. See the title **EXECUTORS AND ADMINISTRATORS**, vol. 6, p. 179.

Where the plea is to the general issue even though it raises the question of right or title in the executor, the certificate of probate and appearance as executor meets the requisition, and a judicial examination of the validity of such letters cannot be gone into. *Kane v. Paul*, 14 Pet. 33, 41, 10 L. Ed. 341.

**17. Same; where profert improperly made.**—*Sneed v. Wister*, 8 Wheat. 690, 5 L. Ed. 717.

**18. Sufficiency; oyer of bond and condition.**—*United States v. Arthur*, 5 Cranch 257, 261, 3 L. Ed. 94, footnote.

**19. Where deed set forth in only one of several counts.**—*Hughes v. Moore*, 7 Cranch 176, 190, 3 L. Ed. 307.



upon the record a contract supposed to be totally distinct from that which was read.<sup>20</sup>

**D. Effect of Improper Demand of Oyer.**—If oyer be improperly demanded, the defect is aided on a general demurrer; but it is fatal to the plea where it is set down as a cause of demurrer.<sup>21</sup>

**E. Procedure upon Oyer; Demurrer or Plea in Abatement**—1. **VARIANCE BETWEEN WRIT AND DECLARATION.**—Variances between the writ and declaration are matters presumably in abatement only, and cannot be taken advantage of upon general demurrer to the declaration, since a general demurrer is in bar of the action. The proper procedure in such case is for the defendant to crave oyer of the writ and then plead in abatement for the variance.<sup>22</sup>

2. **VALIDITY OF LETTERS TESTAMENTARY.**—A judicial examination into the validity of letters testamentary can only be gone into upon a plea in abatement after oyer has been craved and granted; and then upon issue joined the plaintiff's title as executor or administrator may be disputed by showing any of those causes which make the grant void ab initio, or that the administration has been revoked.<sup>23</sup> If the plaintiffs are not executors, that objection must be taken by way of plea in abatement and does not arise upon a demurrer in bar.<sup>24</sup>

**PROFESSION.**—"A vocation in which a professed knowledge of some department of science or learning is used by its practical application to the affairs of others, either in advising, guiding, or teaching them, or in serving their interests or welfare in the practice of an art founded on it. Formerly, theology, law, and medicine were specifically known as the professions; but as the applications of science and learning are extended to other departments of affairs, other vocations also receive the name. The word implies professed attainments in special knowledge as distinguished from mere skill. A practical dealing with affairs as distinguished from mere study or investigation; and an application of such knowledge to uses for others as a vocation, as distinguished from its pursuit for its own purposes."<sup>1</sup>

**PROFIT A PRENDRE.**—See the title **LICENSE (REAL PROPERTY)**, vol. 7, p. 866.

**PROFITS.**—As measure of recovery, see the titles **COPYRIGHT**, vol. 4, p. 616; **DAMAGE**, vol. 5, p. 179; **MORTGAGES AND DEEDS OF TRUST**, vol. 8, pp. 469, 473. As to recovery of profits for detention of vessel, see the titles **REVENUE LAWS: SHIPS AND SHIPPING**. As to recovery of mesne profits, see the title **EJECTMENT**, vol. 5, p. 717. As to recovery of profits in suit to quiet title, see the title **QUIETING TITLE**. As to necessity for participation in profits to constitute partnership, see the title **PARTNERSHIP**, ante, p. 80. As to right of partners to profits, see the title **PARTNERSHIP**, ante, p. 87. As to recovery of profits in suits for infringement of patents, see the title **PATENTS**, ante, p. 302, et seq. As to liability of sureties on appeal bond for profits, see the title **APPEAL AND ERROR**, vol. 2, p. 191. As to whether profits are an insurable interest, see the title **INSURANCE**, vol. 7, p. 114. As to interest on profits, see the title **INTEREST**, vol. 7,

20. Reason for rule.—*Hughes v. Moore*, 7 Cranch 176, 190, 3 L. Ed. 307.

21. Effect of improper demand of oyer.—*Sneed v. Wister*, 8 Wheat. 690, 5 L. Ed. 717.

22. Procedure upon variance between declaration and writ.—*Duvall v. Craig*, 2 Wheat. 45, 55, 4 L. Ed. 180.

23. Procedure upon oyer of letters testamentary.—*Kane v. Paul*, 14 Pet. 33, 41, 42, 10 L. Ed. 341; *Childress v. Emory*, 8 Wheat. 642, 671, 5 L. Ed. 705.

24. *Childress v. Emory*, 8 Wheat. 642, 671, 5 L. Ed. 705.

1. Profession.—*United States v. Laws*, 163 U. S. 258, 266, 41 L. Ed. 151.

In *United States v. Laws*, 163 U. S. 258, 266, 41 L. Ed. 151, it is said: "Although the study of chemistry is the study of a science, yet a chemist who occupies himself in the practical use of his knowledge of chemistry as his services may be demanded may certainly at this time be fairly regarded as in the practice of a profession."

**Professional productions.**—See *Tutton v. Viti*, 108 U. S. 312, 27 L. Ed. 737. See the title **REVENUE LAWS**.

p. 224. As to rights of mortgagor and mortgagee to profits, see the title **MORTGAGES AND DEEDS OF TRUST**, vol. 8, pp. 473, 474, 475. As to whether profits pass under mortgage, see the title **MORTGAGES AND DEEDS OF TRUST**, vol. 8, p. 474. As to whether purchaser at foreclosure sale is entitled to profits, see the title **MORTGAGES AND DEEDS OF TRUST**, vol. 8, p. 517. "Profit" is the gain made upon any business or investment, when both the receipts and payments are taken into the account.<sup>1</sup>

**PRO FORMA JUDGMENT OR DECREE.**—See the title **APPEAL AND ERROR**, vol. 1, p. 927.

**PROHIBIT.**—See the titles **INTOXICATING LIQUORS**, vol. 7, p. 518; **LICENSES**, vol. 7, p. 869.

1. **Profits.**—*Rubber Co. v. Goodyear*, 9 Wall. 788, 804, 19 L. Ed. 566.

In an action for a breach of contract the term **profits** in an instruction as to the measure of damages means the gain which the plaintiff would have made if he had been permitted to complete his contract. *Philadelphia, etc., R. Co. v. Howard*, 13 How. 307, 344, 14 L. Ed. 157; *Hinckley v. Pittsburgh Steel Co.*, 121 U. S. 264, 30 L. Ed. 967.

In *Mobile, etc., R. Co. v. Tennessee*, 153 U. S. 486, 497, 38 L. Ed. 793, it is said: "The term **profits**, out of which dividends alone can properly be declared, denotes what remains after defraying every expense, including loans falling due, as well as the interest of such loans."

**Profits used in constitution.**—In *Grant v. Hartford, etc., R. Co.*, 93 U. S. 225, 227, 23 L. Ed. 878, it is said: "The company having returned the entire balance of their gross earnings over and above current expenses, in the shape of dividends and surplus, for the period in question, and paid the regular tax thereon, we do not see why this was not a full compliance with the law. The object of the law was to impose a tax on net income, or **profits**, only; and that cannot be regarded as net income, or **profits**, which is required and expended to keep the property up in its usual condition proper for operation. Such expenditure is properly classed with repairs, which are a part of the current expenses. If a railroad company should make a second track when they had but a single track before, this would be a betterment or permanent improvement, and, if paid out of the earnings, would be fairly characterized as '**profits** used in construction.' The works of the company would have an additional value to what they had before, with an increased capacity for producing future **profits**." See the title **TAXATION**.

The advance in the value of personal property during a series of years does not constitute the gains, **profits**, or income of any one particular year of the series, although the entire amount of the advance be at one time turned into money by a sale of the property. *Gray v. Darlington*, 15 Wall. 63, 21 L. Ed. 45.

**Net receipts.**—In *Eyster v. Centennial Board of Finance*, 94 U. S. 500, 503, 24 L. Ed. 188, it is said: "The capital stock of this corporation was not employed in, but to prepare for, the business of the contemplated exhibition; and the receipts of the exhibition, over and above its current expenses, are the **profits** of the business. These were the only **profits** anticipated. They are, in fact, the net receipts, which, according to the common understanding, ordinarily represent the **profits** of a business. The public, when referring to the **profits** of the business of a merchant, rarely ever take into account the depreciation of the buildings in which the business is carried on, notwithstanding they may have been erected out of the capital invested. Popularly speaking, the net receipts of a business are its **profits**. So here, as the business to be carried on was that of an exhibition, and its **profits** were to be derived only from its receipts, to the popular mind the net receipts would represent the **profits**."

**Net earnings.**—A revenue act imposed a tax upon all **profits** of any railroad company, etc. The court said: "The **profits** here referred to are the **profits** arising from the operation of the road or canal without deduction of interest paid to its bondholders, or dividends paid to its stockholders, and correspond to the phrase 'net earnings' used in the stipulation of the parties in this case." *Sioux City, etc., R. Co. v. United States*, 110 U. S. 205, 207, 28 L. Ed. 120.

## PROHIBITION.

BY JOSEPH W. TIMBERLAKE.

- I. Nature and Object of Writ, 799.**
- II. Tribunals, Persons and Acts Subject to Writ, 800.**
- III. When Writ Lies, 800.**
  - A. Discretion of Court, 800.
  - B. When Ineffecutal—Acts Already Performed, 801.
  - C. Want or Excess of Jurisdiction, 802.
    - 1. In General, 802.
    - 2. Want of Jurisdiction Must Go to Whole Subject Matter, 803.
    - 3. Jurisdiction of Persons and Subject Matter, 803.
    - 4. Admiralty Proceedings, 803.
    - 5. Bankruptcy Proceedings, 803.
    - 6. Criminal Cases, 803.
    - 7. Proceedings of Court Martial, 803.
    - 8. Title to Office, 803.
  - D. As Dependent upon Existence of Other Remedies, 804.
    - 1. Where Other Remedies Exist, 804.
      - a. In General, 804.
      - b. Errors and Irregularities, 804.
      - c. Where Cause Removed from State Court, 804.
      - d. Action of Forcible Entry and Detainer, 805.
      - e. Proceedings to Enforce Right to Vote, 805.
      - f. Order Granting Injunction, 805.
    - 2. Where No Other Remedy Exists, 805.
      - a. Where Court Has No Jurisdiction, 805.
      - b. Where Court Has Jurisdiction, 805.
- VI. Jurisdiction to Issue, 806.**
  - A. In General, 806.
  - B. Federal Courts, 806.
    - 1. Supreme Court, 806.
      - a. In General, 806.
      - b. To Circuit Courts, 806.
        - (1) Criminal Cases, 806.
        - (2) To Compel Remand of Case to State Court, 806.
      - c. To District Courts, 806.
        - (1) Admiralty Proceedings, 806.
        - (2) Proceedings in Bankruptcy, 808.
      - d. To Choctaw and Chickasaw Citizenship Court, 808.
    - 2. Circuit Courts, 809.
    - 3. Supreme Court of District of Columbia, 809.
    - 4. Territorial Courts, 809.
  - C. State Courts, 810.
- V. Proceedings, 810.**
  - A. Necessity for Objection in Original Proceeding, 810.
  - B. Necessity That Want of Jurisdiction Appear of Record or on Face of Proceedings, 810.
    - 1. In General, 810.



2. As Dependent upon Whether Case Gone to Sentence or Judgment, 810.

C. Parties, 811.

D. Application or Petition, 811.

E. Rule to Show Cause, 811.

F. Granting Writ after Sentence or Judgment, 811.

1. Something Remaining to Be Done, 811.

2. Necessity That Want of Jurisdiction Appear on Face of Proceedings, 812.

G. Scope of Inquiry, 812.

H. Evidence, 812.

I. Appeal and Error, 812.

## VI. Effect of Writ, 812.

### CROSS REFERENCES.

See the titles ACTIONS, vol. 1, p. 96; ADMIRALTY, vol. 1, p. 119; APPEAL AND ERROR, vol. 1, p. 333; BANKRUPTCY, vol. 2, p. 792; CERTIORARI, vol. 3, p. 651; COMMON LAW, vol. 3, p. 958; CONSTITUTIONAL LAW, vol. 4, p. 1; CONTEMPT, vol. 4, p. 531; CORPORATIONS, vol. 4, p. 621; COURTS, vol. 4, p. 861; CRIMINAL LAW, vol. 5, p. 43; ELECTIONS, vol. 5, p. 721; FORCIBLE ENTRY AND DETAINER, vol. 6, p. 303; INJUNCTIONS, vol. 6, p. 1022; INSOLVENCY, vol. 7, p. 1; JUSTICES OF THE PEACE, vol. 7, p. 708; MANDAMUS, vol. 8, p. 1; MANDATE AND PROCEEDINGS THEREON, vol. 8, p. 97; MILITARY LAW, vol. 8, p. 342; PARTIES, ante, p. 34; PUBLIC OFFICERS; REMOVAL OF CAUSES; SHIPS AND SHIPPING.

### I. Nature and Object of Writ.

A writ of prohibition issues only out of a court of common-law jurisdiction,<sup>1</sup> and its object is to prevent a court of peculiar, limited or inferior jurisdiction from assuming jurisdiction of a matter beyond its legal cognizance.<sup>2</sup> A prohibition cannot be made to perform the office of a proceeding for the correction of mere errors and irregularities. Therefore the writ cannot be made to serve the purpose of a writ of error or certiorari, to correct mistakes of an inferior court in deciding any question of law or fact within its jurisdiction.<sup>3</sup> A writ of prohibition is a civil remedy, given in a civil action, as much so as a writ of habeas corpus, which is a civil and not a criminal proceeding, even when instituted to arrest a criminal prosecution.<sup>4</sup> A writ of prohibition is a "suit" within the mean-

1. **Issues from common-law courts only.**—*Smith v. Whitney*, 116 U. S. 167, 174, 29 L. Ed. 601. See post, "Jurisdiction to Issue," IV.

2. **Nature and object of writ.**—3 Bl. Com. 112; *Smith v. Whitney*, 116 U. S. 167, 176, 29 L. Ed. 601.

Such a writ is issued to forbid a subordinate court to proceed in a cause there depending, on suggestion that the cognizance thereof belongeth not to the court. *F. N. B.* 39; 3 Bl. Com. 112; 2 Pars. Ship. 193; 8 Bax. Abr. 206; *Ex parte Easton*, 95 U. S. 68, 77, 24 L. Ed. 373.

The common-law writ of prohibition lies to an inferior court only when the court is acting in excess of, or is taking cognizance of matters not arising within, its jurisdiction. 6 Bax. Abr. 587, tit. Prohibition, K. Its office is to prevent an unlawful assumption of jurisdiction. *In re Cooper*, 143 U. S. 472, 495, 36 L. Ed. 232; *Ex parte Gordon*, 104 U. S. 515, 516, 26 L. Ed. 814; *Ex parte Ferry Co.*,

104 U. S. 519, 26 L. Ed. 815. See post, "Admiralty Proceedings," IV, B, 1, c, (1).

The writ of prohibition, as its name imports, is one which commands the person to whom it is directed not to do something which, by the suggestion of the relator, the court is informed he is about to do. If the thing be already done, it is manifest the writ of prohibition cannot undo it, for that would require an affirmative act; and the only effect of a writ of prohibition is to suspend all action, and to prevent any further proceeding in the prohibited direction. *United States v. Hoffman*, 4 Wall. 158, 161, 18 L. Ed. 354.

3. **Not proceeding for correction of errors, etc.**—See post, "Errors and Irregularities," III, D, 1, b.

4. **Civil remedy.**—*Farnsworth v. Montana*, 129 U. S. 104, 113, 32 L. Ed. 616; *Ex parte Tom Tong*, 108 U. S. 556, 27 L. Ed. 826. See the title HABEAS CORPUS, vol. 6, p. 610.

ing of the twenty-fifth section of the judiciary act of 1789.<sup>5</sup>

## II. Tribunals, Persons and Acts Subject to Writ.

A writ of prohibition can only be issued to restrain the exercise of judicial functions.<sup>6</sup> It will lie to an inferior court when such court is acting manifestly beyond its jurisdiction.<sup>7</sup> The writ will not lie to restrain or prohibit the acts of an executive officer.<sup>8</sup>

## III. When Writ Lies.

**A. Discretion of Court.**—The granting or refusing of a writ of prohibition is discretionary with the court where there is another legal remedy, by appeal or otherwise, or where the question of the jurisdiction of the court whose action is sought to be prohibited is doubtful, or depends on facts which are not made matter of record or where a stranger applies for the writ of prohibition.<sup>9</sup> Nor is the granting of the writ obligatory where the case has gone to sentence, and the want of jurisdiction does not appear on the face of the proceedings.<sup>10</sup> But

**5. A "suit" within meaning of judiciary act.**—See the title APPEAL AND ERROR, vol. 1, pp. 548, 549.

**6. Only judicial functions restrained.**—*Smith v. Whitney*, 116 U. S. 167, 176, 29 L. Ed. 601.

**7. Will lie to inferior court.**—*Alexander v. Crollott*, 199 U. S. 580, 50 L. Ed. 317, citing *Smith v. Whitney*, 116 U. S. 167, 29 L. Ed. 601; *In re Cooper*, 143 U. S. 472, 495, 36 L. Ed. 232; *In re Rice*, 155 U. S. 396, 403, 39 L. Ed. 198; *In re New York, etc., Steamship Co.*, 155 U. S. 523, 531, 39 L. Ed. 246; *Ex parte Easton*, 95 U. S. 68, 77, 24 L. Ed. 373; *Ex parte Gordon*, 104 U. S. 515, 516, 26 L. Ed. 814.

As to the issuance of writs of prohibition to circuit courts, see post, "To Circuit Courts," IV, B, 1, b; to district courts, see post, "To District Courts," IV, B, 1, c; to a court-martial, see post, "Supreme Court of District of Columbia," IV, B, 3; to Choctaw and Chickasaw citizenship court, see post, "To Choctaw and Chickasaw Citizenship Court," IV, B, 1, d.

**8. Executive officer cannot be restrained by writ.**—*Smith v. Whitney*, 116 U. S. 167, 29 L. Ed. 601.

The secretary of the navy being an executive officer, and not a member of the court-martial sought to be prohibited, his acts convening the court-martial cannot be the subject of a writ of prohibition. *Smith v. Whitney*, 116 U. S. 167, 176, 29 L. Ed. 601.

**9. When discretionary.**—*Smith v. Whitney*, 116 U. S. 167, 173, 29 L. Ed. 601; *In re Cooper*, 143 U. S. 472, 495, 36 L. Ed. 232; *In re Huguley Mfg. Co.*, 184 U. S. 297, 301, 46 L. Ed. 549; *In re Rice*, 155 U. S. 396, 402, 39 L. Ed. 198; *In re New York, etc., Steamship Co.*, 155 U. S. 523, 39 L. Ed. 246; *In re Alix*, 166 U. S. 136, 41 L. Ed. 948. See the title APPEAL AND ERROR, vol. 1, p. 1002.

As to whether the granting or refusing of a writ of prohibition in such case is the subject of a writ of error, see the title APPEAL AND ERROR, vol. 1, p. 1002.

**10.** *In re Rice*, 155 U. S. 396, 402, 39

L. Ed. 198; *In re New York, etc., Steamship Co.*, 155 U. S. 523, 39 L. Ed. 246; *In re Alix*, 166 U. S. 136, 41 L. Ed. 948.

In such case the granting of the writ, which even if of right is not of course, is not obligatory upon the court, and the party applying may be precluded by acquiescence from obtaining it. *In re Cooper*, 143 U. S. 472, 495, 36 L. Ed. 232.

Where an application was made to stay by prohibition the enforcement of a decree three years after its rendition, and after the pendency of an appeal therefrom for the same length of time, the court said: "We do not regard the court as constrained to intervene in this way unless, perhaps, upon an irresistible case and adequate reason shown for the delay; and particularly not where such intervention involves the definition of the line of demarcation between co-ordinate departments of the government and the determination of public questions, action in reference to which is appropriately confided to other departments than the judicial." *In re Cooper*, 143 U. S. 472, 504, 36 L. Ed. 232.

John L. Mills filed his libel in the district court of the United States for the district of New Jersey on the fourteenth day of September, A. D. 1896, against the steamer Allegheny and her cargo to recover salvage, and such proceedings were thereafter had thereon as resulted in a decree in favor of the libellant, December 2, 1896. An order for the sale of the steamer and cargo was entered December 15; a motion to vacate this order was made on behalf of Gustave Alix, master of the Belgain steamer *Caucase*, which was denied December 21; the sale took place December 22, and was confirmed December 30, 1896. On December 26, 1896, Alix filed a petition of intervention in said cause, alleging that he had filed a libel in admiralty against the *Allegheny*, October 22, 1894, in the district court of the United States for the district of Delaware; that the steamer had been attached by the marshal of that district in December of that year; and

where it appears that the court whose action is sought to be prohibited has clearly no jurisdiction of the suit or prosecution instituted before it, or of some collateral matter arising therein, and the defendant therein has objected to its jurisdiction at the outset, and has no other remedy, he is entitled to a writ of prohibition as matter of right.<sup>11</sup>

**B. When Ineffectual—Acts Already Performed.**—The writ of prohibition can only be used to prevent the doing of some act which is about to be done, and can never be used as a remedy for acts already completed.<sup>12</sup> Therefore, where the court to which the writ should be issued, has already disposed of the case, so that nothing remains which that court can do, either by way of executing its judgment or otherwise, no prohibition will be granted. That is, the writ will not issue after the cause is ended.<sup>13</sup> And this is true, though the

that the district court for the district of New Jersey had no jurisdiction. All the material allegations of the petition of intervention were denied by the answer thereto, and issues of fact were raised on which the question of jurisdiction depended. Thereupon, on January 11, 1897, a petition or suggestion was filed by Alix in the federal supreme court, seeking the issue of a writ of prohibition to the judge of the district court for the district of New Jersey to restrain him from enforcing any of the orders or decrees by him theretofore made in the suit of said Mills, or proceeding further therein. A rule to show cause was granted, to which return has been duly made. Held, that, tested by the settled rules in reference to the writ of prohibition as laid down in *In re Rice*, 155 U. S. 396, 402, 39 L. Ed. 198, a proper case was not made for awarding such a writ. *In re Alix*, 166 U. S. 136, 137, 41 L. Ed. 948.

**11. When matter of right.**—*Smith v. Whitney*, 116 U. S. 167, 173, 29 L. Ed. 601; *In re Cooper*, 143 U. S. 472, 495, 36 L. Ed. 232; *In re Rice*, 155 U. S. 396, 402, 39 L. Ed. 198; *In re Alix*, 166 U. S. 136, 41 L. Ed. 948; *In re Huguley Mfg. Co.*, 184 U. S. 297, 301, 46 L. Ed. 549; *In re New York, etc., Steamship Co.*, 155 U. S. 523, 39 L. Ed. 246.

As to whether the refusal to grant the writ in such case may be reviewed on error, see the title APPEAL AND ERROR, vol. 1, p. 1002.

**12. Acts already performed.—In general.**—*United States v. Hoffman*, 4 Wall. 158, 18 L. Ed. 354; *Ex parte Easton*, 95 U. S. 68, 72, 24 L. Ed. 373; *Ex parte Christy*, 3 How. 292, 11 L. Ed. 603.

The writ of prohibition, as its name imports, is one which commands the person to whom it is directed not to do something which, by the suggestion of the relator, the court is informed he is about to do. If the thing be already done, it is manifest the writ of prohibition cannot undo it, for that would require an affirmative act; and the only effect of a writ of prohibition is to suspend all action, and to prevent any further proceeding in the prohibited direction.

*United States v. Hoffman*, 4 Wall. 158, 161, 18 L. Ed. 354.

**13. Where cause ended.**—*United States v. Hoffman*, 4 Wall. 158, 18 L. Ed. 354; *Ex parte Joins*, 191 U. S. 93, 102, 48 L. Ed. 110.

The Choctaw and Chickasaw citizenship court was established by an agreement between the United States and the Choctaw and Chickasaw nations, made on March 21, 1902, and ratified by an act of congress of July 1, 1902, 32 Stat. 641, ch. 1362. By § 31 of the act the two nations were authorized to file a bill in equity in the said court to annul, on certain grounds of law, decrees of United States courts in the Indian Territory, whereby certain persons were admitted to citizenship in those nations. A bill was filed and a decree was made purporting to annul the former decrees. A petition for a writ of prohibition was filed in the supreme court to prohibit the citizenship court from giving further effect to this decree or certifying and delivering a copy of the same to the Dawe Commission, established under an earlier act, on the ground that the provisions of § 31 were contrary to the constitution of the United States. It was held, that, irrespective of the constitutionality of the act upon which the decree rested, the writ must be denied, as there was nothing which the supreme court could prohibit, the cause being ended in the citizenship court before the application for prohibition was heard, that is, the test case provided for had been decided and judgment entered and certified to the Dawe Commission before the petition for prohibition was filed, this being all that was done by the court and all that it was empowered to do. *Ex parte Joins*, 191 U. S. 93, 48 L. Ed. 110.

In the case of *Hall v. Norwood, Siderfin* 166—a very old case, when writs of prohibition were much more common than now—a prohibition was asked to a court of the Cinque Ports at Dover. While the case was under consideration, the reporter says: "On the other hand the court was informed that they had proceeded to judgment and execution at



final disposition of the case was made after service on the judge of a rule to show cause why the writ should not issue, and though other cases of the same character may be pending in the same court.<sup>14</sup> Where a decision of the circuit court dismissing a petition for a writ of prohibition is brought to the supreme court by a writ of error, and it appears that subsequently to the judgment of dismissal in the lower court, everything sought to be prohibited has already been done and there remains nothing upon which an order of the supreme court can operate, the writ of error will be dismissed, as being a moot case.<sup>15</sup>

**C. Want or Excess of Jurisdiction**—1. IN GENERAL.—A writ of prohibition will lie to an inferior court when it is acting manifestly beyond its jurisdiction, i. e., when such court is acting in excess of, or is taking cognizance of, matters not arising within its jurisdiction.<sup>16</sup> But where the in-

Dover, and therefore that they move here too late for a prohibition, and of this opinion was the court, since there is no person to be prohibited, and possessions are never taken away or disturbed by prohibitions." The marginal note by the reporter is this: "Prohibition will not lie after the cause is ended." *United States v. Hoffman*, 4 Wall. 158, 163, 18 L. Ed. 354.

"We have examined carefully all the cases referred to by counsel which show that a prohibition may issue after sentence or judgment; but in all these cases something remained which the court or party to whom the writ was directed might do, and probably would have done, as the collection of costs, or otherwise enforcing the sentence. Here the return shows that nothing is left to be done in the case. It is altogether gone out of the court." *United States v. Hoffman*, 4 Wall. 158, 162, 18 L. Ed. 354.

14. *United States v. Hoffman*, 4 Wall. 158, 18 L. Ed. 354.

"The suggestion that there are or may be other cases against the relator of the same character can have no legal force in this case. If they are now pending, and the relator will satisfy the court that they are proper cases for the exercise of the court's authority, it would probably issue writs instead of a rule, but a writ in this case could not restrain the judge in the other cases by its own force, and could affect his action only so far as he might respect the principle on which the court acted in this case. We are not prepared to adopt the rule that we will issue a writ in a case where its issue is not justified, for the sole purpose of establishing a principle to govern other cases." *United States v. Hoffman*, 4 Wall. 158, 162, 18 L. Ed. 354.

15. **Acts performed since dismissal in lower court.**—*Jones v. Montague*, 194 U. S. 147, 48 L. Ed. 913.

A petition for a writ of prohibition filed in the circuit court, to prohibit the board of state canvassers of the state of Virginia, from canvassing votes cast at an election for representatives in congress from that state, being dismissed on the ground of want of jurisdiction, the

petitioners brought the case on error to the supreme court. It appearing that subsequent to the judgment of dismissal a canvass had been made and everything sought to be prohibited done, the writ of error was dismissed. The court said: "But—as shown by the affidavit, and as indeed we might perhaps take judicial notice by the presence in the house of representatives of the individuals elected at that election from the various congressional districts of Virginia—the thing sought to be prohibited has been done and cannot be undone by any order of court. The canvass has been made, certificates of election have been issued, the house of representatives (which is the sole judge of the qualifications of its members) has admitted the parties holding the certificates to seats in that body, and any adjudication which this court might make would be only an ineffectual decision of the question whether or not these petitioners were wronged by what has been fully accomplished. Under those circumstances there is nothing but a moot case remaining, and the motion to dismiss must be sustained." *Jones v. Montague*, 194 U. S. 147, 153, 48 L. Ed. 913. See the title **APPEAL, AND ERROR**, vol. 2, p. 289.

16. **Want or excess of jurisdiction**—In general.—*Alexander v. Crollott*, 199 U. S. 580, 50 L. Ed. 317, citing *Smith v. Whitney*, 116 U. S. 167, 29 L. Ed. 601; *In re Cooper*, 143 U. S. 472, 495, 36 L. Ed. 232; *In re Rice*, 155 U. S. 396, 403, 39 L. Ed. 198; *In re New York, etc., Steamship Co.*, 155 U. S. 523, 531, 39 L. Ed. 246; *Ex parte Gordon*, 104 U. S. 515, 516, 26 L. Ed. 814; *Ex parte Ferry Co.*, 104 U. S. 519, 26 L. Ed. 815; *Ex parte Phenix Ins. Co.*, 118 U. S. 610, 30 L. Ed. 274; *In re Fassett*, 142 U. S. 479, 35 L. Ed. 1086; *Ex parte Christy*, 3 How. 292, 11 L. Ed. 603; *Bronson v. La Crosse, etc., R. Co.*, 1 Wall. 405, 17 L. Ed. 616; *Ex parte Easton*, 95 U. S. 68, 71, 24 L. Ed. 373; *United States v. Peters*, 3 Dall. 121, 1 L. Ed. 535. See ante, "Nature and Object of Writ," I; post, "Errors and Irregularities," III, D, 1, b.

As to the jurisdiction of the particular

ferior court has jurisdiction in the premises, it will not be prohibited from proceeding in the exercise of such jurisdiction.<sup>17</sup>

2. **WANT OF JURISDICTION MUST GO TO WHOLE SUBJECT MATTER.**—Unless it appears upon the face of the proceedings that the court has no jurisdiction of any part of the subject matter of the charges, it is not a case for a prohibition.<sup>18</sup> There may be cases in which two matters before the inferior court are so distinct, that a writ of prohibition may go as to the one and not as to the other. But when the leading charge is within its jurisdiction, and the other charge, though varying in form, is for the same or similar acts, like a second count in an indictment, and the same sentence may be awarded on the first charge as upon both, a writ of prohibition should not issue.<sup>19</sup>

3. **JURISDICTION OF PERSONS AND SUBJECT MATTER.**—A writ of prohibition will issue only in case of a want of jurisdiction either of the parties or the subject matter of the proceeding. But where the court has jurisdiction of the subject matter and the parties, it will not be restrained by a writ of prohibition from deciding all questions properly arising in the suit.<sup>20</sup>

4. **ADMIRALTY PROCEEDINGS.**—See post, "Admiralty Proceedings," IV, B, 1, c, (1).

5. **BANKRUPTCY PROCEEDINGS.**—See post, "Proceedings in Bankruptcy," IV, B, 1, c, (2).

6. **CRIMINAL CASES.**—See post, "Criminal Cases," IV, B, 1, b, (1).

7. **PROCEEDINGS OF COURT MARTIAL.**—See post, "Supreme Court of District of Columbia," IV, B, 3.

8. **TITLE TO OFFICE.**—The jurisdiction to determine the title to a public office belongs exclusively to the courts of law, and may be exercised by pro-

courts," see the titles ADMIRALTY, vol. 1, p. 119; COURTS, vol. 4, p. 861; JURISDICTION, vol. 7, p. 738.

Where the want of jurisdiction appears on the face of the proceedings, the case is clearly one for a writ of prohibition. *Ex parte Phenix Ins. Co.*, 118 U. S. 610, 625, 30 L. Ed. 274, citing *United States v. Peters*, 3 Dall. 121, 1 L. Ed. 535.

17. *In re Fassett*, 142 U. S. 479, 486, 35 L. Ed. 1086; *Ex parte Gordon*, 104 U. S. 515, 26 L. Ed. 814; *Ex parte Hagar*, 104 U. S. 520, 521, 26 L. Ed. 816; *Ex parte Slayton*, 105 U. S. 451, 453, 26 L. Ed. 1066; *Ex parte Pennsylvania*, 109 U. S. 174, 27 L. Ed. 894; *Smith v. Whitney*, 116 U. S. 167, 29 L. Ed. 601; *In re Engles*, 146 U. S. 357, 358, 36 L. Ed. 1004; *The Corsair*, 145 U. S. 335, 343, 36 L. Ed. 727; *Ex parte Easton*, 95 U. S. 68, 24 L. Ed. 373; *Ex parte Phenix Ins. Co.*, 118 U. S. 610, 30 L. Ed. 274; *The Resolute*, 168 U. S. 437, 442, 42 L. Ed. 533; *In re New York, etc., Steamship Co.*, 155 U. S. 523, 531, 39 L. Ed. 246; *Moran v. Sturges*, 154 U. S. 256, 267, 286, 38 L. Ed. 981; *In re Morrison*, 147 U. S. 14, 33, 36, 37 L. Ed. 60.

The mere fact that, in the administration of the assets of an insolvent corporation in the custody of receivers, summary proceedings are resorted to, does not in itself affect the jurisdiction of the circuit court as having proceeded in excess of its powers, and, where notice has been given and hearing had, the result cannot properly be interfered with by

prohibition. *In re Rice*, 155 U. S. 396, 403, 39 L. Ed. 198.

18. **Want of jurisdiction must go to whole subject matter.**—*Smith v. Whitney*, 116 U. S. 167, 182, 29 L. Ed. 601.

19. *Smith v. Whitney*, 116 U. S. 167, 182, 29 L. Ed. 601.

The charges on which a court-martial was ordered to try a petitioner were drawn up in two aspects. The leading charge was for "scandalous conduct tending to the destruction of good morals," and various acts done by the petitioner as paymaster general were set forth in fourteen specifications under that charge. The other charge was for "culpable inefficiency in the performance of duty," with four specifications, some of which, at least, alleged, though in different forms, acts set forth in the specifications under the first charge. Held, that, as the court-martial had jurisdiction of the principal charge and of some or all of the specifications under it, the addition of the second charge with its specifications afforded no ground for issuing a writ of prohibition. *Smith v. Whitney*, 116 U. S. 167, 181, 29 L. Ed. 601.

20. **Jurisdiction of persons and subject matter.**—*In re Fassett*, 142 U. S. 479, 486, 35 L. Ed. 1086; *Ex parte Pennsylvania*, 109 U. S. 174, 27 L. Ed. 894; *Ex parte Hagar*, 104 U. S. 520, 521, 26 L. Ed. 816; *Ex parte Gordon*, 104 U. S. 515, 26 L. Ed. 814; *In re New York, etc., Steamship Co.*, 155 U. S. 523, 531, 39 L. Ed. 246; *Moran v. Sturges*, 154 U. S. 256, 286, 33

hibition.<sup>21</sup>

**D. As Dependent upon Existence of Other Remedies**—1. **WHERE OTHER REMEDIES EXIST**—a. *In General*.—Although a writ of prohibition will lie to an inferior court, when it is acting manifestly beyond its jurisdiction, such writ will not issue where there is another remedy existing.<sup>22</sup> Thus, where there is another remedy by appeal,<sup>23</sup> writ of error,<sup>24</sup> or mandamus,<sup>25</sup> a writ of prohibition will not be issued.

b. *Errors and Irregularities*.—The office of a writ of prohibition is to prevent an unlawful assumption of jurisdiction,<sup>26</sup> and it is never issued unless it clearly appears that the inferior court is about to exceed its jurisdiction.<sup>27</sup> A prohibition cannot be made to perform the office of a proceeding for the correction of mere errors and irregularities, where the inferior court has jurisdiction of the cause.<sup>28</sup> And it cannot therefore be made to serve the purpose of a writ of error or certiorari, to correct mistakes of the inferior court in deciding any question of law or fact within its jurisdiction.<sup>29</sup>

c. *Where Cause Removed from State Court*.—If a cause is properly removed from a state court to a federal court, the rightful jurisdiction of the former court is gone, and it cannot properly proceed further, but it does proceed and does force the defendant, who applied for the removal, to a trial, the remedy is by a writ of error after final judgment, and not by prohibition or punishment for contempt;<sup>30</sup> and where a circuit court refuses to remand to a state court, a case over which it has no jurisdiction and which was improperly removed to

L. Ed. 981; *In re Morrison*, 147 U. S. 14, 33, 36, 37 L. Ed. 60; *The Resolute*, 168 U. S. 437, 442, 42 L. Ed. 533.

21. **Title to office**.—*White v. Berry*, 171 U. S. 366, 377, 43 L. Ed. 199.

22. **Where other remedies exist**—*In general*.—*Alexander v. Crollott*, 199 U. S. 580, 50 L. Ed. 317, citing *Smith v. Whitney*, 116 U. S. 167, 29 L. Ed. 601; *In re Cooper*, 143 U. S. 472, 495, 36 L. Ed. 232; *In re Rice*, 155 U. S. 396, 403, 39 L. Ed. 198; *In re New York, etc., Steamship Co.*, 155 U. S. 523, 531, 39 L. Ed. 246. See ante, "Discretion of Court," III, A.

23. **Appeal**.—*Alexander v. Crollott*, 199 U. S. 580, 50 L. Ed. 317; *Ex parte Warmouth*, 17 Wall. 64, 21 L. Ed. 543; *In re Huguley Mfg. Co.*, 184 U. S. 297, 301, 46 L. Ed. 549; *In re New York, etc., Steamship Co.*, 155 U. S. 523, 531, 39 L. Ed. 246; *The Corsair*, 145 U. S. 335, 343, 36 L. Ed. 727; *Ex parte Gordon*, 104 U. S. 515, 26 L. Ed. 814; *In re Fassett*, 142 U. S. 479, 484, 35 L. Ed. 1086; *Moran v. Sturges*, 154 U. S. 256, 286, 38 L. Ed. 981; *Ex parte Pennsylvania*, 109 U. S. 174, 176, 27 L. Ed. 894. See the title APPEAL AND ERROR, vol. 1, p. 333.

Upon the face of the libel, the facts found and the final decree, the district court clearly had jurisdiction. This petitioner had a remedy by appeal from that decree, which was inefficacious because of his neglect to have included in those findings the fact of the exact locality of the offense and seizure. Such being the case, the writ of prohibition prayed for should not issue. *In re Cooper*, 143 U. S. 472, 513, 36 L. Ed. 232.

24. **Writ of error**.—*Chesapeake, etc., R. Co. v. White*, 111 U. S. 134, 137, 28 L. Ed. 378.

25. **Mandamus**.—*Ex parte Wisner*, 203 U. S. 449, 51 L. Ed. 264. See the title MANDAMUS, vol. 8, p. 1.

26. **Office of writ to prevent unlawful assumption of jurisdiction**.—See ante, "Nature and Object of Writ," I.

27. *Smith v. Whitney*, 116 U. S. 167, 176, 29 L. Ed. 601.

28. **Cannot be used for correction of mere errors**.—*Ex parte Ferry Co.*, 104 U. S. 519, 520, 26 L. Ed. 815; *In re Cooper*, 143 U. S. 472, 495, 36 L. Ed. 232; *Ex parte Gordon*, 104 U. S. 515, 26 L. Ed. 814; *The Corsair*, 145 U. S. 335, 343, 36 L. Ed. 727; *In re New York, etc., Steamship Co.*, 155 U. S. 523, 531, 39 L. Ed. 246; *In re Fassett*, 142 U. S. 479, 484, 35 L. Ed. 1086.

A supposed error in a judgment of an admiralty court on the merits of an action, cannot be corrected by prohibition. The remedy, if any, is by appeal. *Ex parte Pennsylvania*, 109 U. S. 174, 176, 27 L. Ed. 894.

29. **Not substitute for writ of error or certiorari**.—*Smith v. Whitney*, 116 U. S. 167, 176, 29 L. Ed. 601. See the titles APPEAL AND ERROR, vol. 1, p. 394; CERTIORARI, vol. 3, p. 651.

A writ of prohibition is not intended to take the place of exceptions to the libel for insufficiency, and will issue only in case of a want of jurisdiction. *In re Fassett*, 142 U. S. 479, 486, 35 L. Ed. 1086.

30. **Cause removed from state court**.—*Chesapeake, etc., R. Co. v. White*, 111 U. S. 134, 137, 28 L. Ed. 378.

The proper practice in such cases was fully considered in *Insurance Co. v. Dunn*, 19 Wall. 214, 22 L. Ed. 68; *Removal Cases*, 100 U. S. 457, 25 L. Ed. 593; *Railroad Co. v. Mississippi*, 102 U.



it, mandamus and not prohibition is the proper remedy to compel such remand.<sup>31</sup>

d. *Action of Forcible Entry and Detainer.*—In an action of forcible entry and detainer before a justice of the peace in the territory of New Mexico, a defendant claiming to be owner of the property, and alleging a want of jurisdiction on the part of the justice to determine the question of ownership in such a proceeding, has a remedy, in case the justice decides against him, in the form of an appeal to the district court under § 3358 of the New Mexican Code, and a writ of prohibition will not lie in such case from the supreme court of the territory commanding the justice to desist and refrain from further proceedings.<sup>32</sup>

e. *Proceedings to Enforce Right to Vote.*—Where the circuit court of the United States proceeds to exercise jurisdiction under the twenty-third section of the act of 31st of May, 1870, entitled "An act to enforce the rights of citizens of the United States to vote in the several states of this Union, and for other purposes," the supreme court has no power to issue the writ of prohibition in such a cause until appeal is taken from a final decree of the circuit court.<sup>33</sup>

f. *Order Granting Injunction.*—See the title APPEAL AND ERROR, vol. 1, p. 826.

2. WHERE NO OTHER REMEDY EXISTS—a. *Where Court Has No Jurisdiction.*—Where it appears that the court whose action is sought to be prohibited has clearly no jurisdiction of the suit or prosecution instituted before it, or of some collateral matter arising therein, and the defendant therein has no other remedy, he is entitled to a writ of prohibition as a matter of right.<sup>34</sup>

b. *Where Court Has Jurisdiction.*—But if the inferior court has jurisdiction of the cause, it is no ground for relief by prohibition that provision has not been made for a review of its decision by appeal or otherwise.<sup>35</sup> A prohibition cannot be made to perform the office of a proceeding for the correction of mere errors and irregularities.<sup>36</sup> If there is jurisdiction, and no provision for appeal

S. 135, 26 L. Ed. 96; *Railroad Co. v. Koontz*, 104 U. S. 5, 26 L. Ed. 643. See the titles APPEAL AND ERROR, vol. 1, p. 333; CONTEMPT, vol. 4, p. 531; REMOVAL OF CAUSES.

31. *Refusal to remand to state court.*—Ex parte Wisner, 203 U. S. 449, 51 L. Ed. 264. See the titles MANDAMUS, vol. 8, p. 1; MANDATE AND PROCEEDINGS THEREON, vol. 8, p. 97.

32. *Action of forcible entry and detainer.*—*Alexander v. Crollott*, 199 U. S. 580, 50 L. Ed. 317. See the title FORCIBLE ENTRY AND DETAINER, vol. 6, p. 303.

33. *Proceedings to enforce right to vote.*—Ex parte Warmouth, 17 Wall. 64, 21 L. Ed. 543.

34. *Where court has no jurisdiction.*—See ante, "Discretion of Court," III, A.

35. *Where court has jurisdiction.*—Ex parte Ferry Co., 104 U. S. 519, 26 L. Ed. 815; Ex parte Pennsylvania, 109 U. S. 174, 176, 27 L. Ed. 894.

James H. Cuddy exhibited his libel against the steamer "Garland," in the district court of the United States for the eastern district of Michigan, alleging that he was the father of David Cuddy and William H. Cuddy, aged respectively ten and thirteen years, passengers on board a steam yacht bound up the Detroit River, when she was sunk by the "Garland," whereby they were drowned.

and he was deprived of their earnings, services, and society. The sinking of the yacht and their death are charged to be the direct result of the negligence and unskillfulness of the "Garland." In a supplemental libel he alleges that he was duly appointed administrator of the estate of each of his sons, and he charges that he is entitled to damages in the sum of \$4,000 for their death, not only by virtue of his relationship, but as their personal representative, his right in that behalf being created by the law of Michigan. The "Garland" was seized. On the application of the Detroit River Ferry Company, the claimant, she was appraised and surrendered. The company now prays for a writ from the federal supreme court to prohibit the proceedings, as beyond the jurisdiction of the district court. The writ was denied. The court said: "This case is in all its material facts, like that of Ex parte Gordan, supra, p. 515. It matters not that the amount demanded in the libel is less than \$5,000, and that consequently no appeal will lie in this court. An appeal will lie to the circuit court in favor of the libellant if he is defeated, and in favor of the respondent if the recovery exceeds \$50." Ex parte Ferry Co., 104 U. S. 519, 26 L. Ed. 815.

36. *Not proceeding to correct errors and irregularities.*—See ante, "Errors and Irregularities," III. D. 1. b.

or writ of error, the judgment of the trial court is the judgment of the court of last resort, and concludes the parties. It rests with congress to decide whether a case shall be reviewed or not.<sup>37</sup>

#### IV. Jurisdiction to Issue.

**A. In General.**—In this country writs of prohibition issue only out of courts of common-law jurisdiction.<sup>38</sup> Therefore, where a court has both common-law and equity powers, it would seem that proceedings to obtain a writ of prohibition therein must be considered as on the common-law side of the court.<sup>39</sup>

**B. Federal Courts**—1. **SUPREME COURT**—a. *In General.*—A writ of prohibition cannot issue from the supreme court of the United States in cases where there is no appellate power given by law, nor any special authority to issue the writ.<sup>40</sup>

b. *To Circuit Courts*—(1). *Criminal Cases.*—A writ of prohibition, will not lie from the supreme court to the circuit court of the United States, in criminal cases, the supreme court having no appellate power over the proceedings of the circuit court in such cases, and no special authority to issue the writ.<sup>41</sup>

(2) *To Compel Remand of Case to State Court.*—Where a circuit court refuses to remand to a state court, a case over which it has no jurisdiction and which was improperly removed to it, mandamus, and not prohibition is the proper remedy to compel such remand.<sup>42</sup>

c. *To District Courts*<sup>43</sup>—(1) *Admiralty Proceedings.*—By § 688 of the Revised Statutes, authority is vested in the supreme court to issue writs of prohibition to the district court sitting as a court of admiralty and maritime juris-

37. *Ex parte Ferry Co.*, 104 U. S. 519, 26 L. Ed. 815; *Ex parte Pennsylvania*, 109 U. S. 174, 176, 27 L. Ed. 894.

38. **Issues out of common-law courts only.**—*Smith v. Whitney*, 116 U. S. 167, 174, 29 L. Ed. 601.

In England, from long before the Declaration of Independence, writs of prohibition have usually issued from the courts of common law, and do not appear to have issued from a court of chancery in any case in which a court of law might issue them, except during vacation, when the courts of common law were not open. *Smith v. Whitney*, 116 U. S. 167, 174, 29 L. Ed. 601.

39. **Where court has both common-law and equity powers.**—*Smith v. Whitney*, 116 U. S. 167, 174, 29 L. Ed. 601.

Principle applied to the supreme court of the District of Columbia. *Smith v. Whitney*, 116 U. S. 167, 174, 29 L. Ed. 601.

40. **Jurisdiction of supreme court—In general.**—*Ex parte Gordon*, 1 Black 503, 17 L. Ed. 134.

In cases in which the supreme court possesses neither original nor appellate jurisdiction, it cannot grant prohibition as ancillary thereto. *In re Massachusetts*, 197 U. S. 482, 488, 49 L. Ed. 845.

Generally, as to the jurisdiction of the supreme court, see the title **COURTS**, vol. 4, pp. 861, 1006.

As to the power of the supreme court to issue writs generally, see the title **COURTS**, vol. 4, p. 897.

41. **Criminal cases.**—*Ex parte Gordon*, 1 Black 503, 17 L. Ed. 134. See the title **APPEAL AND ERROR**, vol. 1, p. 415.

After a party has been convicted and sentenced in the circuit court for a criminal offense, and after a warrant is in the hands of the marshal, commanding him to execute the judgment, the circuit court itself has no power to recall it; and certainly the federal supreme court, having no appellate power over the proceeding, cannot prohibit a ministerial officer from performing the duty which the circuit court has legally imposed upon him. *Ex parte Gordon*, 1 Black 503, 17 L. Ed. 134.

A writ of prohibition will not lie from the supreme court to the judges of the circuit court of the United States and its officers, and the United States marshal, to restrain them from further proceedings in a case wherein a person had been found guilty of piracy and sentenced to death. *Ex parte Gordon*, 1 Black 503, 17 L. Ed. 134.

42. **To compel remand of case.**—*Ex parte Wisner*, 203 U. S. 449, 51 L. Ed. 264. See the titles **MANDAMUS**, vol. 8, p. 1; **MANDATE AND PROCEEDINGS THEREON**, vol. 8, p. 97; **REMOVAL OF CAUSES**.

43. **To district courts.**—In a case where the supreme court, after an examination of very voluminous records, did not doubt that the district court, after the creation of the circuit court for that district, was acting upon a sincere conviction that it possessed full power and authority to make certain orders, which the supreme court now decided that it had made under a misapprehension of its powers, and without authority of law, such power and

diction, where that court is proceeding in a cause of which it has no jurisdiction.<sup>44</sup> The writ thus provided for by § 688 is the common-law writ, which lies to a court of admiralty only when that court is acting in excess of, or is taking cognizance of matters not arising within, its jurisdiction. Its office is to prevent an unlawful assumption of jurisdiction, and not to cor-

authority being conferred upon the circuit court, and that it was influenced by a high sense of duty, and by what it believed to be for the best interests of all parties concerned, in what the supreme court characterized as "a most complicated, difficult, and severely contested cause," and that it needed but to be advised by the opinion of the supreme court, on a motion which had been made for a writ of prohibition against it, the district court, the supreme court, for the present, withheld the appropriate remedy, giving its opinion that the district court had no jurisdiction, and was acting against law, with liberty to counsel to apply hereafter to the supreme court if necessary. *Bronson v. La Crosse, etc., R. Co.*, 1 Wall. 405, 17 L. Ed. 616. See the title COURTS, vol. 4, p. 900.

**44. Admiralty proceedings in district court.**—*Ex parte Gordon*, 104 U. S. 515, 516, 26 L. Ed. 814; *In re Cooper*, 143 U. S. 472, 494, 495, 36 L. Ed. 232; *Ex parte Ferry Co.*, 104 U. S. 519, 26 L. Ed. 815; *Ex parte Phenix Ins. Co.*, 118 U. S. 610, 616, 30 L. Ed. 274; *In re Cooper*, 138 U. S. 404, 34 L. Ed. 993; *In re Massachusetts*, 197 U. S. 482, 488, 49 L. Ed. 845; *Kendall v. United States*, 12 Pet. 524, 648, 9 L. Ed. 1181; *Ex parte Christy*, 3 How. 292, 11 L. Ed. 603; *Ex parte Graham*, 10 Wall. 541, 542, 19 L. Ed. 981; *Ex parte Easton*, 95 U. S. 68, 71, 24 L. Ed. 373; *United States v. Peters*, 3 Dall. 121, 1 L. Ed. 535; *In re Fassett*, 142 U. S. 479, 35 L. Ed. 1086; *Ex parte Hagar*, 104 U. S. 520, 521, 26 L. Ed. 816; *Smith v. Whitney*, 116 U. S. 167, 176, 29 L. Ed. 601.

Generally, as to the jurisdiction of the district courts, see the title COURTS, vol. 4, p. 898.

Generally, as to the jurisdiction of the district courts of the United States when proceeding as courts of admiralty and maritime jurisdiction, see the title ADMIRALTY, vol. 1, p. 119.

For particular cases in which the writ of prohibition has been allowed or denied on the ground that the district court proceeding in admiralty had or had not jurisdiction, see the title ADMIRALTY, vol. 1, pp. 140, 144.

Where the district court sitting in admiralty has jurisdiction in the premises, the supreme court will not prohibit it from proceeding in the exercise of such jurisdiction. A writ of prohibition is not intended to take the place of exceptions to the libel for insufficiency. *In re Fassett*, 142 U. S. 479, 486, 35 L. Ed. 1086.

The supreme court was petitioned to

issue a writ of prohibition to forbid the district court of the United States for the eastern district of New York, sitting as a court of admiralty, from further proceeding in certain causes in which it had entertained libels against certain vessels, in rem, and had attached the vessels, the petitioner claiming title to them, as a receiver appointed by a state court of New York, by a prior title and having set up such title, in answers to the libels, and alleged want of jurisdiction in the district court over the vessels. The supreme court denied the application for the writ without delivering any opinion, but the ground of the denial was that the matter was in course of litigation in the district court, on due process. *In re Fassett*, 142 U. S. 479, 484, 35 L. Ed. 1086, citing *Ex parte Easton*, 95 U. S. 68, 24 L. Ed. 373; *Ex parte Gordon*, 104 U. S. 515, 26 L. Ed. 814; *Ex parte Ferry Co.*, 104 U. S. 519, 26 L. Ed. 815; *Ex parte Hagar*, 104 U. S. 520, 26 L. Ed. 816; *Ex parte Phenix Ins. Co.*, 118 U. S. 610, 625, 626, 30 L. Ed. 274.

The district court has no jurisdiction of a libel for damages, against a privateer, commissioned by a foreign belligerent power, for the capture of an American vessel as prize—the captured vessel not being within the jurisdiction. Therefore, the supreme court will grant a writ of prohibition to a district judge in such case. *United States v. Peters*, 3 Dall. 121, 1 L. Ed. 535.

Where a pleasure yacht, purchased in England and brought to this country, was seized by the collector at the port of New York on the ground that she was subject to duty, it was held that the owner could maintain a libel against the yacht and the collector in the district court of the United States and that the supreme court would not issue a writ of prohibition to the district court to prevent further proceedings in the matter, the seizure being a marine tort of which the district court sitting in admiralty had jurisdiction. *In re Fassett*, 142 U. S. 479, 35 L. Ed. 1086.

**Proceedings to confiscate real estate** under the act of July 17th, 1862, entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels," etc., are not "proceedings in admiralty," although the act declares that they "shall be in rem, and conform as near as may be to proceedings in admiralty or in revenue cases." Accordingly, no writ of prohibition from the federal supreme court to a



rect mere errors and irregularities.<sup>45</sup> By the provision empowering the supreme court to issue writs of prohibition to the district courts when proceeding as courts of admiralty and maritime jurisdiction, it is understood that the power is limited to a proceeding in admiralty.<sup>46</sup> Where the district court of Alaska is acting as a district court of the United States and, as such, proceeding in admiralty, it comes within that § 688 of the Revised Statutes and the supreme court has power to issue a writ of prohibition to that court in a proper case.<sup>47</sup>

(2) *Proceedings in Bankruptcy*.—The supreme court cannot issue a writ of prohibition to the district court to prohibit it from further proceedings in a case in bankruptcy pending in the said court, as it has no reviewing power over the decrees of the district court sitting in bankruptcy.<sup>48</sup>

d. *To Choctaw and Chickasaw Citizenship Court*.—Quære, whether the Choctaw and Chickasaw citizenship court is a court in such a sense as to be subject to prohibition from the supreme court.<sup>49</sup>

district court lies in the case of such proceedings. *Ex parte Graham*, 10 Wall. 541, 19 L. Ed. 981.

**A suit for pilotage fees** is within the jurisdiction of the district court in admiralty, and where the court has jurisdiction of the vessel sued, and the subject matter of the suit, it will not be restrained by a writ of prohibition from deciding all questions properly arising in that suit. *Ex parte Pennsylvania*, 109 U. S. 174, 27 L. Ed. 894, following *Ex parte Hagar*, 104 U. S. 520, 26 L. Ed. 816; *Ex parte Gordon*, 104 U. S. 515, 26 L. Ed. 814.

**Proceedings to limit shipowner's liability**.—Where a request was made to the supreme court for a writ of prohibition to the district court, prohibiting it from further proceeding with a petition of an owner of a barge for limited liability and requiring him to dismiss the said proceedings, leave to file a petition for such writ was denied upon the authority of *In re Fassett*, 142 U. S. 479, 484, 35 L. Ed. 1086, and cases there cited, the district court having jurisdiction of the proceeding. *In re Engles*, 146 U. S. 357, 358, 36 L. Ed. 1004.

A writ of prohibition will be issued by the supreme court to the district court, sitting as a court of admiralty, prohibiting it from determining, on the petition of the owner of a vessel, whether he has incurred any liability by reason of fire on land caused by the vessel, and if so, whether §§ 4283, 4284, Rev. Stat., limiting a shipowner's liability, covers the case. The district court in admiralty has no jurisdiction of such a cause of action. *Ex parte Phenix Ins. Co.*, 118 U. S. 610, 30 L. Ed. 274.

"Where the case is within admiralty cognizance, the district court may decide whether the party is entitled to the benefit of the statute, and a writ of prohibition will not lie. But where, as here, the tort is not a maritime tort, there can be no jurisdiction in the admiralty to determine the issue of liability or that of limitation of liability. This court refused a writ of prohibition where a suit in rem

was brought against a vessel, in admiralty, in a district court, to enforce an illegal lien for wharfage, on the ground that a contract for the use of a wharf by a vessel was a maritime contract, and cognizable in the admiralty, and that, as a lien arose in certain cases, the admiralty court was competent to decide in the given case whether there was a lien. *Ex parte Easton*, 95 U. S. 68, 24 L. Ed. 373. \* \* \* But in the present case the district court is called upon by the petition of the owner of the vessel to first determine the question of any liability, when it has no jurisdiction of the cause of action, and then to determine whether the statute covers the case. The case is clearly one for a writ of prohibition, as the want of jurisdiction appears on the face of the proceedings." *Ex parte Phenix Ins. Co.*, 118 U. S. 610, 625, 30 L. Ed. 274; *United States v. Peters*, 3 Dall. 121, 1 L. Ed. 535.

**45. Common-law writ**.—*In re Cooper*, 143 U. S. 472, 495, 36 L. Ed. 232; *Ex parte Gordon*, 104 U. S. 515, 516, 26 L. Ed. 814; *Ex parte Ferry Co.*, 104 U. S. 519, 26 L. Ed. 815.

**46. Power limited to proceeding in admiralty**.—*Ex parte Easton*, 95 U. S. 68, 71, 24 L. Ed. 373; *Ex parte Christy*, 3 How. 292, 11 L. Ed. 603; *Ex parte Graham*, 10 Wall. 541, 542, 19 L. Ed. 981; *United States v. Peters*, 3 Dall. 121, 1 L. Ed. 535; *Ex parte Gordon*, 1 Black 503, 505, 17 L. Ed. 134.

Quære, whether the jurisdiction of the supreme court to grant a writ of prohibition to the district courts is confined to cases where those courts are "proceedings as courts of admiralty and maritime jurisdiction." Rev. Stat., § 688. *Ex parte Joins*, 191 U. S. 93, 102, 48 L. Ed. 110.

**47. District court of Alaska**.—*In re Cooper*, 143 U. S. 472, 494, 36 L. Ed. 232; *In re Cooper*, 138 U. S. 404, 34 L. Ed. 993.

**48. Proceedings in bankruptcy**.—*Ex parte Christy*, 3 How. 292, 307, 11 L. Ed. 603; *Ex parte Gordon*, 1 Black 503, 505, 17 L. Ed. 134.

**49. To citizenship court**.—*Ex parte Joins*, 191 U. S. 93, 102, 48 L. Ed. 110.

2. **CIRCUIT COURTS.**—The circuit courts have no power under § 716 of the Revised Statutes to issue writs of prohibition, except when necessary in the exercise of their existing jurisdiction.<sup>50</sup>

3. **SUPREME COURT OF DISTRICT OF COLUMBIA.**—*Quære*, whether the supreme court of the District of Columbia has power in any case to issue a writ of prohibition to a court martial.<sup>51</sup>

4. **TERRITORIAL COURTS.**—Section 3816 of the Revised Statutes of the territory of Idaho, providing that the jurisdiction of the supreme court of that territory should be original and appellate, and that its original jurisdiction should extend to the issuance of writs of prohibition, and all writs necessary to the exercise of its appellate jurisdiction, was not inconsistent with the constitution or any act of congress.<sup>52</sup> Also, it was competent for the territory of Idaho to extend the jurisdiction of the district courts of the territory to all

See *In re Vidal*, 179 U. S. 126, 45 L. Ed. 118; *Gordon v. United States*, 2 Wall. 561, 17 L. Ed. 921; *Gordon v. United States*, 117 U. S., appx., 697, 702.

50. **Jurisdiction of circuit courts.**—In re Massachusetts, 197 U. S. 482, 488, 49 L. Ed. 845, citing *Bath County v. Amy*, 13 Wall. 244, 248, 20 L. Ed. 539; *McClung v. Silliman*, 6 Wheat. 598, 601, 5 L. Ed. 340.

As to power of the circuit courts to issue writs generally, see the title **COURTS**, vol. 4, p. 897.

Generally, as to the jurisdiction of the circuit court, see the title **COURTS**, vol. 4, p. 902.

51. **Writ to court martial.**—In *Smith v. Whitney*, 116 U. S. 167, 175, 29 L. Ed. 601, the court, speaking of the question as one of great importance and not therefore adjudged by it, said: "We are not inclined, in the present case, either to assert or deny the existence of the power, because upon settled principles, assuming the power to exist, no case is shown for the exercise of it." See the title **MILITARY LAW**, vol. 8, p. 342.

"The reasons against issuing a writ of prohibition to the court-martial require fuller statement. A writ of prohibition is never to be issued unless it clearly appears that the inferior court is about to exceed its jurisdiction. It cannot be made to serve the purpose of a writ of error or certiorari, to correct mistakes of that court in deciding any question of law or fact within its jurisdiction. These rules have been always adhered to by this court, in the exercise of the power expressly conferred upon it by congress to issue writs of prohibition to the district courts sitting as courts of admiralty; *United States v. Peters*, 3 Dall. 121, 1 L. Ed. 535; *Ex parte Easton*, 95 U. S. 68, 24 L. Ed. 373; *Ex parte Gordon*, 104 U. S. 515, 26 L. Ed. 814; *Ex parte Ferry Co.*, 104 U. S. 519, 26 L. Ed. 815; *Ex parte Pennsylvania*, 109 U. S. 174, 27 L. Ed. 894, as well as by the courts of England and of the several states, in the exercise of their inherent jurisdiction to issue writs of prohibition to courts-martial. *Grant v. Gould*, 2 H. Bl. 69; *State v. Wakely*, 2 Nott. & McCord, 410; *State v. Stevens*, 2

*McCord*, 32; *Washburn v. Phillips*, 2 Met. 296. And this court, although the question of issuing a writ of prohibition to a court-martial has not come before it for direct adjudication, has repeatedly recognized the general rule that the acts of a court-martial, within the scope of its jurisdiction and duty, cannot be controlled or reviewed in the civil courts, by writ of prohibition or otherwise." *Smith v. Whitney*, 116 U. S. 167, 176, 29 L. Ed. 601; citing *Dynes v. Hoover*, 20 How. 65, 82, 83, 15 L. Ed. 838; *Ex parte Reed*, 100 U. S. 13, 25 L. Ed. 538; *Ex parte Mason*, 105 U. S. 696, 26 L. Ed. 1213; *Keyes v. United States*, 109 U. S. 336, 27 L. Ed. 954; *Wales v. Whitney*, 114 U. S. 564, 570, 29 L. Ed. 277; *Kurtz v. Moffitt*, 115 U. S. 487, 500, 29 L. Ed. 458.

An officer of the navy, who, while serving by appointment of the president as paymaster general and chief of a bureau in the navy department, makes contracts or payments, in violation of law, in disregard of the interests of the government, and to promote the interests of contractors, may lawfully be tried by a court-martial composed of naval officers, and by them convicted of scandalous conduct, tending to the destruction of good morals, and to the dishonor of the naval service, and in such case a writ of prohibition will not be issued out of the supreme court of the District of Columbia to prohibit the court-martial from proceeding with the trial. Such conduct of a naval officer is a case arising in the naval forces, and therefore punishable by court-martial under the articles and regulations made or approved by congress in the exercise of the powers conferred upon it by the constitution, to provide and maintain a navy, and to make rules for the government and regulation of the land and naval forces, without indictment or trial by jury. *Smith v. Whitney*, 116 U. S. 167, 186, 29 L. Ed. 601.

52. **Supreme court of Idaho.**—*Clough v. Curtis*, 134 U. S. 361, 368, 33 L. Ed. 945.

Of the power of the legislature of Idaho to confer original jurisdiction upon the supreme court of the territory in such a case, there can be no doubt. Its power extends to all rightful subjects of legis-



civil actions for relief formerly given in courts of equity, including power to issue writs of prohibition.<sup>53</sup>

**C. State Courts.**—Whether, under the state constitution and laws, the supreme court of Missouri possesses the power to grant a writ of prohibition directed to one of the subordinate courts of that state, and what is the legal scope and effect of the writ when granted, are questions for that court to decide.<sup>54</sup>

## V. Proceedings.

**A. Necessity for Objection in Original Proceeding.**—Where a party seeks a writ of prohibition on the ground that a court has no jurisdiction of a suit or prosecution instituted before it, it is necessary that he should have objected to its jurisdiction at the outset in the original proceeding.<sup>55</sup>

**B. Necessity That Want of Jurisdiction Appear of Record or on Face of Proceedings.**—1. **IN GENERAL.**—The granting or refusing of a writ of prohibition is discretionary where the question of the jurisdiction of the court whose action is sought to be prohibited depends on facts which are not made matter of record.<sup>56</sup> But where the want of jurisdiction appears on the face of the proceedings, the case is clearly one for a writ of prohibition.<sup>57</sup>

2. **AS DEPENDENT UPON WHETHER CASE GONE TO SENTENCE OR JUDGMENT.**—A writ of prohibition will not be issued after sentence unless the want of jurisdiction appears on the face of the proceedings.<sup>58</sup> And it would seem that the court to which the application is made cannot consider the evidence taken below in determining whether a prohibition should issue after sentence.<sup>59</sup> But where the application is made before sentence, the court can look into the evidence before the inferior court.<sup>60</sup> Also before judgment, if the court below

lation not inconsistent with the constitution and laws of the United States. Rev. Stat., § 1851. The jurisdiction of the several courts of the territory is a rightful subject of legislation. *Clough v. Curtis*, 134 U. S. 361, 368, 33 L. Ed. 945.

**53. District courts of Idaho.**—*Clough v. Curtis*, 134 U. S. 361, 368, 33 L. Ed. 945.

The provision in § 1910, Rev. Stat., that each of the district courts in certain territories, including Idaho, "shall have and exercise the same jurisdiction, in all cases arising under the constitution and laws of the United States, as is vested in the circuit and district courts of the United States," does not confer original jurisdiction, in cases of that character, only upon the territorial district courts, and does not forbid the legislature from giving original jurisdiction to the district courts of the territory in cases other than those therein named. *Clough v. Curtis*, 134 U. S. 361, 368, 33 L. Ed. 945.

**54. State courts.**—*St. Louis, etc., R. Co. v. Merriam*, 156 U. S. 478, 484, 39 L. Ed. 502.

**55. Necessity of objecting at outset.**—*In re Rice*, 155 U. S. 396, 402, 39 L. Ed. 198; *In re Alix*, 166 U. S. 136, 41 L. Ed. 948; *Smith v. Whitney*, 116 U. S. 167, 173, 29 L. Ed. 601; *In re Cooper*, 143 U. S. 472, 495, 36 L. Ed. 232; *In re Huguley Mfg. Co.*, 184 U. S. 297, 301, 46 L. Ed. 549; *In re New York, etc., Steamship Co.*, 155 U. S. 523, 39 L. Ed. 246.

**56. Necessity that want of jurisdiction appear of record.**—*See ante*, "Discretion of Court," III, A; *post*, "Scope of Inquiry," V, G.

As to the necessity that it appear on the face of the proceedings that the court has no jurisdiction of any part of the subject matter, *see ante*, "Want of Jurisdiction Must Go to Whole Subject Matter," III, C, 2.

**57. Where want of jurisdiction appears.**—*In re Cooper*, 143 U. S. 472, 36 L. Ed. 232; *United States v. Peters*, 3 Dall. 121, 1 L. Ed. 535; *Ex parte Phenix Ins. Co.*, 118 U. S. 610, 626, 30 L. Ed. 274.

**58. Application for writ after sentence.**—*In re Cooper*, 143 U. S. 472, 495, 504, 36 L. Ed. 232.

As to the granting of the writ being discretionary in such case, *see ante*, "Discretion of Court," III, A.

**59. In re Cooper, 143 U. S. 472, 36 L. Ed. 232.**

"But it is contended that the face of the proceedings in a case like the present one embraces the evidence. We think, however, that there is a distinction on principle, and sustained by authority, between what is open on prohibition applied for before sentence and what afterwards. Prohibition stays what is about to be done, but which ought not to be done without it." *In re Cooper*, 143 U. S. 472, 504, 36 L. Ed. 232.

**60. Application before sentence.**—*In re Cooper*, 143 U. S. 472, 505, 36 L. Ed. 232; *United States v. Peters*, 3 Dall. 121, 1 L. Ed. 535.

"*In Ex parte Christy*, 3 How. 292, 308, 11 L. Ed. 603, which was an application for a writ of prohibition against the district court of Louisiana sitting as a court in bankruptcy, Mr. Justice Story said: 'So



persist in going on when it should not, the court above can examine, not simply the process and pleadings technically of record, but the facts in evidence upon which action is being taken.<sup>61</sup> But after final judgment and the lapse of the term, the superior court cannot enter upon an examination of the evidence upon a suggested defect in the jurisdiction, that is, a defect not apparent upon the face of the record proper.<sup>62</sup>

**C. Parties.**—When the suit or prosecution complained of and sought to be prohibited is on behalf of the government, the writ of prohibition can go to the court only.<sup>63</sup> But when the suit complained of is brought by a private person, he may be joined as a defendant.<sup>64</sup>

**D. Application or Petition.**—Prohibition proceedings are instituted by a motion for leave to file an application or petition for the writ.<sup>65</sup> The practice in prohibition was formerly to file a suggestion, an affidavit in support of which was required where the prohibition was moved for upon anything not appearing upon the face of the proceedings.<sup>66</sup>

**E. Rule to Show Cause.**—Upon the granting of leave to file an application for a writ of prohibition, and upon the filing of such application, a rule will be issued to the inferior court to show cause why the writ should not issue agreeably to the prayer of the petitioner.<sup>67</sup> If the matter can be disposed of upon the rule to show cause, that course may be pursued.<sup>68</sup> Under the former practice, upon a rule to show cause, if it appeared to the court, on cause shown, that the surmise was not true, or not clearly sufficient to ground the prohibition upon, it would be denied, otherwise the rule would be made absolute; or, if the matter were doubtful, the party was ordered to declare, and issue joined on such declaration was regularly tried, being in the nature of an issue to inform the conscience of the court.<sup>69</sup>

**F. Granting Writ after Sentence or Judgment.**—1. SOMETHING REMAINING TO BE DONE.—A writ of prohibition will not be issued after sentence or judgment, unless something remains which the court or party to whom the writ is to be directed might do, and probably would do, as the collection of

far as respects these allegations of facts, not so found in the proceedings of the district court, we are not upon the present occasion at liberty to entertain any consideration thereof for the purpose of examination or decision, as it would be an exercise of original jurisdiction on the part of this court not confided to us by law. The application for the prohibition is made upon the ground that the district court has transcended its jurisdiction in entertaining those proceedings; and whether it has or not must depend, not upon the facts stated *dehors* the record, but upon those stated in the record upon which the district court was called to act, and by which alone it could regulate its judgment.' And this language was repeated and approved in *Ex parte Easton*, 95 U. S. 68, 24 L. Ed. 373, where prohibition was asked against a district court in admiralty. These were cases where the application was before sentence, and they show that the court may consider the evidence as well as the other proceedings in the court sought to be restrained." In *re Cooper*, 143 U. S. 472, 504, 36 L. Ed. 232.

**61. Application before judgment.**—In *re Cooper*, 143 U. S. 472, 504, 36 L. Ed. 232.

**62.** In *re Cooper*, 143 U. S. 472, 505, 36 L. Ed. 232.

For the superior court to do this would be to rehear the case and direct the court below not to carry its own judgment into effect, for defect of power to try the particular issue—rather than of jurisdiction over the cause. What the court below could not then do, or omit to do, the court above ought not ordinarily to undertake to compel it to do or to omit. In *re Cooper*, 143 U. S. 472, 505, 36 L. Ed. 232.

**63. Suit on behalf of government.**—*Smith v. Whitney*, 116 U. S. 167, 176, 29 L. Ed. 601.

**64. Suit by private person.**—*Smith v. Whitney*, 116 U. S. 167, 176, 29 L. Ed. 601.

**65. Motion for leave to file application.**—In *re Cooper*, 143 U. S. 472, 36 L. Ed. 232; In *re Cooper*, 138 U. S. 404, 34 L. Ed. 993.

**66. Former practice.**—In *re Baiz*, 135 U. S. 403, 430, 34 L. Ed. 222.

**67. Rule to show cause.**—*Ex parte Graham*, 10 Wall. 541, 19 L. Ed. 981; In *re Cooper*, 143 U. S. 472, 36 L. Ed. 232; In *re Cooper*, 138 U. S. 404, 34 L. Ed. 993; *Smith v. Whitney*, 116 U. S. 167, 29 L. Ed. 601.

**68.** In *re Baiz*, 135 U. S. 403, 431, 34 L. Ed. 222.

**69. Former practice.**—In *re Baiz*, 135 U. S. 403, 430, 34 L. Ed. 222.

costs, or otherwise enforcing the sentence. The writ will not issue where nothing is left to be done, and the case is altogether gone out of the court.<sup>70</sup>

2. **NECESSITY THAT WANT OF JURISDICTION APPEAR ON FACE OF PROCEEDINGS.**—A writ of prohibition will not be granted after sentence unless the want of jurisdiction appears on the face of the proceedings.<sup>71</sup>

**G. Scope of Inquiry.**—On prohibition the inquiry is confined to the matter of jurisdiction.<sup>72</sup> Consequently, the court to which application is made cannot go into the merits of the action for the purpose of correcting a supposed error in the judgment of the inferior court.<sup>73</sup> Therefore it would seem that, unless under very extraordinary circumstances, the record proper should only be looked into in such case.<sup>74</sup> The supreme court cannot, on an application for a writ of prohibition, determine what shall be the effect of any judgment of the district court while exercising its rightful jurisdiction.<sup>75</sup>

**H. Evidence.**<sup>76</sup>—Where the relator claiming a diplomatic privilege applies to the supreme court for a writ of prohibition to restrain proceedings against him in the district court on the ground of such a privilege, the burden rests upon the respondent to overcome the case of privilege made out by the relator.<sup>77</sup>

**I. Appeal and Error.**—Generally, as to questions of appeal and error, see the title **APPEAL AND ERROR**, vol. 1, pp. 333, 394. As to whether the decision of an inferior court granting or refusing a writ of prohibition may be reviewed on a writ of error, see the title **APPEAL AND ERROR**, vol. 1, pp. 563, 701, 1002. As to the amount in controversy necessary to give the supreme court jurisdiction to review by appeal or writ of error, a judgment of the supreme court of the District of Columbia dismissing a petition for a writ of prohibition, see the title **APPEAL AND ERROR**, vol. 1, pp. 853, 854.

## VI. Effect of Writ.

The effect of a writ of prohibition is to suspend all action, and to prevent

**70. Something remaining to be done.**—*United States v. Hoffman*, 4 Wall. 158, 162, 18 L. Ed. 354. See ante, "When Ineffectual—Acts Already Performed," III, B.

**71. Necessity that want of jurisdiction appear on face of proceedings.**—See ante, "As Dependent upon Whether Case Gone to Sentence or Judgment," V, B, 2.

**72. Inquiry confined to question of jurisdiction.**—*In re Cooper*, 143 U. S. 472, 507, 36 L. Ed. 232; *In re Morrison*, 147 U. S. 14, 37 L. Ed. 60.

**73. Court cannot inquire into merits of action.**—See ante, "Errors and Irregularities," III, D, 1, b.

**74. Only record looked into.**—*In re Cooper*, 143 U. S. 472, 507, 36 L. Ed. 232. See ante, "Necessity That Want of Jurisdiction Appear of Record or on Face of Proceedings," V, B.

Whether a writ of prohibition should be issued to the district court, when proceeding as a court of admiralty and maritime jurisdiction, depends upon the fact stated in the record upon which that court is called to act. Matters dehors that record, which are set forth in the petition for the writ, cannot be considered here. *Ex parte Easton*, 95 U. S. 68, 24 L. Ed. 373. See ante, "Admiralty Proceedings," IV, B, 1, c, (1).

**75. Effect of judgment of inferior court.**—*Ex parte Slayton*, 105 U. S. 451, 453, 26 L. Ed. 1066.

Thus, the supreme court cannot, on an

application for a writ of prohibition, determine what shall be the effect of any judgment of the district court while exercising its rightful jurisdiction in proceedings instituted by the owner of a vessel to obtain the benefit of the limitation of liability provided for by §§ 4284 and 4285, Rev. Stat.; neither is it to determine in this form of proceeding what persons, or what classes of persons, are entitled to the fund in hand. All these are questions to be settled in some other way than by prohibiting the court from proceeding under the jurisdiction it has acquired by getting possession, in an appropriate manner, of that which, according to the claim of the owner, represents the extent of his liability, or that of his vessel. Whether it does so or not is to be settled between the parties when the case is tried. With the possession and control of the property, the court has jurisdiction. *Ex parte Slayton*, 105 U. S. 451, 453, 26 L. Ed. 1066. See ante, "Admiralty Proceedings," IV, B, 1, c, (1). See the titles **ADMIRALTY**, vol. 1, p. 119; **SHIPS AND SHIPPING**.

**76. Evidence.**—See ante, "Necessity That Want of Jurisdiction Appear of Record or on Face of Proceedings," V, B; "Scope of Inquiry," V, G.

**77. Burden of proof.**—*In re Baiz*, 135 U. S. 403, 34 L. Ed. 222. See the title **PRESUMPTIONS AND BURDEN OF PROOF**, ante, p. 618.

any further proceeding in the prohibited direction.<sup>78</sup> The writ of inhibition enables the court of appellate jurisdiction, in case of disobedience, to punish the inferior court as being in contempt.<sup>79</sup>

**PROMISSORY NOTES.**—See the title **BILLS, NOTES AND CHECKS**, vol. 3, p. 267.

**PROMISSORY WARRANTIES.**—See the title **INSURANCE**, vol. 7, p. 171.

**PROMOTER.**—See the title **CORPORATIONS**, vol. 4, p. 621.

**PROMOTION.**—See the title **ARMY AND NAVY**, vol. 2, p. 501.

**PROOF OF LOSS.**—See the title **INSURANCE**, vol. 7, p. 66.

**PROOF OF OTHER CRIMES.**—See the title **EVIDENCE**, vol. 5, p. 1021.

**PROPER.**—See note 1.

**PROPERTY.**—See the titles **CONSTITUTIONAL LAW**, vol. 4, p. 428; **DUE PROCESS OF LAW**, vol. 5, p. 501; **EMINENT DOMAIN**, vol. 5, p. 746; **TAXATION**. The term "property," as applied to lands, comprehends every species of title, inchoate or complete. It is supposed to embrace those rights which lies in contract; those which are executory; as well as those which are executed.<sup>2</sup> Prop-

<sup>78.</sup> **Effect of writ.**—United States *v.* Hoffman, 4 Wall. 158, 161, 18 L. Ed. 354.

Prohibition stays what is about to be done, but which ought not to be done without it. In *re* Cooper, 143 U. S. 472, 504, 36 L. Ed. 232.

<sup>79.</sup> Penhallow *v.* Doane, 3 Dall. 54, 87, 1 L. Ed. 507.

**1. Necessary and proper.**—Legal Tender Cases, 12 Wall. 457, 20 L. Ed. 287; United States *v.* Fisher, 2 Cranch 358, 2 L. Ed. 304. And see the title **CONSTITUTIONAL LAW**, vol. 4, p. 256, et seq., 311 et seq.

**Proper court.**—In *Ex parte* Phenix Ins. Co., 118 U. S. 610, 623, 30 L. Ed. 274, it is said: "Rule 54 provides that when a vessel is libeled, or her owner is sued, he may file a libel or petition for a limitation of liability 'in the proper district court of the United States, as hereinafter specified.' Rule 56 provides that in the proceeding the owner may contest his liability, or that of the vessel, independently of the limitation of liability claimed and that the opposing party may contest the right of the owner either to an exemption from liability or to a limitation of liability. What is the 'proper district court' referred to in rule 54 and contemplated by rule 56? It is the court, and only the court, mentioned in rule 57, namely, the district court in which the vessel is libeled, or, if she is not libeled, then the district court for any district in which the owner 'may be sued in that behalf.'"

**2. Property.**—Soulard *v.* United States, 4 Pet. 511, 7 L. Ed. 938; Hornsby *v.* United States, 10 Wall. 224, 242, 19 L. Ed. 900; Smith *v.* United States, 1 Pet. 326, 330, 9 L. Ed. 442; Slidell *v.* Grandjean, 111 U. S. 412, 423, 28 L. Ed. 321; Bryan *v.* Kennett, 113 U. S. 179, 28 L. Ed. 908; Scranton *v.* Wheeler, 179 U. S. 141, 170, 45 L. Ed. 126.

In Hornsby *v.* United States, 10 Wall. 224, 242, 19 L. Ed. 900, it is said: "By the term **property**, as applied to lands, all titles are embraced. legal or equitable.

perfect or imperfect." Bryan *v.* Kennett, 113 U. S. 179, 28 L. Ed. 908; Morton *v.* Nebraska, 21 Wall. 660, 22 L. Ed. 639.

An inchoate title to lands is **property**. Delassus *v.* United States, 9 Pet. 117, 9 L. Ed. 71.

The treaty of Paris of 1803 provided that the inhabitants of the ceded territory shall be protected in the free enjoyment of their liberty and **property**. In construing the term thus used, the court, in United States *v.* Reynes, 9 How. 129, 150, 13 L. Ed. 74, said: "The term **property** in this article will embrace rights either in possession or in action; **property** to which the title was completed, or that to which the title was not yet completed; but in either acceptance, it could be applied only to rights founded in justice and good faith, and based upon authority competent to their creation. The article above cited cannot, without the grossest perversion, be made either to express or imply more than this."

A concession, having no defined boundaries, made by the lieutenant governor of Upper Louisiana in 1799, but not surveyed, cannot be considered as **property**, and, as such, protected by the courts of justice, without a sanction by the political power, under the third article of the treaty with France made in 1803. Menard *v.* Massey, 8 How. 293, 12 L. Ed. 1085. Compare Chouteau *v.* United States, 9 Pet. 137, 9 L. Ed. 78. And see, generally, the title **PUBLIC LANDS**.

Where the Cairo and Fulton Railroad Company accepted certain bonds issued under an act of the general assembly of the state of Missouri, which declared that they should "constitute a first lien and mortgage upon the road and **property**" of the company, held, that the word **property** included all the lands of the said company, and that a valid lien on them was created by the act. Wilson *v.* Boyce, 92 U. S. 320, 23 L. Ed. 608.

In United States *v.* Hooe, 3 Cranch 73, 91, 2 L. Ed. 370, it is said: "The words of



erty is everything which has an exchangeable value, and the right of property includes the power to dispose of it according to the will of the owner.<sup>3</sup> The term "property," standing alone, includes everything that is the subject of ownership. It is a nomen generalissimum, extending to every species of valuable right and interest, including things real and personal, easements, franchises, and other incorporeal hereditaments.<sup>4</sup>

the act extend the meaning of the word insolvency to cases where 'a debtor, not having sufficient **property** to pay all his debts, shall have made a voluntary assignment thereof, for the benefit of his or her creditors.' The word **property** is unquestionably all the **property** which the debtor possesses; and the word 'thereof' refers to the word **property** as used, and can only be satisfied by an assignment of all the **property** of the debtor."

In *Legal Tender Cases*, 12 Wall. 457, 551, 20 L. Ed. 287, it is said: "In a state of civil society **property** of a citizen or subject is ownership, subject to the lawful demands of the sovereign."

3. *Slaughter-House Cases*, 16 Wall. 36, 127, 21 L. Ed. 394, dissenting opinion.

4. *Scranton v. Wheeler*, 179 U. S. 141, 170, 45 L. Ed. 126, dissenting opinion.

**Chose in action.**—In *Murray v. Charleston*, 96 U. S. 432, 440, 24 L. Ed. 760, it is said: "Debts are not **property**. A non-resident creditor cannot be said to be, in virtue of a debt due to him, a holder of **property** within the city."

In *Sinking-Fund Cases*, 99 U. S. 700, 738, 25 L. Ed. 496, it is said: "What is **property**? What is the common understanding of the term? It is, in reference to its subject, whatever a person can possess and enjoy by right, and the person who has that right has the **property**. The subject may be corporeal or incorporeal. A right in action is as completely **property** as is a title to land. A very large portion of the **property** of the country consists in rights attendant upon contract. The right of a promisee to demand payment when the note falls due is a right of **property**; and equally so is the right of the promisor to hold, as against his promisee, the consideration for the promise until the time stipulated in the note for payment. The promisee has no right to enforce payment, or to enforce giving security for it, if none was promised in the contract. Such a right is no portion of his **property**, and it can be enforced only at the expense of a clear right of the promisor." See, also, *Jenkins v. International Bank*, 106 U. S. 571, 27 L. Ed. 304.

**Railroads—Franchise.**—A statute exempting the **property** of a railroad company is held to exempt its franchises as well as its rolling stock and real estate. The court said: "Property is a word of large import, and in its application to this company included all the real and personal estate required by it for the successful prosecution of its business." *Wil-*

*lington Railroad v. Reid*, 13 Wall. 264, 267, 20 L. Ed. 568. And see, also, the title **TAXATION**.

A franchise is **property**. See *Conway v. Taylor*, 1 Black 603, 17 L. Ed. 191. And see **FRANCHISES**, vol. 6, p. 392. See, also, the title **DUE PROCESS OF LAW**, vol. 5, p. 567.

**Good will.**—See the title **GOOD WILL**, vol. 6, p. 567.

A mining claim perfected under the law is **property** in the highest sense of that term. *Belk v. Meagher*, 104 U. S. 279, 283, 26 L. Ed. 735; *Sullivan v. Iron, Silver Mining Co.*, 143 U. S. 431, 36 L. Ed. 214; *Forbes v. Gracey*, 94 U. S. 762, 764, 24 L. Ed. 313.

**Money.**—In *Pirie v. Chicago Title, etc., Co.*, 182 U. S. 438, 443, 45 L. Ed. 1171, it is said: "We are not unaware that a distinction between money and other **property** is sometimes made, but it would be anomalous in the extreme that in a statute which is concerned with the obligations of debtors and the prevention of preferences to creditors, the readiest and most potent instrumentality to give a preference should have been omitted. Money is certainly **property**, whether we regard any of its forms or any of its theories. It may be composed of a precious metal, and hence valuable of itself, gaining little or no addition of value from the attributes which give it its ready exchangeability and currency. And its other forms are immediately convertible into the same precious metal, and even without such conversion have, at times, even greater commercial efficacy than it."

**Patent.**—An invention secured by patent is **property** in the holder of the patent, and the right of the holder is as much entitled to protection as any other **property**. *Cammeyer v. Newton*, 94 U. S. 225, 24 L. Ed. 72; *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33.

A patent creates a **property** right in the invention patented. *Marsh Nichols*, 123 U. S. 605, 32 L. Ed. 538.

**Profession and occupation.**—See the titles **ATTORNEY AND CLIENT**, vol. 2, p. 732; **CONSTITUTIONAL LAW**, vol. 4, pp. 377, 430. And see *Slaughter-House Cases*, 16 Wall. 36, 21 L. Ed. 394.

**Reputation as property.**—See the title **DUE PROCESS OF LAW**, vol. 5, p. 566.

**Riparian rights.**—Property includes riparian rights, such as free access to the navigable part of a stream, and the right to make a landing, wharf or pier. *Yates v. Milwaukee*, 10 Wall. 497, 504, 19 L. Ed.

**PROPOUNDING.**—See the title **WILLS**.

**PROPRIETARY—PROPRIETOR.**—See note 1.

**PROSECUTE—PROSECUTION.**—See note 2.

**PROSECUTING AND DISTRICT ATTORNEYS.**—See the title **DISTRICT AND PROSECUTING ATTORNEYS**, vol. 5, p. 396.

**PROSPECTIVE DAMAGES.**—See the title **DAMAGES**, vol. 5, p. 168.

**PROSPECTIVE RIGHT.**—A prospective right is not yet a right. It is only an expectation having a certain intensity of reasonableness.<sup>3</sup>

**PROTECT—PROTECTION.**—See note 4.

984. See the title **DUE PROCESS OF LAW**, vol. 5, p. 564. And see, generally, the title **WATERS AND WATER-COURSES**.

**A seat in stock exchange is property.** *Hyde v. Woods*, 94 U. S. 523, 524, 24 L. Ed. 264; *Page v. Edmunds*, 187 U. S. 596, 47 L. Ed. 318; *Sparhawk v. Yerkes*, 142 U. S. 1, 12, 35 L. Ed. 915. See, also, the title **EXCHANGES**, vol. 6, p. 77.

**Statute of limitations.**—The right to the defense of the statute of limitations is not **property**. *Campbell v. Holt*, 115 U. S. 620, 29 L. Ed. 483. But in this case Mr. Justice Bradley, dissenting, said: "The term **property**, in this clause, embraces all valuable interests which a man may possess outside of himself, that is to say, outside of his life and liberty."

**Property of the United States.**—In *Searight v. Stokes*, 3 How. 151, 175, 11 L. Ed. 537, it is said: "When one speaks of transporting the **property** of the United States, the meaning of the terms **property** of the United States is never mistaken. They mean munitions of war, provisions purchased for the support of the army, and any other **property** purchased for the public revenue. They do not mean the mail of the United States. A wagon laden with **property** is understood to be a wagon used for the transportation of **property**, in the ordinary sense of such terms."

**Property rights.**—A charter of a water company provided that companies which might afterwards be chartered were not to interfere with the **property** rights or the rights of obtaining water pertaining to the water company. In construing the provisions, the court said: "But manifestly **property** rights refer to rights in respect to tangible **property**, and thus construed the proviso forbade any interference by any new company with the plant of the plaintiff." *Bienville Water Supply Co. v. Mobile*, 186 U. S. 212, 46 L. Ed. 1132.

**Property interest and ownership distinguished.**—See the title **EVIDENCE**, vol. 5, p. 1031.

**Deprivation of life, liberty or property without due process of law.**—See the title **DUE PROCESS OF LAW**, vol. 5, p. 501.

**1. Proprietary—Proprietor.—Proprietary** is defined thus in the Imperial Dictionary: "Belonging to ownership; as, **proprietary rights**." In Webster: "Belonging or pertaining to a **proprietor**," **proprietor** being defined, "One who has the legal right or

exclusive title to anything, whether in possession or not; an owner." In Worcester: "Relating to a certain owner or **proprietor**." *Ferguson v. Arthur*, 117 U. S. 482, 29 L. Ed. 979. See, generally, the title **REVENUE LAWS**.

**2. Prosecute—Prosecution.**—In *Cohens v. Virginia*, 6 Wheat. 264, 265, 408, 5 L. Ed. 257, it is said: "To commence a suit is to demand something by the institution of process in a court of justice; and to **prosecute** the suit, is, according to the common acceptance of language, to continue that demand. By a suit commenced by an individual against a state, we should understand process sued out by that individual against the state, for the purpose of establishing some claim against it by the judgment of a court; and the **prosecution** of that suit is its continuance."

The well-understood legal signification of the word **prosecution** is a criminal proceeding at the suit of the government. *Tennessee v. Davis*, 100 U. S. 257, 269, 25 L. Ed. 648; *United States v. Reisinger*, 128 U. S. 398, 403, 32 L. Ed. 480.

In *Counselman v. Hitchcock*, 142 U. S. 547, 563, 35 L. Ed. 1110, it is said: "A criminal **prosecution** under article 6 of the amendments, is much narrower than a 'criminal case,' under article 5 of the amendments."

**Prosecution** has been held to include an action of debt under a penal statute, as well as an information or indictment. *Adams v. Woods*, 2 Cranch 336, 2 L. Ed. 297.

**3. Southern Pac. R. Co. v. United States**, 189 U. S. 447, 450, 47 L. Ed. 896.

**4. Protect.**—Upon the consolidation of several corporations, it was agreed that the bonds of the companies consolidated should, "as to the principal and interest thereof, as the same shall respectively fall due, be **protected** by the consolidated company, according to the true effect and meaning of the bonds." In construing this provision, the court said: "It was next contended that the stipulation in the agreement of consolidation that the bonds and debts therein specified of the former companies shall 'be **protected** by the said consolidated company' created a lien in their favor. But it is only 'as to the principal and interest as they shall respectively fall due,' and 'according to the true meaning and effect' of the instruments or bonds which are the evidence of the debts, that it is stipulated that the

**PROTEST.**—See the titles **BILLS, NOTES AND CHECKS**, vol. 3, p. 322; **REVENUE LAWS**.

**PROVIDED.**—See **PROVISO**.

**PROVINCE OF COURT AND JURY.**—See references under **QUESTIONS OF LAW AND FACT**.

**PROVING A WILL.**—See the title **WILLS**. See note 1.

**PROVISIONAL.**—The term provisional excludes the idea of permanency; it means something temporary and for the occasion.<sup>2</sup>

**PROVISIONS.**—See **MUNITIONS OF WAR**, vol. 8, p. 788.

**PROVISO.**—See the title **STATUTES**. A proviso in deeds and laws is a limitation or exception to a grant made or authority conferred; the effect of which is to declare that the one shall not operate, nor the other be exercised, unless in the case provided.<sup>3</sup>

**PROVOST COURT.**—Provost courts are military courts having a well-known jurisdiction, which is limited exclusively to minor offenses, tending to disorder and breaches of the peace, by soldiers and citizens within the lines of an army, and occupy with reference to such offenses a similar position with that of police courts in our cities.<sup>4</sup>

**PROXIES.**—See the title **STOCK AND STOCKHOLDERS**.

**PROXIMATE CAUSE.**—See the title **NEGLIGENCE**, vol. 8, p. 881.

**PROXIMITY.**—See note 5.

**PRUDENCE.**—See the title **NEGLIGENCE**, vol. 8, p. 878.

**PUBLIC AID.**—See the title **MUNICIPAL, COUNTY, STATE AND FEDERAL AID**, vol. 8, p. 618.

debts shall 'be protected by the said consolidated company;' and the stipulation covers debts secured by mortgage as well as unsecured debts. The agreement 'to protect' referring to the time of payment, and 'the true meaning and effect' of the equipment bonds having been to create only a personal and unsecured debt of one of the former companies, the words 'shall be protected' must have the same meaning which they ordinarily have in promises of men of business 'to protect' drafts or other debts, not made or contracted by themselves; that is to say, a personal obligation to see that they are paid at maturity." *Wabash, etc., R. Co. v. Ham*, 114 U. S. 587, 596, 29 L. Ed. 235.

1. **Proving a will.**—In *Ellis v. Davis*, 109 U. S. 485, 494, 27 L. Ed. 1006, it is said: "It was elaborately considered and finally determined in England by the House of Lords in the case of *Allen v. McPherson*, 1 H. L. Cas. 191. In that country it was undoubtedly the practice of the courts of chancery to entertain bills to perpetuate the testimony of the witnesses to a will devising lands, at the suit of the devisee against the heir at law, it being alleged that the latter disputed its validity; and this, as Blackston says (3 Bl. Comm. 450), 'is what is usually meant by proving a will in chancery.'"

2. **De Haro v. United States**, 5 Wall. 599, 628, 18 L. Ed. 681.

3. **Proviso.**—*Voorhees v. United States Bank*, 10 Pet. 449, 471, 9 L. Ed. 490. See the titles **CONDITIONS**, vol. 3, p. 1005; **DEEDS**, vol. 5, p. 277; **PUBLIC LANDS**; **STATUTES**.

**Exception and proviso distinguished.**—Doubtless there is a technical distinction between an exception and a **proviso**, as an exception ought to be of that which would otherwise be included in the category from which it is excepted, and the office of a **proviso** is either to except something from the enacting clause or to qualify or restrain its generality, or to exclude some ground of misinterpretation of it, as extending to cases not intended to be brought within its operation, but there are a great many examples where the distinction is disregarded and where the words are used as if they were of the same signification. *United States v. Cook*, 17 Wall. 168, 177, 21 L. Ed. 538.

The difference between an exception and a **proviso** is that where an exception is incorporated in the body of the clause he who pleads the clause ought also to plead the exception, but when there is a clause for the benefit of the pleader, and afterwards follows a **proviso** which is against him, he shall plead the clause and leave it to the adversary to show the **proviso**. *United States v. Cook*, 17 Wall. 168, 177, 21 L. Ed. 538.

4. **Mechanics', etc., Bank v. Union Bank**, 22 Wall. 276, 301, 22 L. Ed. 871.

5. **Proximity.**—In *United States v. St. Anthony R. Co.*, 192 U. S. 524, 537, 48 L. Ed. 548, it is said: "While **proximity** or 'nearness' to an object is somewhat uncertain as a measure of distance, yet the use of such words as a definition, brings to the mind the idea that lands which are in fact far off, or distant, are not adjacent." See, also, **ADJACENT**, vol. 1, p. 116.



**PUBLICATION.**—As to publication of notice, see the titles *EMINENT DOMAIN*, vol. 5, p. 789; *INSANITY*, vol. 6, p. 1074; *SPECIAL ASSESSMENTS*; *SUMMONS AND PROCESS*. As to publication of notice in newspaper or order of publication, see the titles *APPEAL AND ERROR*, vol. 2, p. 165; *SUMMONS AND PROCESS*. As to publication of libel, see the title *LIBEL AND SLANDER*, vol. 7, p. 860. As to publication of notice of dissolution of partnership, see the title *PARTNERSHIP*, ante, p. 116. And see the title *COPYRIGHT*, vol. 4, p. 610. And see note 1.

**PUBLIC BLOCKADE.**—See the title *BLOCKADE*, vol. 3, p. 366.

**PUBLIC BUILDINGS.**—See the titles *COUNTIES*, vol. 4, p. 832; *MUNICIPAL CORPORATIONS*, vol. 8, p. 596; *UNITED STATES*.

**PUBLIC CHARITY.**—See the title *CHARITIES*, vol. 3, p. 675.

**PUBLIC CONTRACTS.**—See the titles *CONTRACTS*, vol. 4, p. 552; *MUNICIPAL CORPORATIONS*, vol. 8, p. 578; *STATES*; *UNITED STATES*. As to contracts of district commission, see the title *DISTRICT OF COLUMBIA*, vol. 5, p. 410.

**PUBLIC CONVEYANCE.**—See the title *ACCIDENT INSURANCE*, vol. 1, p. 59.

**PUBLIC CORPORATIONS.**—See the titles *CORPORATIONS*, vol. 4, p. 632; *MUNICIPAL CORPORATIONS*, vol. 8, p. 554; *UNITED STATES*.

**PUBLIC DOMAIN.**—See, also, the title *PUBLIC LANDS*. "Public domain" is equivalent to "public lands," and these words have acquired a settled meaning in the legislation of this country.<sup>2</sup>

**PUBLIC ENEMY.**—As defense to escape, see the title *ESCAPE*, vol. 5, p. 894. As defense to action against carrier, see the title *CARRIERS*, vol. 3, p. 593, et seq.

**PUBLIC DOCUMENTS.**—See the titles *DOCUMENTARY EVIDENCE*, vol. 5, p. 436; *RECORDS*.

**PUBLIC FUNDS.**—See references under *PUBLIC MONEY*.

**PUBLIC GRANT.**—See *GRANT*, vol. 6, p. 578. See, also, the title *PUBLIC LANDS*. And see note 3.

**PUBLIC GROUNDS.**—See note 4.

**PUBLIC HIGHWAYS.**—See the title *STREETS AND HIGHWAYS*.

**PUBLIC IMPROVEMENTS.**—See the title *SPECIAL ASSESSMENTS*, and references given.

**PUBLIC INTEREST.**—See note 5.

1. *Postal laws.*—By § 1 of the act of July 12, 1876, "every obscene, lewd or lascivious book, pamphlet, picture, paper, writing, print or other publication of an indecent character," etc., is declared to be non-mailable matter. The court in *United States v. Chase*, 135 U. S. 255, 258, 34 L. Ed. 117, in construing this statute, said: "In the statute under consideration, the word 'writing' is used as one of a group or class of words—book, pamphlet, picture, paper, writing, print—each of which is ordinarily and prima facie understood to be a publication; and the enumeration concludes with the general phrase 'or other publication,' which applies to all the articles enumerated, and marks each with the common quality indicated." *United States v. Chase*, 135 U. S. 255, 257, 258, 34 L. Ed. 117.

2. *Barker v. Harvey*, 181 U. S. 481, 490, 45 L. Ed. 963.

3. *Public grant.*—In *Brush v. Ware*, 15 Pet. 93, 98, 10 L. Ed. 672, it is said: "A public grant is not only an appropriation of the land, but is itself a perfect title. *Green v. Lister*, 8 Cranch 229, 247, 248, 3 L. Ed. 545. Officers are appointed and

commissioned by the government for the express purpose of conducting and supervising all the preliminary proceedings, from the origin to the consummation of the title; and when these incipient measures are completed, and the grant issued, the law presumes, that the government agents have performed their duty, and that the grant is valid. In one word, it is a legal presumption, in favor of a patent, that there are no defects behind it, by which it can be invalidated or avoided."

4. *Public grounds.*—See *Davis v. Massachusetts*, 167 U. S. 43, 42 L. Ed. 71. And see references under *PARKS AND SQUARES*, ante, p. 10.

5. *Public interest.*—In *Munn v. Illinois*, 94 U. S. 113, 126, 24 L. Ed. 77, it is said: "When private property is 'affected with a public interest,' it ceases to be *juris privati* only." This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise *De Portibus Maris*, 1 Harg. Law Tracts, 78. and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a man-

**PUBLIC JOURNAL.**—See note 1.

ner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created."

1. **Public journal.**—In *Hopt v. Utah*, 120 U. S. 430, 434, 30 L. Ed. 708, it is said: "By the express terms of the statute of 1884 he could not be disqualified as a

juror for an opinion formed or expressed upon statements in **public journals**, if it appeared to the court upon his declaration, under oath or otherwise, that he could and would, notwithstanding such an opinion, act impartially and fairly upon the matters submitted to him. We think that evidence, or what purports to be evidence, printed in a newspaper, is a 'statement in a **public journal**,' within the meaning of the statute; and that the judgment of the court upon the competency of the juror in such cases is conclusive."









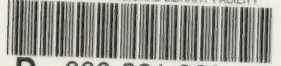








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